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THE THEORY AND PRACTICE
OF
PRIVATE INTERNATIONAL LAW.

Printed at THE EDINBURGH PRESS, 9 & 11 Young Street

FOR

WILLIAM GREEN & SONS

AGENTS IN LONDON	STEVENS AND HAYNES.
" UNITED STATES	BANKS AND BROS., NEW YORK.
" CANADA	CARSWELL AND CO., LD., TORONTO.

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BY
L. v. BAR

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SECOND EDITION, REVISED AND ENLARGED

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TRANSLATOR'S PREFACE.

IN 1889 Dr Bar published the second edition of his work on International Law. Although it was styled a second edition, it was in fact a new book, twice as large as the former work, in spite of the omission of the subject of criminal law. The former edition being thus entirely superseded, I thought it desirable to give those who had some acquaintance with the author's work in its English form the opportunity of seeing it in its latest shape.

This new edition deals so fully with the details of the various topics of the subject that it will prove as useful to the practical lawyer as its predecessor was. The philosophic lawyer will find the general principles of international law, as well as those of each chapter of it, fully examined and set out. The only important part of the treatise which an English lawyer will find it impossible to accept in any degree is the substitution of nationality for domicile as the determinant of personal law. So many of the questions of international law that have been dealt with by our Courts have arisen between parties who are all of the same nationality, *i.e.* all British subjects, although under the dominion of different legal systems, *e.g.* Scotsmen and Englishmen, that the idea of nationality as a solvent of such questions is unfamiliar and would necessarily be inadequate. But there is no difficulty in substituting domicile for nationality in all those cases in which the latter has been selected by the author as the consideration upon which this or that problem depends; and thus his results are available for the English or Scottish or American lawyer, in spite of this discrepancy in principle.

I have endeavoured, in the notes appended to the author's paragraphs to set out shortly the state of the law in Scotland and England on the various points dealt with by the author or suggested by him. He has

gone so fully into the decisions of the Continental courts, and has so uniformly appealed to American text-writers in his own text, that I have not found it necessary to cite many decisions either from Continental courts or from those of the United States. When I have cited Continental judgments, I have given references to the *Journal du droit international privé*, in which all these decisions are to be found.

PREFACE.

FULLY a quarter of a century has passed since the appearance of the first edition of this book. The conclusions which I then advocated—I shall not say originated—have been upon the whole, but of course with certain exceptions, more and more recognised in judicial and diplomatic procedure, in congresses of the learned, and in legislation and treaties, in so far as legislation and treaties have attacked the subject.

The present, the second edition, has however taken a shape which practically makes it a new work. The size of it, if nothing else, shows this. Although I have left out the subject of international criminal law, which I took up along with civil law in the former edition, still this edition contains more than double the number of pages which the first did.

Various circumstances have combined to effect this. Not only have the questions which require discussion multiplied largely; subjects which, when the first edition appeared, were scarcely noticed in private international law, have in the meantime had much valuable labour given to them, and some of them have been treated of in monographs. This has been the case with *nationality*, and with *copyright*, including the law of so-called *industrial property*; while commercial law, including maritime law, has been much discussed with special reference to its bearings on private international law in a fashion quite different from that of former days. Further, the *Revue de droit international*, which has appeared ever since 1869, and in a special degree, too, the *Journal du droit international privé*, have amassed material for illustration of the different topics of our subject in a way that cannot be too highly spoken of, while the literature of the subject has grown in a surprising degree, particularly in France and Italy. So too much of the territory which lies on the boundary line between what is properly public law and private international law, *e.g.* extra-territoriality, has been more thoroughly explored. Lastly, however, the

new Italo-French school of private international law has shown the way to a thorough examination of the leading principles of the science. Even although we may not be able to adopt the principles of that new school, we must gratefully recognise all its services, both direct and indirect. In the present edition, forced as I was to take up a distinct position upon these leading principles, I found that this new school required me to subject Savigny's theory, which up to this time had ruled the German school, to a renewed examination. Even in my former edition I hinted that it could not remain standing without some modification. But as that was a youthful production I could not in it becomingly depart from the principles of the well-known master. Now I think I may say that the ground-plan which I have adopted in my second edition, although it is akin to Savigny's doctrine, has taken up a position beside it, which is not altogether dependent upon it.

The question may be raised, whether the time is yet come for treating private international law as a unity, and without special reference to the law and jurisprudence of the individual states concerned, except in a short sketch, which may serve to give us the bearings of the subject. If an author is to treat the whole subject of private law in different nations thoroughly, he exposes his legal knowledge of the most various topics to a test that is anything but pleasant. Mistakes will very probably be made, both in his appreciation of particular legal doctrines and in his views of the positive legislation and legal precepts of different countries. An author who deals with some particular heads of private international law in a monograph is in many respects in as advantageous a position as one who writes upon that law from the point of view of one country only. As a fact, so quickly do laws alter in our time, every general work upon international law must be taken, as traders say, "with errors excepted," and any lawyer who consults the book for the practical purposes of some particular case should be warned to apply to legal specialists for information as to the law of the country in which he happens to be interested.

But nevertheless, in spite of these advantages which the treatment of the subject by monographs, or from the point of view of one system of law only, enjoys, science dare not refuse to undertake an enquiry which will include all civilised countries, or at least the most important of these countries. For that there is this reason, if no other, viz. that private international law stands in very close connection with public international law, the law of nations. Any special treatment of the subject, such as starts from the positive law of this or that particular national system, runs this risk, for want of assistance from some general theory, that, from the very narrowness of its field of vision, it may make a mistake in its selection

of the proper point from which to set out, or may lose all standards by which to determine the extent of recognition that should be accorded to the different principles of the science in the general organisation of private international law. But, lastly, any special and restricted treatise will always create a feeling of uncertainty, and will be exposed to the danger of being undermined by some new ideas, perhaps embodied in a statute, which are new and fanciful, but wear the appearance of ingenuity. The structure of private international law of the present day, when taken as a whole, is like an artificial arch. Each particular stone appears to float upon the air; it is only those who know the whole who know that it will carry great weight in safety, although they know, at the same time, that it cannot be altered just as any one likes.

I have not added to the various sections of my work a comparative review of the rules of law in different particular States, which may concur with each other, or may differ. If one has not a certain amount of familiarity with comparative jurisprudence, it is not very easily feasible to work out the problems of private international law without losing oneself among unsubstantial phantoms. German literature, above all others, gives us some warning examples of this kind of attempt. I thought, however, that it was not desirable to treat details and theory together. When these are combined, either the one or the other is apt to be taken too shortly; at least, I could not trust myself to do equal justice to both. Besides a detailed statement of actually existing law stands in need of constant correction. At the same time, I hope that the selection of illustrations which I have made from the legal systems of different countries will not be found to be altogether too small. In this way I thought that the leading types of the various developments which different doctrines of law have attained in the most important civilised countries might be presented to the reader, without prejudice to the impression which should be made by the consecutive exposition of the theory of private international law, or of the sound rules of practice to be observed in it, which reveal themselves along with the theory.¹ I had no intention of saying a word of reproach against the works which have undertaken to deal at the same time with comparative jurisprudence and private international law, but my opinion was that the two subjects were better apart.

I have nothing but extrinsic reasons for abandoning the dissertation upon criminal law in this edition, which in the former edition was part of

¹ In this second edition I have retained and discussed even more fully than in the first, as will be observed, along with theoretical problems, the subject of the practical tendency of these problems.

my subject. I cannot share the theory, which has certainly a large measure of support, that criminal international law belongs to another sphere of ideas altogether. I am rather inclined to the view of one of the most recent of French authors (Lainé),² that private and criminal law, including the law of procedure, are bound up with each other by the consideration that the object to be attained is to settle what is the treatment which the law should mete out to the individual who is in the midst of a foreign legal order, or, more accurately, to settle the jurisdiction of the instruments of law set up by the organisation of different States over individuals and their rights. This consideration is common to criminal and to private law, in so far as, in the former case, viz., in criminal law, the individual's title to defend the sphere of his rights against the control of the law is concerned. In public law, on the other hand, the relation and conduct of States to each other as wholes is what is considered.³ I should have gladly then retained the original scope of the work, in which criminal law was included. But very recent days have given us comprehensive and valuable works, particularly in the jurisprudence of Germany, upon this subject of criminal international law, at least upon the special subject of extradition. Thus my work on the subject may quite conveniently, for the present, stand over, whereas this second edition was much required, especially in view of the effects which important political changes have produced since the date of the first edition. If I had taken in criminal law, the publication must have been long delayed, and in practical use private and criminal law, as a rule, are separable. Thus I felt myself able to exclude it for a time from consideration.

In my view private international law does not require, as a condition precedent to its existence, that it should have been constituted, so far as its leading principles or doctrines are concerned, by treaties or by legislation. It exists because it is a necessity, and it is the force of circumstances, the nature of things that makes it so. The fact that it embraces a multitude of doubtful and controverted points proves nothing to the contrary, just as little as in other departments of the law. Without desiring to deny the value which treaties and legislative provisions possess in many respects, I believe that I have shown in various ways that treaties and detailed enactments of the legislature, the difficulties of which can

² *Introduction au droit international privé*, i. p. 11. I regret extremely that I could not make more use of this work, which is not yet completed.

³ Many legal topics, however, may be treated under the one head as well as under the other.

only be disregarded by superficial observers, have sometimes done more harm than good in this field, in which every arbitrary measure brings its own revenge, just because the essential characteristics of the subject are determined by the real nature of things.

But I am just as far from believing that what is termed an international uniformity of legislation will make private international law for the most part a superfluity.⁴ There are no doubt certain territories in which such an uniformity of legislation may at times be adopted with profit, although perhaps it should be even there confined to a few propositions. But the extent of these territories is small. On the other hand, too extensive an uniformity in the laws of civilised States would do much to check progress, which for the most part is dependent on each State enjoying freedom of movement. It is the task of private international law to maintain harmony amidst this freedom of the different legal systems, which are not to be prevented from solving the problems of civilisation in various ways.

The part which private international law has to play in the work of civilisation—it is still treated in Germany as a sort of step-child of the philosophy of law—may appear modest as compared with that of public international law; still, it is important enough. It protects and assures the peaceable intercourse of private persons in different nations. In this way, therefore, it maintains the threads,—which, fine as they are, still together will sustain great things,—on which the exchange of goods and of ideas, the mutual respect of nations, and therefore the maintenance of peace, depend. In the outset of national history hatred of all who do not belong to the nation, and the exclusion of them from intercourse, are, as a rule, the leading principles. It is, however, a sign of strength and prosperity in peoples and States that they should receive strangers hospitably, and should cultivate closer international fellowship, to the advantage of humanity at large, without injury to their appreciation of their individual nationality, and without anxiety about it.

GÖTTINGEN, June 1889.

⁴ See in this connection Georg. Cohn, "On the Assimilation of the Laws of Nations" (*Ueber international gleiches recht*), a lecture given in the Juridical Society in Vienna. Vienna, 1879

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ERRATA.

- Page 114, *note* 8. The reference to the case of *Low v. Low* is Ct. of Sess. Reps., 4th ser. xix. 115.
- Page 117, *note* 23. Correct the reference to the case of *Low v. Low* as above.
- Page 212, *note* 12. First line, for "Timer" read "Times."
- Page 260. Fifth line from the foot of the page, for "E. & J. App." read "E. & I. App."
- Page 260. Third line from the foot of the page, after "Ct. of Sess. Reps." insert "4th ser."
- Page 385, *note* 20. Third line from the foot of the page, after "4th ser." insert "xix."
- Page 402. Fourteenth line from the foot of the page, for "75" read "78."
- Page 568. Twelfth line, for "*premitentiæ*" read "*pœnitentiæ*."
- Page 597. First line of § 271, for "mandant" read "mandate."
- Page 607. At the beginning of the eleventh line insert a square bracket.
- Page 701. Fourteenth line, for "Lenanton" read "Levantton."
- Page 717. Second line of § 327, for "*Anscglung*" read "*Anseglung*."
- Page 839. Seventeenth line from foot of the page, for "Enohim" read "Enohin."
- Page 1112. Twenty-ninth line, for "*rationæ*" read "*ratione*."

INTERNATIONAL LAW

First Book.

THE OBJECT AND THE SCOPE OF PRIVATE INTERNATIONAL LAW: ITS HISTORY AND GENERAL THEORY.

I. THE OBJECT AND THE SCOPE OF PRIVATE INTERNATIONAL LAW.

§ 1. As soon as the citizens of different States or communities¹ begin a lawful traffic with each other, it must be determined in one way or another whether the rules of law² which are recognised in one particular State or community are to be applied to their legal relations,³ and to what extent they are to be so applied. To find the answer to this group of questions is the task of private international law. It may also be said: Private international law determines the limits of the application of the legal systems of different States in private legal relations; and, again, as the jurisdiction of State authorities—courts or magistrates—which may trench upon private legal relations, depends upon the applicability of the legal system, it may be put still more clearly thus: Private international law determines the applicability of the legal systems and the jurisdiction of the agencies—the courts and magistrates—of different States in private legal relations.⁴

¹ We say “or communities,” because questions often arise as between provinces, cities, and even communes, which belong to one and the same State, but have different systems of law.

² We say “rules of law” advisedly, for assuredly it matters not whether we have to deal with statutory law or customary law. When we speak hereafter of the “laws” (*Gesetze*) of a State, that is understood to include customary law and the practice of the courts, which to some extent supplies the place of positive law.

³ A process or suit is a legal relation, and hence the international application of the maxims which belong to the law of process is part of the subject with which private international law deals.

⁴ We say “private legal relations,” and not “legal relations of private persons,” because we may have to deal with the legal relations of a State, in so far as a State enters into private legal relations; while, on the other hand, a private person may have legal relations which must be exclusively determined on principles of public law, the law of nations in the narrower sense.

It is plain that, if there is to be any orderly and secure intercourse among the citizens of different States, an indiscriminate application of the native law of that State alone to which the court that happens to have to determine the suit belongs, would lead in many cases to a simple denial of the rights of the foreigner, and even of the native citizen himself, or in other words, would deprive international intercourse of all legality. Would that not be the case if a marriage contracted abroad between foreigners, or the acquisition in some foreign country of a thing that was situated there, should be refused recognition simply on the ground that our law requires different forms for the celebration of marriage and the acquisition of property from those which are prescribed abroad? If we wish to secure persons and things in their intercourse with our country, we must to a certain extent—how far, need not in the meantime be discussed—allow these persons and things to come in among us with a certain legal character, *i.e.* with the legal character which the foreign law has given them. On the opposite view we should simply deny all virtue to the legal community to which these persons and things once belonged, or, in other words, deny that this foreign legal community was a legal community or a State at all.

PRIVATE INTERNATIONAL LAW AND THE LAWS OF PARTICULAR STATES.

§ 2. These remarks have already shown that the rules of private international law cannot possibly be dependent merely upon the arbitrary determination of particular States. The State cannot assert the competency of its own legal system in absolute independence of other States, and in the face of their sovereign rights, which are of as much weight as its own. Such a claim will most assuredly be met by certain limitations belonging to the law of nations,⁵ *e.g.* by the proposition that no State can exercise a power of compulsion within the territory of another. The same considerations also prove private international law to be an independent department of law; it is not, as Lorimer⁶ has recently of new affirmed, merely a part of the domestic law of each State. In the abstract, every State can determine its own legislation as it pleases; the effect of its laws upon legal relations, which have any

⁵ Cf. Bar, *Münchener Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft*, 15 (1873), p. 1 *et seq.*, also pp. 5, 6; and Stobbe, i. § 29 (i.), pp. 199, 200; Fiore, i. No. 5; Martens, ii. § 68. Brinz expresses himself most pointedly and cleverly as to this principle of the law of nations (*Pandecten*, 3 Aufl. i. p. 23, i. p. 349 *et seq.*); in the same way Harrison, *J. de dr.* 7, p. 417 *et seq.* See, too, Bard in his preface.

⁶ Lorimer's view (i. pp. 349 *et seq.*) seems all the more astonishing, as he admits that the separate treatment of private international law is to be recommended, and describes it as the "doctrine of jurisdiction," and as he very properly lays it down that the development of private international law is certainly not to be obtained exclusively by means of the courts of the various States through actual processes, but that its propositions of law of themselves regulate men's lives and commerce. Bard thinks that by means of treaties the principles of international legal maxims belonging to the domestic law of each separate State may assume the

connection with a foreign country, will be determined by the nature of the subject—*i.e.* by the requirements of an orderly and lawful intercourse, and by the respect which is due to the sovereign power of other States. The false impression that private international law is only the domestic law of each separate State, and that it is impossible for us to set up rules that are generally recognised for the intercourse that is nowadays carried on among civilised States, proceeds on the one hand simply from the fact that the courts of the different States, subject as they are to their own legislature, must follow the directions of that legislature as to their own jurisdiction, even when these are mistaken;⁷ and arises on the other hand from the extraordinary difficulty and doubt that belong to very many of its questions. In particular cases which happen to fall under the jurisdiction of the courts of this or that State, these courts will recognise only that theory of jurisdiction in international questions, which is peculiar to the law of their State; and just because of the doubts and difficulties of particular cases, we find that many blunders and encroachments by this or that system of law, and this or that State authority, are acquiesced in in the intercourse of nations, that is to say, so far as public law is concerned. But if it can be shown that these mistaken decisions on jurisdiction are errors and blunders,⁸ then in the end the pressure of the general conviction on the subject, working along with the might of commercial intercourse, will force them out of the way. Besides, since the instructions of the legislatures of the different States as to the international application of their maxims of law are not, as a rule, very detailed or excessively distinct, there is, as a matter of fact, a very considerable field for the operation of a general theory of the proper determination of such questions of jurisdiction. If the independence of so-called private international law as against the laws of each particular State is denied,⁹ it follows that on the same ground the existence of a number of principles which unquestionably belong to public law, such as the extra-territoriality of sovereigns, ambassadors, etc., must be pronounced to be doubtful,¹⁰ because there may be some State that has adopted these

character of true international law. This view falls with the theory that nothing is law which does not rest upon an express declaration of the legislative powers. Is that not also law, which necessarily corresponds to the nature of the subject? Dicey, in his *Law of Domicile*, Introduction iv. v., says that the propositions of so-called private international law are, in so far as international, not law in its strict sense.

⁷ Cf. the judgment of the old German Imperial Commercial Court, of 3rd January 1878 (Seuffert, 33, No. 184), which holds that the *lex fori* can alone prescribe the application of foreign or domestic law by the judge.

⁸ Cf. Wharton, § 1. "Private international law is binding not because it is enacted as a code . . . but because it is ascertained as a logical inference from the conditions of each case.

⁹ In the most extreme cases, *e.g.* in cases where an undoubtedly perverse application of the law of any particular State would result in the direct spoliation of foreigners, it may be that the remedies of public law will be used against such stretches of competency. But this is not easily brought about, because, as Lorimer himself observes, the jurisdiction and the legal system of every State is entitled to the presumption of honest intention in these matters.

¹⁰ Reinh. Schmid. p. 22, in the same way as Lorimer.

principles in its territorial law in a very faulty or fragmentary form, while, of course, its courts and officials are bound by that faulty form.

POSSIBILITY OF A GENERAL THEORY OF PRIVATE INTERNATIONAL LAW.

§ 3. It is not, of course, possible to set up a general theory of private international law in such a way that it shall not constantly require to be supplemented in view, on the one side, of the new propositions of law that are constantly arising in the various States, and on the other of the innumerable host of legal propositions that are now in existence side by side with each other. It is only a fraction of these, the applicability of which to international questions can be directly tested even in a comprehensive work. But yet the task of private international law does not sink to that of a mere statistical treatise on law, and an incomplete treatise too. The applicability of territorial rules of law to international questions is measured by certain general and typical characteristics; the international application of one proposition of law may be settled without further enquiry, if the application of a cognate rule is known; the difficulty frequently lies simply in testing a proposition of law with a view to seeing whether, in its international application, it is not to be broken up into more than one rule, one of which has an universal operation in international intercourse, while the other can affect only such things as are found in the territory of the power that made the rule of law. For example, the difficulty may be in testing whether a document, which in its own country at once gives rise to a real right, does not, in a foreign country at least, give rise to a personal obligation to provide the person who holds the document with a real right, in conformity with the forms that are recognised at the place where the thing is.

The eye of the jurist, by long practice, of course grows keener to mark such applications of legal maxims by way of analogy, and to discover their various relations to the system of real or of personal rights prevailing in any particular territory, and to its police regulations or its public order, which must be maintained at all hazards. And thus, where at first nothing was to be discovered but conflicts of legal systems and sovereign rights, amidst which it seemed that the security of commerce, and even the happiness and comfort of many individuals must suffer most grievously, there is often ascertained subsequently to be a complete harmony of legal system. We often ascertain, in such cases, that it cannot, for example, reasonably be held to be the view of one legal system, that the case in question should fall to be governed by it, when it is already, in accordance with the expectations of commerce, regulated by the other systems. It is not, however, meant that there are not real cases of conflict. They are, however, less numerous than might be imagined upon a superficial view of our problem.

The logic of jurisprudence has not, however, the same certainty as

belongs to mathematical reasonings. Accordingly, a guarantee for the correctness of juristic arguments has long been found in the fact that tried authorities, writers, and tribunals have reached the same results. This respect for authority is, however, of special importance in the region of private international law; for there, because of the very scarcity of legislative utterances on the international application of legal propositions, and occasionally also because of their dubiety, we enjoy considerable freedom in forming deductions from the nature of the subject in hand, which have also a large possibility of error. It is, therefore, the authors of highest repute in the domain of private international law who have laid great weight upon the citation of other authorities.¹¹ On the other hand, writers who have set about their task with the *à priori* logical method alone, have undoubtedly missed the right road. Citations, carefully collected and critically examined,¹² are, in private international law, no pedantic display, but an absolute necessity, if any certain results are to be attained, and it is hardly possible to reach a tenable position by this means without considerable labour.¹³ On this ground,¹⁴ it is not advisable to set up a complete theory of private international law as an episode in working out some particular system of law which has not much comprehensiveness.¹⁵ But, at the same time, there is no doubt that authors engaged in working out particular systems of law may do a real service to the development of private international law by bringing into view and illustrating some details.¹⁶

REAL VALIDITY OF PRIVATE INTERNATIONAL LAW. LAW OF CUSTOM.

§ 4. It can be demonstrated that there is to a certain extent a real *communis consensus* of civilised States, a true law of custom.¹⁷ That is

¹¹ The deliverances of legislatures count as authorities.

¹² Special care is necessary in the use of the decisions of courts, which, from their enormous bulk, are specially important. It often happens that the decision is arrived at in view of the peculiar circumstances of the case on some *ratio*, which is only dimly, if at all, to be found set forth in the formal grounds of judgment.

¹³ Fusinato (*Introduzione*, pp. 7, 8) pleads in eloquent words for the independent treatment of private international law. He puts it that only in that way, and not by being discussed within the confines of the legal system of the particular State, can that commanding position be attained, from which the legal system of each State can have its proper place assigned to it, and those deplorable conflicts may be avoided, in consequence of which the same actual state of relations is recognised in one state as legal, in another is looked on as invalid.

¹⁴ Thus *e.g.* the works of Th. Pütter *Das praktische (!) Europäische Fremdenrecht* (1846), and of L. Pfeiffer *Das princip des Internationalen Privatrechts* (1851), are utterly worthless.

¹⁵ Thus, for example, even Böhlau, in his work on the land laws of Mecklenburg (1871), i. pp. 420 *et seq.*, has missed the right path. See *e.g.* on pp. 435, 436, the authoritative disposal of the problems—which in truth are not so simple—of the treatment of *Res Judicata*, and the carrying out of civil judgments in international commerce.

¹⁶ There is, however, no objection to a summary exposition of private international law in a handbook of common law. But it is dangerous on such an occasion to lay down in a couple of lines or pages a new theory, or enter upon a criticism that goes to the root of the subject.

¹⁷ R. Schmid. (p. 24 *et seq.*), on very unsubstantial grounds, is for denying the possibility of such customary law. Was the reception of the Roman law at the end of the Middle Ages limited in any sense by the boundaries of the individual States?

e.g. distinctly the case with regard to the rule known to all, that a legal transaction, putting special exceptional cases aside, will be universally regarded as validly concluded so far as form is concerned, if it answers to the form which is required by the law of the place where the transaction takes place. *Locus regit actum*. Of course, every State has, in the abstract, the power of denying effect within its own territory to such a law of custom. But up to that limit the general law of custom, if it can really be shown to be such, will be recognised in the individual States. A law of custom is simply the instinctive development of right, tied down to no particular form, and this instinctive development does not draw its virtue from the will of the State. We cannot admit the objection, therefore, that there can be no such thing as a general law of custom, with reference to the rules of private law, for the whole of the civilised world. The boundary of the State has this significance merely, that it can deny effect to such universal propositions of customary law, a denial which, as a rule, will draw down upon itself and its citizens considerable disadvantages.

INDEPENDENT TREATMENT OF PRIVATE INTERNATIONAL LAW.

§ 5. As a matter of principle, no objection can be taken to the conjunction of private international law with public law. There are indeed subjects which are common to both—*e.g.* the doctrines of allegiance and extra-territoriality, and on this ground it might seem desirable to treat them together. But in that case, private international law could on no account be represented as an entirely subordinate division of public law.¹⁸ It would be, as a matter of principle, correct to take up public law and private international law together, under the description "international law." But in that case a division must be made into—*1st*, the international law of States (public law); *2nd*, the international law of private persons; *3rd*, international criminal law; and *4th*, international law of process, both civil and criminal.¹⁹ But there is this difficulty in the way of combining private international law and criminal law with public law, *viz.* that private international law (including in it criminal and process law) is in itself a most comprehensive subject, and for this reason may get rather scant justice in such an arrangement. Besides, it is not every one who is an authority on public law properly so-called, who has also a knowledge of

¹⁸ As, for instance, when private international law is disposed of in a brief chapter on the legal relations of foreigners. Phillimore discusses private international law as a special fourth part of his "International Law," and v. Bulmerincq deals with international law, private, criminal, and processual, under the title, "*Die Concessionen der Staaten zu Gunsten der Internationalen Rechtsgemeinschaft*;" and Martens has recently discussed the same subjects in the second volume of his "Public Law," in the chapter, "*Die internationale Verwaltung im Gebiete der rechtlichen Interessen der Individuen und Völker*." These authors, however, give a comparatively comprehensive and thorough exposition. They cannot be charged with overlooking the practical importance of private international law.

¹⁹ To this would require to be added some common doctrines, *e.g.* the doctrine of allegiance.

private law sufficient for the treatment of private international law, or has the necessary experience in dealing with disputed points of private law.

DIFFERENT TITLES FOR "PRIVATE INTERNATIONAL LAW."

§ 6. According to strict logical interpretation, the title "Private International Law" cannot be altogether approved, and has frequently been challenged. It would be more exact to call it, "The international legal treatment of private persons;" for "Private International Law" seems at first sight to point to the relations of different States or nations, as such, in matters of private law. But the expression, "The international legal treatment of private persons" (or, to be still more exact, "of legal relations in private law") is somewhat cumbrous, while on the other hand a title which is not strictly correct does little harm, so soon as it is generally known what is to be understood by it.

Other titles which have been given or suggested are either exposed to still graver objections, or have met with still less general approval.

Thus, as Savigny (pp. 3 *et seq.* § 344, Guthrie, p. 48) has already pointed out, the title of "The Collision" or "Conflict" of laws or statutes which at one time was universally given to our subject, and in more recent times is still used by a section of English and North American jurists, gives rise to a rival but a mistaken conception of the subject.

That title assumes that, so soon as a question as to the application of the laws of different States to the particular case comes up, these laws will always come into collision. Now it is quite possible that they should all be in harmony, and should all commit the decision to the same legal system, and to the same tribunal. As a matter of fact this is what generally happens, even in cases which are apparently the most complicated, as we shall perhaps be able to prove in the sequel. Collisions of law are, as Savigny pointedly remarks, in their nature secondary and subordinate questions. A conflict of laws is not caused by the difference of the laws which may possibly be applied to any particular case, but arises only when the legal systems of different States, differing among themselves, all claim that a particular case shall be submitted to their own jurisdiction. That, however, there are cases of this latter description we do not, as has been said, propose to deny.

Savigny and numerous German writers following him²⁰ use the expression, "local limitations of the rules of law." But, if it is admitted that there are certain rules of law which accompany the person everywhere—that the law of our State must, for instance, be frequently applied by a foreign judge, we have ground enough for holding that a title, which makes the scope of the operation of a rule of law in international intercourse

²⁰ So Gerber, *D. Privatr.* § 32. Windscheid, *Pandekten*, i. § 34. Unger, *Oesterr. Privatr.* i. § 22. Stobbe, *D. Privatr.* i. § 29. (Dernburg, *Pandekten*, i. § 45, has on the other hand, under the general division, "The scope of legal rules in time and place," the subdivision, "Private International Law.")

appear to be local, is not exactly appropriate. On the contrary, one would rather be disposed to speak of the movement of the rule of law with the person or thing to which it belongs into foreign states, so that, as a matter of fact, the place where the thing or the person may subsequently be found would be of no consequence. But, apart from this, the expression is seen to be inadequate, if, as is the case with Savigny, domicile and allegiance are drawn into the circle of discussion, since the whole subject of these doctrines is the enquiry whether and to what extent a particular person, without regard to his local situation, belongs to the jurisdiction of this or of that State.

In some treatises (*e.g.* Thöl, *Einl. in d. D. Privatr.* Eichhorn, *D. Privatr.* §§ 34 *et seq.*) the subject is treated under the name, "Relations of the sources of law" (more accurately, "of the co-ordinate sources of law"). This expression is no doubt correct, if the enquiry is confined to substantive private law, and it is justified in the textbooks mentioned, because this is the restriction which they accept. But it is not suited for an enquiry which embraces the law of process along with other subjects: for instance, the subject of the execution of foreign judgments can not, it is certain, be brought under it. It cannot, besides, be left out of account, that this title, although it is quite intelligible as the heading of a chapter in a treatise on German private law, is exposed to much misconstruction, if it is used as the title of a monograph.

Holland²¹ has recently proposed the title, "Extra-territorial recognition of rights," but as yet he has not gained any general approval for it. The expression hints too plainly at a particular theory of international law, which is much disputed—the theory of the recognition of vested rights; and again, as we have said, in all such questions the point is not simply absolute correctness, but also handiness.²²

After all, we shall do best to stick to the expression, "Private International Law." We know what we are to understand by it, and it undoubtedly prevails in the jurisprudence of France and Italy, while in the scientific literature of other nations it is upon the whole more used than any other.²³

We must, of course, remember that the questions, with which private international law is concerned, may come up in the relations of the systems of law in different provinces, towns, or localities of one and the same State.

²¹ *Revue*. xii. p. 574 [see also Holland's "Jurisprudence," p. 288]. So, too, Torres Campos, pp. 31, 32. The expression proposed by Harrison, "international law," is altogether inadequate. See, in criticism of it, Holland *ut cit.*

²² Lomonaco and Laurent say, "Civil international law." See Asser Rivier, p. 4, note 1, against this, and generally on the different titles. The expression "civil law," taken strictly, excludes commercial law and the law of process.

²³ In this sense see also Fusinato, *Introduzione*, p. 9.

IS THERE AT PRESENT A COMPREHENSIVE SCIENCE OF PRIVATE INTERNATIONAL LAW? TREATIES DEALING WITH QUESTIONS OF PRIVATE INTERNATIONAL LAW.

§ 7. But there is a more important question than the question of title, viz. the question whether we can speak of the existence of a science of private international law. If we were to believe the occasional deliverances of some authors,²⁴ our science would be in a bad way. But, so soon as it is admitted that deductions from the nature of the subject in hand, although they are not specially enacted by the legislative power, are yet indeed law, we shall find that there is much that rests upon pretty firm foundations, and on close inspection it will often be discovered that, in the various decisions and opinions, the real difference is much slighter than it seemed from the inadequate or abrupt statement of the grounds on which they are rested.

If we were to think of dating the origin of the existence of private international law, or the science of it, from the moment at which, by international treaties, everything should be so precisely regulated that we could deduce our decisions from them as from a complete code,²⁵ we should be forgetting that, in the most and weightiest questions, the lawgiver and the diplomatist can do for private international law little besides furnishing with statutory force²⁶ the deductions which are drawn from the nature of the subjects dealt with. For there is no department of law in which caprice leads more easily to an absurdity than in the department of private international law, in which the power of the lawgiver comes into collision with certain barriers of public law. And although it is often possible by statute or by treaty to bar judicial decisions from wandering off the right path, on the other hand the mistakes of the legislator or the diplomatist are all the more fatal.

A free practice and science correct their own errors much more easily in a region like this, where deductions from the nature of the subject in hand are the prevailing force. It would be no difficult matter to bring examples of this. Wharton²⁷ is right in declaring himself recently to be against the possibility and the profit of a comprehensive codification of private international law. On the other hand, some authors, chiefly French and Italian—but only a minority, be it understood—too much used

²⁴ Thus Laurent, 1, § 3, declares that the existence of a private international law is very problematical. But to point to the discrepancy between different judgments on a single case, or even on several difficult cases, is not enough to justify his assertion. See, too, p. 40. "*Notre science vient à peine de naître.*"

²⁵ Cf., too, Beach Lawrence, 3, p. 65. "*Le droit International privé n'en existe pas moins, quoique sur quelques points on ne rencontre pas une conformité de vues parfaite. Il en est de même dans le droit international public. . . . Mais parce qu'il n'y a pas un accord sur tous les points, il ne s'en suit pas que la conformité ne soit établie.*"

²⁶ Daireaues lays down correctly (J. xiii. p. 418) that treaties on questions of private international law are often very useless. Besides, there are treaties with very indistinct, and therefore mischievous provisions. ²⁷ Commentaries on law, Philadelphia 1884, p. 195, *Note*.

to the leading strings of what professes to be a complete codification, and too much swayed by the abstract idea that judicial authority has nothing to do but to carry out the will of the legislator, which has somehow already been determined, seem unwilling to believe that there can be any real established law without such codification.²⁸ We do not dispute the advantage of public treaties for certain points of private international law; these are points in which the question is not as to deductions from the nature of the subject, starting from doctrines which have been already settled by the municipal laws concerned, but where there is a question as to taking up fresh points of departure altogether, as to which there is room for difference of opinion: an example would be the determination of the nationality or allegiance of a person. But in private international law it is specially necessary that the main work should be left to a free science. With every new law in each different State, new problems may emerge. Treaties and statute law would often be unable to give assistance before it was too late; and, on the other hand, science, if she were too much confined by positive law and had forgotten her free movements, would only be able to do her work in a satisfactory manner now and again.

Stimulated by Mancini, and partly under his direct guidance,²⁹ the kingdom of Italy has entered upon diplomatic negotiations since 1867 with a great number of States, in order to reach a comprehensive system of private international law as generally recognised as might be; but as yet no appreciable result has been attained. The replies of the Ministers of Justice and Foreign Affairs in the most important and the majority of States recognise, it is true, the most praiseworthy exertions of the Italian Government, but by holding back they prove the truth of the opinion we have just pronounced as to the operation of international treaties in the region of private international law.

In the year 1870, negotiations took place between Spain and France with a view to a comprehensive treaty for the regulation of private and process international law in these two States. The idea came from the Spanish minister of that day, Manuel Silvela, and was eagerly adopted by the French premier at the time, Ollivier, without, however, resulting in anything.

In 1878 a congress of the jurists of Central and South America (Peru, the Argentine Republic, Chili, Bolivia, Ecuador, Venezuela, and Costa Rica) at Lima worked out a comprehensive treaty for private international law

²⁸ Thus Laurent, i. p. 79, assigns in theory a much too narrow task to the science. Happily he has not allowed that to prevent him from giving us, from points of view most freely taken up, very valuable discussions, which he considers, in spite of his theory, to be immediately applicable. And, on the other hand, Laurent himself explains excellently the difficulty of concluding treaties on points of private international law in a comprehensive way.

²⁹ Cf. *Negoziati del Governo Italiano . . . per norme convenzionali di diritto internazionale privato . . . Roma. Tipografia della Camera dei deputat. 1855, and Atti Parlamentari, Legislatura xv. Documenti diplomatici, 1885.* These publications of the Italian Government, which, as is well known, were liberally made available to scientific men, deserve at least the gratitude of all who are concerned with private international law.

and legal remedies for the contracting States, which in many aspects deserves recognition. In particular, so far as the equality of foreigners and natives before the law is concerned, it rests on very liberal principles; but it contains nothing at all as to the acquisition and loss of citizenship, one of the most important subjects, and one that particularly stands in need of regulation by treaty. I am not aware whether, or to what extent, the treaty was definitely adopted and put in operation.³⁰

II. HISTORY.

A. ROMAN LAW.

THE AUTHORITIES OF JUSTINIAN.

§ 8. Many attempts used to be made to find, in the authorities of the Roman law, general principles for the application of the laws of different countries, but with very scanty success. Commentators and authors of later times have hung discussions of their own on the conflict of laws upon isolated passages, especially on the first title of the Codex, *de Summa Trinitate*. But, as is obvious from the first glance, it is not their purpose to make any special application of the passages which they cite. The discussion, for example, instead of being appended, as was generally the case, to the words, "*Cunctos populos, quos clementiae nostrae regit imperium*," might have taken place just as appropriately on any other passage. For nothing at all can be drawn from these words save that the emperor can only proclaim laws for the peoples whom he rules, a proposition for which we need not seek authority in the *Corpus Juris*.

All that can be proved is as follows:—

ORIGINAL OUTLAWRY OF FOREIGNERS, BUT RECOGNITION OF THE LEGAL EXISTENCE OF FOREIGN GOVERNMENTS. FRIENDLY STATES. RECUPERATORES.

§ 9. Like the peoples of antiquity generally,¹ so too the Romans² viewed their law as exclusively national. That is to say, it seems to them to be applicable only to their own countrymen, and on the other hand not to be applicable to things or to persons who, unless in the enjoyment of such special privileges as ambassadors enjoyed, actually found themselves in the

³⁰ The treaty, along with the report of the Peruvian plenipotentiary, Dr Antonio Arenas, is given in a German translation in the *Zeitschrift für des ges. Handelsrecht*, vol. 25 (1880), pp. 544 *et seq.*; in an Italian translation in the *Document. Dipl.* cited in the last note, p. 197. Cf. Torres Campos, pp. 311 *et seq.*

¹ As to the Jews, see Lomonaco, pp. 12 *et seq.* Durand, pp. 3 *et seq.* While the books of Moses require hospitality and friendly treatment for the individual foreigners, on the other hand they approve of wars of extermination against whole peoples. On Grecian law and customs, see e.g. K. F. Hermann, *Lehrbuch der Griechischen Privatalterthümer*, 2nd Ed. by Stark, 1870, §§ 52, 56, and 58. On the peoples of antiquity generally, see Pierantoni Trattato, vol. i. p. 1 and p. 348.

² Cf. Padelletti *Lehrb. d. röm. Rechtsgeschichte*, German Ed. 1879, p. 164, and more specially Karlowa *Röm. Rechtsgeschichte*, i. § 44, pp. 279 *et seq.* Laurent, i. pp. 667 *et seq.*

dominions of a foreign people,³ with whom the Romans had no special friendly relations known as *amicitia* or *foedus*. In strict law, therefore, the foreigner in the territory of another State is at first an outlaw, although custom and religion enjoin that a guest should be protected and respected.⁴

"But at the same time the Romans recognised that the religion, the State, and the law of the *peregrini* had the same validity in their own territory, and for the citizens who were subject to them, as the religion, the State, and the law of Rome had for the Romans." Roman law and the law of the *peregrini* faced each other, recognised as independent but mutually exclusive.⁵

But if there was with another nation *amicitia*, or even *foedus*, the citizens of this nation were no longer mere outlaws in Roman territory, they were *publico nomine tuti*, could have certain limited legal intercourse with Romans, and legal disputes between them and Roman citizens were determined by special court (*Recuperatores*).⁶ In Sell's⁷ opinion these courts were often controlled by special instructions as to the rules of law to be applied by them contained in public treaties, which were their true foundation, although much of course might be left to them to determine according to their discretion.

THE *jus gentium* OF THE ROMANS AND THE *jus civile*.

§ 10. By degrees the subjects, speaking generally, of the States with which Rome was not at war, but with which she lived in peaceable intercourse, began to be recognised as capable of legal rights to a limited extent. This did not, however, go so far as to set foreigners on equal terms with the Roman citizen as regarded private rights; they were merely held to be capable of sharing in the institutions of Roman law, in so far as this was required by their residence in Roman territory, or by the intercourse of trade.

For the purposes of trade only, those principles of law which Roman jurists indicated by the title of *jus gentium* were necessary. These the Romans characterised as a law "*quod apud omnes gentes peræque custoditur*," so that it could never come into conflict with Roman law.⁸

³ Cf. L. 5, § 2, D. *de captivis*, 49, 15. In this passage the ultimate inference is drawn, that in that event the right of the foreign nation over persons or things, which up to that moment had been Roman, began. "*Illorum fit*."

⁴ As is well known, Greek authors especially frequently speak of this.

⁵ Karlowa, *ut. sup. cit.* Thus the Romans were a long way removed from the absurdity which has often been maintained in modern times, that the native judge can only apply native rules of law, and must thus refuse to recognise the foreign legal system even in a domain which indisputably belongs to it.

⁶ Zimmern, *Geschichte d. röm., Privatr.* iii. § 17.

⁷ *Die Recuperatio der Römer*, pp. 318 *et seq.*

⁸ Although the source of the *jus gentium* is commonly found in international intercourse, Karlowa (§ 59, p. 454) proposes to trace it to a Roman origin. Perhaps both theories are to some extent correct. Cf., however, Puchta *Inst.* ii. §§ 83-85.

Roman rights of succession, family law and property in land (at least in Italy), continued to be denied as a rule to foreigners.⁹ The marriage of a Roman with a foreign woman was not, according to Roman law, for all purposes a valid marriage.¹⁰ A foreigner could not inherit under a Roman testament, and even many forms of the transference of property were inapplicable to the acquisition of property by foreigners.¹¹

Where a rule of law belonged to the *jus civile*, it needed either a special legislative enactment to make it applicable to the relations of Romans and foreigners, where the necessities of the case inevitably demanded such an application, or else the prætor, in the case of an enactment specially laid down by the legislature, and therefore belonging to the *jus civile*, but yet at bottom merely the development of some rule belonging to the *jus gentium*, created the fiction that the dispute was between Roman citizens. An instance of the former is to be found in the plebiscite of the year 561 A.U.C., which extended the provisions as to the legal rate of interest to loans from foreigners to Roman citizens (Liv. xxxv. 7); an instance of the latter is the formula given in Gaius (iv. 37) for extending the punishment of theft to cases occurring between Roman citizens and foreigners.¹²

That the law of the foreign country should be applied in those cases where the legal relations of foreigners fell to be considered as an incidental point before a Roman tribunal, was the necessary result of any recognition of intercourse with foreigners as a legal intercourse. Otherwise, the Roman who acquired any goods from a foreign country would have had no appeal to the right that lay in the foreigner who was his author, and trade even within the empire must have become uncertain. In the same way, in a suit where one phase of the dispute was as to the Roman law of citizenship, a question might incidentally arise as to the validity of a marriage concluded between foreigners, and this was determined even in a Roman tribunal by the law of the foreign country, in so far as it was of importance to determine it (Gaius i. 92).¹³ None of the rules of Roman law that had reference to succession could form matters of dispute except

⁹ Cf. Rudorff, *Röm. Rechtsgeschichte* i. § 1.

¹⁰ It was no *justum matrimonium*; but yet certain legal effects of it were recognised. As an exceptional privilege, the *connubium* was given to some foreign peoples. Ulp. *Frag.* v. 4, 8, 9.

¹¹ Puchta, *Inst.* ii. §§ 217, 236. Walter, *Röm. Rechtsgeschichte* i. (3rd ed.) § 115.

¹² In the year 584 A.U.C. the right was specially granted by the Senate to envoys from Gaul to buy ten horses in Italy and take them away with them; *Denorum equorum eis commercium esset, educendique ex Italia potestas fieret* (Liv. xliii. 5, Puchta, *Inst.* ii. 197 not. 6). One may infer that without such permission foreigners could not buy horses. Perhaps the meaning of the division of things into *res Mancipi* and *res nec Mancipi* lay in this, that foreigners were excluded from acquiring the former. In the case of *res Mancipi*, *traditio*, which was open to foreigners, could not transfer the property, and *res Mancipi* were the very things which foreigners must at first have been forbidden to acquire. The fact that *res Mancipi* could be acquired by *in jure cessio*, goes all the further to show that this is the true explanation, since this form of acquiring property was only known among Roman citizens.

¹³ Cf. L. 6, § 2; D. 28, 5; L. 59, § 4, *Cod.* L. 1, C. 6, 24.

between Roman citizens, for there was no succession between Romans and foreigners. Again, in a question of succession as between foreigners, a question that could only come before a Roman court as an incidental point, the law of the foreign country alone could be applied, if indeed there was to be any recognition at all of succession as between foreigners. This is laid down by Ulpian (*Frag. tit. xx. § 14*) and by Gaius (*iii. § 120*) in so far as the testaments of foreigners and obligations transmitted by succession are concerned.

All this is simply explained by the fact that the Romans, as a matter of principle, allowed the numerous nationalities which were subject to them to retain their own law and a certain measure of autonomy.¹⁴ The intermediate stages between a mere alliance and full incorporation were manifold, and the natural result was that foreigners who did not belong to the empire came to be treated on exactly the same principles as the citizens of the nationalities which had been drawn into the empire. Accordingly the jurists speak of them indiscriminately as *Peregrini*.

The private law of property and rights was, therefore, as Wächter (*i. p. 242*) aptly describes it, treated among Romans and foreigners as a special part of the law of *status* belonging to both, which followed the person wherever he went. This condition of things is especially clear in the days of the empire, when Roman citizens lived in all quarters of its dominions, and always observed their own law, without regard to the place where they dwelt. Of course, however, in this state of things the *jus gentium* had the force of a common law as against the laws of the individual *civitates*, and the operation of the *Imperium*, which belonged to the Roman provincial magistrates, was to make some of the peculiar forms of Roman law (in particular the private testament of the Roman citizens, so far as form was concerned) absolutely universal law.¹⁵

CARACALLA'S INNOVATION. THE INVASION OF GERMAN TRIBES.

§ 11. When in later times Caracalla gave rights of Roman citizenship to all the free inhabitants of the empire, the legal position of all became the same.¹⁶ And as by degrees barbarian and German tribes began to people more and more the soil of the Roman Empire, to grow more and

¹⁴ Cf. specially Karlowa, p. 328. The subject city, too, as a rule retained its jurisdiction for disputes among its own citizens. As regards the Sicilians, cf. Cic. in Verrem, ii. 2, c. 13, "*Sicuti hoc jure sunt, ut quod civis cum cive agat, domi certet suis legibus: quod Siculus cum Siculo non ejusdam civitatis ut de eo praetor judices ex P. Rupelii decreto sortiatur.*" Cf., too, Cic. in Verrem, ii. 2, c. 37. On details see, too, Voigt the *jus naturale* . . . *jus gentium* of the Romans, vol. iv. pp. 317 *et seq.*

¹⁵ Karlowa, pp. 329-330.

¹⁶ It is Savigny's opinion (*viii. § 357*, Guthrie, p. 120) that the right of Roman citizenship, which every citizen of a *municipium* had in addition to his own native rights of citizenship, had nothing to do in determining his personal rights; that, in determining these, no regard was paid except to the law of his own immediate home. This view is met by the prominent meaning given to Roman citizenship in relation to private rights in the latter days of the empire, and is completely answered by the well-known object of Caracalla's decree—viz. to

more independent, and indeed to master that empire, there was found to be, in dealing with the relations of Romans and Germans, no better or simpler way of treating their various laws than that which had been in use up to this time, and had prevailed among Romans and the *Peregrini*.¹⁷ The so-called system of personal law, of the earlier Middle Ages, is only a development of the system which the Romans had already observed. It does as little violence as may be to the national peculiarities, and simplifies the combination of different tribes and nations into larger political unities.

APPENDIX.

THE PASSAGES IN THE ROMAN AUTHORITIES WHICH SEEM TO TOUCH UPON THE SO-CALLED CONFLICT OF LAWS.

§ 12. The object of the books of law compiled under Justinian was so practical that they could hardly take up the treatment of a subject so antiquated as the discussions on the conflict of laws that might be discovered in the writings of the classical jurists; and besides, by reason of the great centralisation of the Roman Empire, and the maintenance and preservation of the Roman private law as a privilege of Roman citizens, in contrast to those who had not all the rights of freemen, the *Dediticii* and the *Latini Juniani*, no customary laws had established themselves except in a few unimportant matters arising out of the interpretation of commercial instruments. In cases of this kind, however, matters could easily be adjusted with the aid of the principle of *bona fides*, which in later times was so much extended.

On the one hand, then, this is an explanation of the scantiness of authority upon the conflict of laws in the law books of Justinian; and on the other, it follows that where in the authorities there is a possibility of a double interpretation of any passage, where there is a doubt as to its meaning, one must give the preference to that explanation which does not assign the disputed passage to our subject, just because cases of that kind are not so likely to occur.

The following passages in particular are assigned to the subject of the conflict of laws:—

(1.) L. 34, D. *de div. reg. jur.*, 50, 17. The question discussed here is as to the interpretation of a contract. The passage says, that you must

draw from foreigners as well as from Roman citizens the taxes levied on succession. But how could the Roman law of succession have been extended to the citizens of the *municipia*, if the laws of the family and legal and commercial capacity were not also regulated by Roman law? According to Savigny's view, cases of conflict between the laws of the different States and the law of Rome must have been most numerous, and the want of any decisions of questions of the kind, in the authorities noticed by Savigny himself, would be incomprehensible. A direct authority against Savigny, and in support of the view given above, is the fact recorded by Gellius, N. A. iv. c. 4, that when the right of Roman citizenship was given to the Latin towns they lost their own marriage laws.

¹⁷ Cf. on that subject Durand, pp. 38 *et seq.*

have recourse to the express wishes of the parties, and if these are not clearly expressed, that then you must determine the question according to the custom of the locality in which the bargain was made. There is no reference to the form of the contract,¹⁸ or to the essentials of the legal instrument, as has been frequently maintained;¹⁹ the passage takes for granted that the instrument is valid. There is more to be said for the view which makes it a case of conflict between some particular customary law and the meaning of a legal instrument; but, as Savigny has plainly pointed out,²⁰ this explanation is highly improbable: if the question were about a contract concluded in one place, and to be carried out in another, the general expression, "*in regione in qua actum est negotium*," must almost inevitably have been misunderstood: for on this hypothesis it could not be determined whether "*actum est*" referred to the place where it was concluded or to the place where it was to be carried out. Taken in its natural sense, the passage refers to the common case, in which two men living in the same State conclude a contract that is to be carried out there.

(2.) The same holds good of L. 6, D. *de evictione*, 21, 1; L. 1, and L. 31, D. *de usur.*, 22, 1. (See on the latter passage Savigny, § 374, Guthrie, p. 257.)

(3.) Other passages treat of the rules of jurisdiction within the Roman State; and it is plain that if, for example, in L. 20, D. *de jurisdictione*, 2, 1, it is said "*extra territorium jus dicenti impune non paretur*," this can only be made to refer, as the second sentence of the passage demonstrates, to the native Roman judge. (See also L. 3, D. 1, 12; L. 16, D. *de off. proc.*, 1, 16; and also Wächter, i. p. 250.)

(4.) L. 65, D. *de judiciis*, 5, 1, which is by many authors (*e.g.* Hert. sect. 4, § 30, not. 8; Glück, *Pand.* xxv. p. 271; Thibaut, *Pand.* § 323) treated as referring to the regulation of the property of spouses according to the laws of their domicile, only speaks of the domicile as the place in which an action for recovery of the *Dos* can be brought (Savigny, § 370, Guthrie, p. 209.)

(5.) L. 19 of the same title lays down that actions for debts due by one who has died must be brought against his heir in the place where his predecessor had his domicile: there is no reference to different laws of succession, among which the law of the predecessor's domicile is to prevail (Wächter, i. 250, 251). To take another instance, the rule that questions as to moveables are to be determined by the law of the domicile of their owner (Mevius *ad Jus. Lub. Proleg. quæst.* 6, n. 20; Hofæker, *Principia jur. Rom. Germ.* § 140) cannot be deduced from L. 32, D. 20, 1, *de pignor.*, and L. 35, D. *de hered. instit.* 28, 5. In the former passage, the point discussed is simply, What are the pertinents of any subject? in the second, What is to be the interpretation of a testament in which two heirs were named, one for

¹⁸ See Wächter, i. p. 248; Savigny, § 356, Guthrie, pp. 117, 118.

¹⁹ See, *e.g.* Glück, *Pand.* i. p. 290.

²⁰ §§ 372 and 374, Guthrie, pp. 226 and 245.

Res Italica, the other for *Res Provinciales*, that belonged to their predecessor?

(6.) If the passages which treat directly of a conflict of laws are put out of account [*e.g.* L. 1, § 15, D. 25, 4; L. 3, § 6, D. *de testibus*, 22, 5, and L. 31, C. *de testam.* 6, 23], all that are left are the passages in L. 9, C. 6, 23, *de testam.*; L. 2, C. 6, 32, *quemadmodum test.*, L. 1, C. 8, 49, *de emancip.* The first and most plausible of these passages is referred by Wächter (i. § 24) to a case of conflict of laws, and, if this is assumed, would certainly enunciate the rule which, according to the previously cited authorities, is correct, that according to Roman law the form of a testament is regulated by the law of the domicile of the testator.

But, as Savigny notices (§ 382, Guthrie, p. 326), if the passage treated of a case of conflict, the words "*patriæ tuæ*" must have reference to the law of the domicile of the heiress, and this deliverance could not possibly be correct in law. It is therefore to be understood that the heiress and the testator had the same domicile, and that in that domicile the testator had executed his testament.

The second passage lays down that testaments are opened and made public according to the custom of the place of opening. This enactment, in the first place, has nothing to do with the private law of property and obligations; and, in the second place, makes no allusion to any case of conflict between different laws.

The third passage treats of the powers of the *duumviri* in cities. Whether a ceremony of emancipation performed before them is or is not valid depends upon whether they have, by special enactment, received the right of "*legis actio*," and no further explanation is necessary. There is no question of a conflict between the laws of different cities, but merely of the different powers of officers of cities, depending, of course, on the provisions of the laws of these cities. (See Savigny, viii. § 382, Guthrie, p. 327.)

If, then, it be true that provisions as to the private law of property and obligations are not to be found in the law of Rome, it can very easily be understood that there is nothing forthcoming as to the relations of Roman tribunals to those of foreign States. In the days of the Empire, all the courts that existed within it from one end to another were under the supreme jurisdiction of the emperor; and those peoples who were not subject to the sway of Rome, belonged to so low a grade of civilisation, that questions of that nature could hardly arise.

B. THE MIDDLE AGES.

1. SYSTEM OF PERSONAL LAWS.

§ 13. Custom and law were not so much separated from each other among the Germans as among the Romans. Accordingly we probably cannot assert

the complete outlawry of the stranger among the Germans so strictly as we can among the Romans.¹ One reason of this is that the Germans, who did not shut themselves up in cities, could not maintain so exclusive an attitude against foreigners. Families, communities, district leagues and tribes, mixed with each other without any exact conditions; and kindred tribes, who must have had all kinds of intercourse on their frontiers, could not well treat each other as outlaws.² It must therefore, to begin with, be doubtful who were foreigners in the proper sense, who should be held to be outlaws. But, of course, the most important protection which the individual enjoyed was that which was secured to him by his family and his clanship; this protection, of course, was not enjoyed by the foreigner. The rising power of the king, however, took foreigners under its protection.³ Merchants travelling from the south, which was much more advanced and developed, brought with them the valuable products of artistic industry; and in particular the kings felt themselves bound to protect the pilgrims and envoys of the Church.⁴

We have already noticed that the Germanic stocks, who came upon Roman territory at first as allies, kept their law, and the Roman subjects who were settled there kept theirs also. The allies became conquerors, but for all their pride, they could not conceive the idea of treating as slaves, or as in any sense beyond the law, the inhabitants of the Roman provinces, who excelled them so much in culture. What made it more impossible was that the heads of the Germanic races gladly took up the dignities of the Roman State, or climbed the throne of the Cæsars as their successors. In this way the law of the different tribes and nations, united upon the same territory, became for each individual a special law of status; and the general state of legal relations was distinguished from the relations of Romans and Peregrini in older times in this respect only, that all those who belonged to the different tribes, except in so far as, by being slaves or on some other special ground, they were denied full rights or liberty by the tribe to which they belonged, were regarded as of full legal capacity for all legal relations. The distinc-

¹ On this matter I have changed the view I expressed in my first edition. The general view certainly is that the foreigner was an outlaw. But see, on the other hand, Wilda, *Das Strafrecht der Germanen* 1842, pp. 673-676, and now specially Stobbe, § 42, note 3. Brunner (*Deutsche Rechtsgeschichte*, i. § 35) assumes outlawry to have been the rule; but in those countries, which once belonged to the great kingdom of the Franks, the rule of outlawry is, after this time, applied only to slaves and to non-Christians. Cf. Heusler. *Institutionen d. deutschen Privatrechts*, i. § 34.

² There is certainly a want of direct evidence from German legal sources, but we may appeal to the provisions of northern laws used by Wilda (*ut sup. cit.*). In these there are cases where the rules of punishment are graduated according to the closeness of the relations with the country of the man who has been slain.

³ *Lex Bajuuv.* Tit. 3, c. 14, §§ 1 and 2. Cf., too, Waitz, *Deutsche Verfassungsgeschichte*, 2 Aufl. iii. p. 323.

⁴ The law of Russia in the Middle Ages allowed foreigners not merely an equal legal capacity with native Russians, but gave them various advantages. On the Russian treaties of commerce concluded in the Middle Ages, see the interesting papers of F. Witte. (*Die Rechtsverhältnisse der Ausländer in Russland*, pp. 4-22.)

tion between the *jus civile* and the *jus gentium*, which had in earlier times been so carefully developed, had fallen into oblivion. It would scarcely have suited the practical needs of the time, as the most various tribes at the time of the immigration were thrown confusedly together in many districts.

§ 14. In this way⁵ the so-called system of personal laws⁶ arose, a system which, in the great kingdom of the Franks, necessarily became of much practical importance. "When," says Savigny, "a State extended its conquests, and cast other German races as well as Romans under its sway, then the Germanic law that belonged to the conquered race obtained just as general a recognition in its dominions as the Roman law had done; and conversely, in every country that fell under a foreign invader, all the systems of law that were recognised by the conquering race were held good there also. After Italy was conquered by the Franks, the victors introduced all the various kinds of law that were recognised in their own country."⁷

As a rule, every man lived by the law of the nation to which he belonged by descent, and the law of his father's nation of course ruled. The wife and the widow lived by the law of the husband's nation. It was for the first time by a capitulary of Lothair I., passed for Italy, that the widow fell back into the law in which she had been born. Marriage was celebrated under the law of the husband's nation. But the husband had to redeem the bride from her state of pupillage in accordance with her law, although his own law regulated the dower and the marriage present (*Morgengabe*).⁸ The Church, as an institution which had come over from the Roman Empire, enjoyed Roman law. The individual priests lived among the Longobardi by the Roman law also, but not so among the Franks.⁹

As no one could capriciously change his own rank, so it was forbidden to change the law under which he lived.¹⁰ Difficulties, however, arose when persons belonging to different tribes wished to conclude legal trans-

⁵ Brunner wishes to trace back the system of personal laws exclusively to the endeavours of the Salic Franks to establish, on a firm footing, for themselves the enjoyment of their own tribal law, a principle which, in accordance with the law of reciprocity, might be extended to other tribes.

⁶ Cf., on this subject, especially Savigny. *Geschichte des Römischen Rechts im Mittelalter*, 2nd ed. pp. 118 *et seq.*, Stobbe in Bekker's and Muther's *Jahrbüchern des gemeinen deutschen Rechts*, vol. 6 (1863), pp. 24 *et seq.* Lainé, *Le droit intern. privé dans ses rapports avec la théorie des statuts*. (J. xii. p. 129).

⁷ At the same time, it is quite possible that by this time these personal rights were recognised as well in the heart of Germany, where different peoples dwelt side by side, especially where there was some kinship. [A similar system now prevails in British India. Cf. Westlake, p. 11. The law there administered consists of:—(1) Enactments of the Indian Legislative Council; (2) Statutes of the British Parliament applicable to India; (3) Hindoo or Mohammedan laws of inheritance, status and the like, in cases where Hindoos or Mohammedans are concerned; and (4) the customary laws of particular castes and races. In cases of conflict, the law of the defender is preferred, as stated in the text.]

⁸ Cf. Brunner, in note 47, pp. 51 *et seq.*

⁹ Brunner, note 33.

¹⁰ On the so-called '*Professio legis*', see §§ 41, 42, and the right view in Hegel, *Geschichte der Städteverfassung von Italien*, Leipz. 1847, i. pp. 436 *et seq.* Brunner, § 34 *ad fin.*

actions with each other, or when a process was to be decided, in which the parties belonged to different tribes. It was no doubt the fact that in such cases the procedure was not quite impartial; it was only natural that the conquering tribes especially should enjoy privileges in the case of legal disputes.¹¹ The general rule, however, and the one that naturally suggested itself in the circumstances, was that the defender should defend himself in his own courts, and by his own law,¹² in which case a distinction between real and personal rights could scarcely be made, and that a man could only undertake personal obligations in accordance with his own law. In the transference of rights from others, and specially in the case of rights to landed property, the law of the seller was the basis.¹³ The transference was conceived as a renunciation by the lawful owner in favour of the person who was to acquire it, and thus in processes the decision was ruled by the law of the author from whom the possessor claimed to have acquired. Every man's succession was ruled by his own law; so that, if a Roman was to be the heir of a Longobardian by his last will, two or three witnesses were sufficient, but in the converse case seven were required.

Blood money and composition, however, were settled by the status of the person who had been killed or hurt. Both of these were simply the computation of the value which the dead man had had for his family, or indirectly for his nation, and such a computation had to be settled by the place which each nation held in the whole kingdom. The ruling nation could not possibly allow the value of the lives of its members to be determined by the law of any subject race, nor could it sanction a higher rate of blood money for members of the subject race than it approved for those of its own stock.¹⁴ Some laws were good for all the subjects of the kingdom: such general laws make up the principal part of the capitularies.

A condition of law similar to the so-called system of personal laws will always have an object to serve, and will as a matter of fact be found to prevail, in a greater or lesser degree, in countries where the subjects of nations which are of widely different degrees of culture move in close intercourse within one territory. In this way, Europeans live in Asiatic States under their own laws: the law for Englishmen in India is as a rule their own native law, and so in Algeria the French, Mohammedan and Jewish laws are distinct.¹⁵ So, too, within the territory of the United

¹¹ Cf. Stobbe, *ut sup. cit.* p. 24. It may well be, as he says, that in the law of process Roman law was being gradually pushed aside.

¹² By the 139th article of the Ed. Theod. the competency of the court was determined by the status of the true defender, not by that of his surety (Savigny, § 104c). According to other passages, however, as far as material rights are concerned, there is no doubt that the law under which the author lived is taken into consideration (Savigny, § 46. Brunner, note 27).

¹³ Sometimes, in such transactions, the law of the person who was acquiring the right was observed as well as the right of the person who was alienating. Cf. Siegel, *Deutsche Rechtsgeschichte*, 1886, § 9, note 5.

¹⁴ Savigny, *Geschichte i.* § 47: for further proofs, see Brunner, *ut sup. cit.* note 8.

¹⁵ Cf. Lainé, J. xii. p. 137. Beach-Lawrence, iii. p. 5, and, on Algeria, especially the appendix to Félix by Demangeat, i. § 33, pp. 87 *et seq.* French decree of the Senate of 14th July 1865; "Sur l'état des personnes et la naturalisation en Algérie," Art i. "L'indigène

States of North America¹⁶ the Indians live under their own law, but they are, for instance, if they reside beyond the limits of the so-called Reservations, which have been made over to them, subject also to certain laws of the United States. The whites, however, even in the reserved territories, are not subject to the law that rules the Indian tribes, unless in some special case of adoption into one of these tribes. There is a peculiar rule of law, that the Indians cannot transfer their lands to others. It is derived, however, not from any special statute, but from the theory of the occupation of the land by the settlers upon it. There is no doubt that, as a practical measure, it is to be commended.

2. THE LATER MIDDLE AGES. THE STATUTE THEORY.

§ 15. In the later Middle Ages the system of personal laws has disappeared.¹ But the change which ensued is by no means, as has been frequently assumed,² the radical change of a system of personal laws being followed by a system of absolute territoriality. The changes which we remark at the time of the so-called books of law (*Rechtsbücher*, especially the *Sachsenspiegel*) are merely as follows. After the break-up of the kingdom of the Franks, the different peoples no longer came into contact with each other so often or in such large bodies.³ Hence it became as a matter of fact impossible to keep the law of the individual steadily in view. The court was unacquainted with the personal law of the foreigners brought before it, and was therefore naturally constrained to apply its own law. This was the rule as to the law of evidence, which was so important in the Middle Ages.⁴ Again, as a general rule, a man could only be sued for debt at the place where he lived, and so the law of the debtor's domicile decided claims of debt. There was therefore no longer any attention paid to a man's descent. There was another and an important change, viz.:—that the tribunal of the place where the property lay was the only tribunal recognised for landed estates,⁵ and that on the whole real rights in land were determined by that law.

musulman est Français; néanmoins il continuera d'être régi par la loi musulmane Il peut sur sa demande, être admis à jouir des droits de citoyen français; dans ce cas, il est régi par les lois civiles de la France." The same enactment is made by Art ii. for the "*Israélite indigène*" in Algeria.

¹⁶ Cf. Wharton, § 9, 252 and Dig. 2, §§ 208-210.

¹ We follow here Stobbe's precise exposition *ut sup. cit.* pp. 43 *et seq.* Compare too Savigny. *Geschichte* as cited, pp. 180 *et seq.* Eichhorn, *Deutsche Staats- und Rechtsgeschichte*, i. 5th ed. § 46.

² Laurent, i. No. 178, seems to assume a radical change, with which he associates many thoughtful ideas.

³ In many districts the pure system of so-called personal laws maintained itself longer, because the clansmen of different stocks were settled promiscuously in the same territories. This was the case in Istria, Trient, and afterwards too in the German *Königsgericht*.

⁴ Cf. Landaws of Görlitz, 39, § 5. *Sachsensp.* iii. 79, § 2. From this latter passage we see that a village community could certainly not apply its particular law against a foreigner, but must proceed according to the "*Landrecht*."

⁵ Cf. *Sächs. Landr.* iii. 33, § 5. *Die koning sal ok richten um egen nicht na des mannes rechte, wan na des landes dar'tinne leget.*, iii. 79, § 2.

On the other hand, legal transactions, except no doubt such as had to do with the creation or the transference of real rights in immoveable property, began, as a general rule, to be recognised as valid in point of form, if they were concluded in the shape prescribed by the law of the place at which they were concluded. As regards succession in moveables,⁶ the old rule, which left the determination of everything to the personal law of the deceased, continued to be followed. These rules might, of course, be broken in upon by special privileges given by the Emperor to individual States.⁷

We need only further explain at present (apart from the rule that the form of legal transactions depends for its validity on the place of execution, a rule which must be discussed hereafter) the law of the place of domicile and the law of the *situs* of a thing. There is no doubt that from an early period it had been possible, by special adoption into another national or clan-union, to assume the law of that union; in later days, this adoption was discovered to exist in the acquisition of a domicile.⁸ Then, again, as Savigny has already pointed out, feudal vassalage and bondage transformed every nation from a mass of clan communities into a mass of feudal followers and retainers. "As among the former the law of the clan had been the recognised rule, so among the latter it was the law of service. This law of service or feudal law had drawn most of its contents from the law of the clan, but no distinction was made now according to a man's descent." Where bondage arose, the proverb, "the air makes property," was often recognised: that is to say, that a man became the bondsman of the owner of the land on which he had lived for a year and a day.⁹ This peculiar maxim is not much more than the complement of the other maxim, that residence for a year and a day in a town as a citizen gave freedom to those who had not been free. In both cases it was a question of adoption into a fellowship; in the first the fellowship was not free, in the second it was. As a consequence of the autonomy, which was claimed by the free communities and the over-lords in relation to their bondsmen, it seemed that it must be recognised that these autonomous communities and persons¹⁰ were entitled to prescribe the fashion in which the landed

⁶ Cf. Pauli, *Abhandlungen aus d. Lübischen Rechte*. iii. p. 36. The law of succession in immoveables was determined by the *Lex rei sitae*. *Sächs. Landr.* i. 30. Goslar'sche Statuten (ed. Göschen), p. 30.

⁷ Thus the citizens of Lübeck had received from the Emperor Frederick the First, in 1188, the privilege of being tried everywhere by their own law, and it was not uncommon that the law of a town should, by force of some privilege, extend to possessions acquired by her citizens beyond her own boundaries.

⁸ Cf. Eichhorn, *Rechtsgeschichte ut sup. cit.* note 1.

⁹ Cf. on the "*faire seigneur*" in France, Durand, pp. 105 *et seq.*, and in the proverb cited in the text in later times, pp. 141 *et seq.* (Beaumanoir, *Cout. de Beauvoisis*, c. 45). The maxim was recognised in France, but not in the case of one noble residing in the domain of another.

¹⁰ In truth, the landlord constituted a community with his feudal vassals on the one side, and with his bondsmen on the other (see Gierke, *Das Deutsche Genossenschaftsrecht* (1869), § 15 and § 20). V. Wys, in his paper upon the conflict of laws according to Swiss legal views (*Zeitschrift für Schweizer Recht*, vol. ii. pp. 34 and 45), has already directed attention to this origin of the territoriality of laws, but at the same time has pointed out that there could be no

property which lay at their disposal should be inherited, acquired and occupied.¹¹

THE PREPONDERANCE OF LAND OWNERSHIP. THE *lex rei sitæ*.

§ 16. At the same time, all that has been asserted by the writers on the French customary laws, as to the territoriality of the different Coutumes in France, remains true.¹² Additional rights and duties were constantly being attached to the different kinds of property in land. Thus the person, putting towns out of consideration, seemed more and more the mere representative of a particular estate, and this view was all the more easily taken up, as the value of moveables was comparatively trifling. The customs and other rules of law seemed to be enacted not so much for men as for the land.¹³ If it was prescribed how a tutory was to be conducted, or how the line of succession was to shape itself, the first matter of concern seemed always to be that the necessary feudal services or returns due from an estate should continue to be rendered after the death of the owner for the time. There was, at least apart from the towns, sufficient stability in husbandry to provide for the persons concerned, if only the estate from which they lived was kept in its proper legal position. At the same time, the whole system of the preponderance of landed property over the person had the way prepared for it by the custom of the Frankish kings, who required a special oath of allegiance from landed proprietors. Then, again, the subordinate landlords, and even the towns, required a special form of submission from all who desired to acquire landed property of any kind in their territory. The idea easily grew up, that one who acquired land in any district belonged to it with his person, and all his personal rights and obligations.

We said already that Germanic law, from its earliest day, by no means entirely excluded foreigners from legal capacity.¹⁴ The union of manifold races in the great kingdom of the Franks, in which the Frankish stock had certainly a preponderance, but not a real supremacy, must have especially promoted the recognition of the legal capacity of foreigners; so, too, must the idea of Christianity, which sees in every man a brother.

But still, in the later Middle Ages, we find manifold limitations of this capacity. The explanation is this. The stronger the bonds of the different communities or associations grew, and the more the general legal union of

idea of a completely exclusive territorial law to seize, as a matter of principle, upon all the persons and things found in its territory. Wys cites precise documentary evidence for this, as well as for the fact that frequently the acquisition in full and free property of a piece of ground, by the citizen of a town, resulted in bringing that ground under the law of the town.

¹¹ This autonomy, no doubt, is closely connected with the fact that in the Middle Ages there is no strict division of public from private law.

¹² Cf. Laurent, i. § 193.

¹³ Cf. Wys, *ut sup. cit.* pp. 49-51.

¹⁴ Among the Gauls the position was no doubt much more like an outlawry. Cf. Durand, p. 32.

the great kingdoms dwindled, so much the more did the legal status seem to be dependent on the employments, the wishes, and the strength of the different subordinate associations. So much the more was it held to be fair, if not to shut out foreigners altogether, at least to throw difficulties in the way of their sharing in the legal rights of the community or association, or even enjoying any legal rights at all. In the midst of their many malicious wars and feuds, men cherished in the small circuit of the town walls, and sometimes too over whole districts, that spirit of exclusiveness and distrust, which rejoices in setting foreigners at a disadvantage, but never thinks that if these disadvantages and disabilities were mutually applied by all communities, the result must be that all should suffer. Exclusiveness of this kind sends its roots back into the old days when freedom was unknown: complete and free¹⁵ *connubium* and *commercium* existed only among those who shared manorial rights under one overlord,¹⁶ a state of things which left traces here and there for a long period.

Thus, in very many places, it was impossible for foreigners¹⁷ to acquire land or real rights in land or securities, etc. In some places attempts were made to exclude them from trade by forbidding cellars or storerooms to be let to them. Moreover, very considerable duties were raised from moveable property which, in consequence of succession¹⁸ or emigration,¹⁹ was being taken out of the territory. Foreign creditors were, according to many systems, postponed to native creditors in bankruptcy, and foreigners generally were exposed to many disadvantages in matters of legal process: *e.g.* they were subject to the so-called "foreigner's arrestment," and as pursuers had to find caution for the expenses of process. A special mark of a falling back into barbarism was shown in the withdrawal from foreigners resident in the country of the right of succession.²⁰ In this way the landlord or prince, as the case might be, held himself entitled to pocket the whole inheritance, or at least only bound to hand it over under a heavy deduction.²¹

¹⁵ The landlord had to approve of any marriage with a member of another community before it could take place.

¹⁶ Cf. Gierke, *Genossenschaft*, i. § 15, note 4, and the citations.

¹⁷ On these disabilities of foreigners, see specially Stobbe. *D. privatr.* i. § 42.

¹⁸ *Jus detractus*. Deduction.

¹⁹ *Gabella emigrationis*.

²⁰ In truth, the rights of the family, the *Status legitimus*. Against this selfish and barbaric view, see the *Informatio e speculo Saxonico* (Homeyer, in the Transactions of the Academy of Berlin, 1856, p. 640); cf. Stobbe, *ut sup. cit.* note 24.

²¹ Law of strangers (*Jus albinagii*, *Droit d'aubaine*). See Stobbe, *ut sup. cit.*; and on the special development of it in France, see Durand, pp. 123 *et seq.* The latter represents it in a less capricious and odious light. As Durand shows, the "aubain" was in France a Frenchman; in a year and a day he had become bondsman or vassal of the "Seigneur." He could, it is true, be succeeded by the heirs of his body, but not by foreign collaterals, for, to use Durand's expression, intercourse with other countries was too scanty, or, to come nearer the truth the community was exclusive. (See note 15, *supra*.) The Emperor Frederick the Second, at this time, in 1220, at Rome ordained, in a law which was to be promulgated *per totum* (cf. Auth,

But the idea is nowhere to be found that strangers should be simply subjected to the law of the territory in all their legal relations.²² Even in the later Middle Ages there was no such thing known as territoriality of law in this sense. Territoriality of the law in this sense is, in the first place, irreconcilable with the security of commerce anywhere, and postulates the idea of a complete and a strained sovereignty. The Middle Ages were a long way from any such notion. It was only by a voluntary subjection, so they thought, that the particular law could be applied to the foreigner; no doubt they took up this idea of voluntary subjection in a very wide sense,²³ and by means of legal fictions they trespassed even its bounds. But all this is evidence against the existence of an idea of an unlimited territorial sovereignty.

OPPOSITION OF THE COMMENTATORS ON THE FRENCH COUTUMES TO
THE LATER COMMENTATORS. RISE OF THE STATUTE THEORY.

§ 17. The opposition of the customary laws of France and their commentators on the one side, to the Italian jurists of the Middle Ages on the other, in determining questions of private international law, is not by any means, as Laurent has asserted, absolute, but only relative. One must remember that the former had in view the rules and principles of German law, the latter rather those of the Roman law. It is plain that very different conclusions must be drawn by them.²⁴ Thus German law in the Middle Ages has not yet reached the idea, in the law of inheritance, of a universal succession completely covering the whole mass of a man's property, and in the French Coutumes we have often to deal, not with absolute property, but with the restricted rights of the feudal vassals or bondsmen. The result is a treatment of the case of an inheritance in a way quite distinct from that which is required by the principles of Roman law. Thus it is by no means these later commentators, as the modern Italian school, and

Omnes peregrini in Cod. 6, 59 and Pertz, *Monum. Germaniæ Legum* ii. pp. 243 et seq. (c. 8), that foreigners should be fully at liberty to test, and that, if they died intestate, their succession should be handed over to their heirs, and in particular that the *Hospes* should keep none of it. This would prove that intercourse with foreigners was not quite so unimportant, even if the fact were not otherwise certified, and that therefore the *jus albinagii* had not been, as Durand thinks, almost justified by its legal results. It was still a kind of robbery, as the rapacity of those in whose territory the foreigner resided, the "*Hospites*," shows. Soon after Frederick's ordinance, it was held permissible in Germany to make deductions (*Abschoss, Gabella hereditatis*) cf. Stobbe, *ut sup. cit.*

²² Laurent, i. § 201, says, "*Toute coutume était réputée réelle, en ce sens qu'elle régissait exclusivement les hommes et les choses qui se trouvaient sur le territoire des seigneurs.*" This is an exaggeration. See the true view in Rivier (Asser.), p. 8, note 1.

²³ The law of bondage mentioned above, § 15, or a portion of it, may no doubt also be traced back to a voluntary subjection.

²⁴ Cf. on the individual Postglossatores, in particular Laurent, i. §§ 199-225 et seq., and Lainé, J. xiv. pp. 21 et seq.

with them, *e.g.* Laurent, believe,²⁵ who have the credit of bringing the personality of the individual up to the point where the theory of the conflict of statutes begins. There is a simple explanation of the fact that they regarded the statutes, which propose to lay down rules for persons, and which seem therefore to adhere to persons even when they are in foreign countries, as of supreme consequence. In the law of Rome, which was recognised in Italy, the individual was not so much regarded merely as the representative of his land, as he was in France; this difference made itself especially apparent in the rich commercial towns of Italy, which entered into the destinies of Italy in quite a different fashion from the French towns into those of France; and then the well-known jurists were citizens, and highly favoured citizens, of these ruling towns.²⁶

The leading idea, from which these later commentators start, is simply that of the express or implied subjection of the person or the thing, or, at least, of the transaction to some statute differing from the common, *i.e.* the Roman law. They had no conception as yet of an absolutely sovereign authority in the State, which could treat strangers as it pleased. They hold the theory of the universal supremacy of the Pope in spiritual affairs, and of the Emperor in worldly affairs,²⁷ a theory which, as regards the Emperor, did not by any means square with the fact. But yet they did not in truth ascribe to any territorial lord an entirely unlimited sovereignty, but merely an autonomy, which by fictions is set on a level with the more extensive power. This is the whole origin, combined with the tripartite division of legal relations according to persons, things, and transactions, which recommended itself to a superficial and scholastic logic, of the so-called statute theory—a theory which, for so long a time, dominated the doctrines of the conflict of laws and statutes, and to which in our own time the most modern Italian school has sought again to attach itself.

MEANING OF THE STATUTE THEORY.

§ 18. If, so runs the theory, a statute concerns a person, the operation of that statute cannot be extended to strangers or *forenses*, as the expression was. Still more the *subditus*, even in a foreign country, remained continually subject to the laws of his home, in so far as their meaning did not show that they were intended merely to have a local application, as, for example, corn laws, laws as to exports and imports, and other police regulations. On the other hand, if the statute refers to a thing, the law of the place where it is situated must be applied; it was understood, however,

²⁵ Cf. Laurent, i. pp. 200 *et seq.* Laurent can give no meaning to the opposition of the principles of German and of Roman law (cf. *e.g.* p. 296). He labours at certain mystic peculiarities of "Fendalism" (Féodalité).

²⁶ Cf. Lainé, J. xiii., pp. 149 *et seq.*

²⁷ Cf. *e.g.* Barthol. de Saliceto, in L. 1, C. de S. Trin. No. 3, Bald. Ubald. in L. 1, C. cit. No. 20. Lanfranc de Orianò, *De interpretatione statut.* in the Tract. ill. J. Ct. ii. fol. 391, p. 2. Jason Mayn, in C. 1, C. de S. T. Bartolus, in Dig. L. Nov. 24, *de captivis*.

generally that this rule applied only to immoveables, since questions as to moveables must be determined by the law of the place where the person—the owner or the possessor—had his home.²⁸ At last it came to be recognised that strangers too might by their own acts, either by concluding a contract or committing a delict, subject themselves to the laws of a particular territory.

The greatest difficulty lay in subjecting foreigners to the laws that have to do with contracts and delicts. But as the sovereignty of States became more fully developed, and trade became more complicated, the former became to a certain extent inevitable, the latter absolutely so. For this purpose the fiction of a voluntary subjection was used, notwithstanding that such a fiction is, at the best, applicable in the former class of cases only.²⁹

On this theory of the later Middle Ages all the authorities may be said to be at one: this principle is adopted as one that cannot be gainsaid—viz. that the lawgiver can lay down rules only for his own subjects, and only in relation to the land that belongs to his own territory; but in these cases he has an exclusive right of legislation. It is, however, matter of dispute which laws are laws of the person, and which again are laws that concern things, and consequently in what cases the law of the domicile or the law of the place where the thing is situated is to be applied. Then there were developed the rules, which we shall afterwards have to discuss more narrowly, that moveables follow the law to which the person of their owner is subject, and that the form of any legal transaction must be determined by the laws that are recognised in the place where that transaction takes place. (*"Mobilia personam sequuntur,"* or *"Mobilia ossibus inhaerent,"* and *Locus regit actum.*)³⁰

The last rule in particular, as it may often bear some reference to the substance of the legal transactions, gives rise to the introduction of a third class of statutes, *Statuta mixta*,³¹ although this name, and these technical descriptions of statutes as *"personalia"* and *"realia,"* are first made use of in later times in the sixteenth century, after the days of Molinæus, Argentræus, and others.

It was the verbal construction of the statute that, in the Middle Ages as a rule, and in later times very frequently, supplied the means of determin-

²⁸ On this point, and generally on the extension of this doctrine, there is very great obscurity. Cf. *infra*, The law of things.

²⁹ In the Middle Ages Jews were treated as foreigners. In disputes among Jews, the Jewish tribunals decided according to Jewish law. There were many remarkable particular rules of law with reference to legal relations between Jews and Christians. By the theory of the later Middle Ages Jews were outlaws, in so far as a special protection was not accorded to them, and practice often translated this theory into fact in a sufficiently capricious and horrible way. Cf. Stobbe, *Die Juden in Deutschland während des Mittelalter*, 1866, particularly p. 103 *et seq.* Heusler *Instit. des. d. R. i.* § 35. Brunner, i. § 35.

³⁰ Cf. e.g. B. Barthol. de Saliceto ad C. i. 1; *De. S. Trin.*, No. 14.

³¹ On *statuta mixta*, see especially in later days Argentræus, *Comm. ad Britt. leges*, art. 218.

ing in cases where an offhand decision could not be pronounced, whether this or that law applied to persons or to things, and whether, therefore, it was to be held to apply outside the territory, but only to native-born subjects, or to be confined to its own country, but applied there to natives and to foreigners alike.

It is well known that Bartolus decided the controversy as to whether a statute, which provided that the eldest son should succeed to his father's whole estate, had the former or the latter scope, by inquiring whether the law said "*primogenitus succedat*" or "*immobilia veniant ad primogenitum*;" in the former case, the statute under consideration was to be held to be one that dealt with persons, in the latter, one that dealt with things (Bartolus *ad loc cit.* 1. *Cod. De Summa Trinitate*).

And just as little can it be safely assumed that a particular statute will not apply to foreigners on the authority of that often-cited maxim, that no statute can create or destroy legal capacity in a foreigner,³² a maxim which is generally introduced with reference to the capacity of minors in a foreign country. For nothing, for instance, is more certain than that a statute which excludes foreigners from the acquisition of land, is intended to be applied to foreigners; and yet such a statute might easily be considered as imposing upon foreigners an incapacity to exercise certain modes of acquisition. Many points, no doubt, were determined by a *consensus* of authorities, as, for instance, the legal capacity of minors, and subsequently the question according to what laws the form a testament was to be ruled.

The canon law was from its nature not in a position to lay down any propositions upon private international law: it is the unity of the Church and the subordination of all to one supreme power, that constitute its chief features. Isolated provisions,³³ that seem to tend in this direction, are merely ordinances of the supreme ecclesiastical authority with reference to the warrants and the competency of subordinate officials. Of course, discussions have often taken place upon these passages, just as upon the passage of the Roman law we have so often mentioned. The passage³⁴ of which most use is made expressly leaves the laws of the different territories out of sight, and decides the validity of a marriage by canon law alone.³⁵

C. MODERN TIMES, UP TO THE BEGINNING OF THE NINETEENTH CENTURY.

§ 19. In practical results the views of the sixteenth, seventeenth, and eighteenth centuries differ little from that of the Middle Ages.¹ The theory of *statuta personalia realia* and *mixta* (the last of which were not recognised by all writers) was, as we have shown, involved in the views

³² Cf. e.g. Bald. Ubald. in *loc. cit. de Summâ Trinitate*, No. 57.

³³ Cf. e.g. Clem. 2, *de sent.* 2, 11, C. 2, *de constit.*, in vi. 1, 2.

³⁴ C. 1, x. *de spons.* 4, 1.

³⁵ Cf. Savigny, § 382, Guthrie, p. 327; Schäffner, p. 18.

¹ Extracts from the theories of the different authors of this time are to be found in Wächter's treatise, and in Laurent also. But neither Wächter's nor Laurent's conception and criticism

of the later commentators and of the Italian jurists of the Middle Ages. It now for the first time acquired a distinct technical name.

It is at the same time certainly true, as Laurent especially has pointed out,² that in the course of time the so-called personal statutes gained ground more and more in theory upon the real statutes. This must not, however, be supposed to furnish any historical argument in support of the view maintained by Laurent, as well as by the modern Italian school, which regards all rules of law as being in principle personal statutes, and finds that in their territorial and international operation they have no other limit than the so-called laws of public order (*ordre public*). The development we have noticed is better accounted for by the presence of Roman legal maxims and Roman legal ideas, which was constantly deepening and gaining ground; in particular it is explained by the Roman idea that the law of succession, and the law of the property of married persons, were not so much laws dealing with the acquisition and property of isolated things, as laws taking up the entire property of a person.

But the gradually rising idea of a complete territorial sovereignty³ rendered a deeper foundation for the whole subject indispensable. The division of laws into those which concern persons, things, and transactions, had arisen in close connection with the autonomy of the communities and the free operation of the will of the individual. How was it possible, starting from the exclusive supremacy of the State authority, to bring it to pass that foreign laws should be allowed to have their course and to be recognised within the dominion of that State?

Two ways were proposed. Sometimes an attempt was made to regard the new theory as a necessary deduction from the limitation to a particular territory now imposed on the jurisdiction of each State, and from maxims of the Roman law (cited, however, in ignorance of their true meaning), which confined the jurisdiction of a judge to a particular district. Sometimes, again, and with greater accuracy, the application of foreign laws was regarded as a concession by the native lawgiver, starting from the assumption that all persons, although they were in the country for a merely temporary stay, were, so long as they remained there, completely subject to the legislative and executive authority of that country.

Both views—of which the first is represented by such men as Argentré and Hert,⁴ the second by Huber and John Voet—are introduced under the

are historically correct or fair; both fail to remember that these authors, when they declare themselves to be for the reality or the personality of a statute, have frequently in view principles of law that are perfectly distinct in fact, although in name they may be identical, or very like each other.

² Cf. i. §§ 245 *et seq.*

³ It is quite an inadequate account of the matter to attribute, as *e.g.* Laurent does, to feudalism the theory that the superior or landlord was unlimited lord in his own territory. In theory he could not alter laws, although in case of necessity the emperor or king could. The superior or landlord, as matter of fact, could only exclude the application of the common law by means of a treaty or by long continued usage, to which the same effect was ascribed.

⁴ Hertius, it is true, as far as the terms are concerned, throws aside the division into

most various modifications, and are frequently treated together by the same writers, according as the conception of the *statutum personale* and *reale* is determined⁵ either by its subject—*i.e.* on the consideration whether the statute has reference to a person or a thing—or by its operation—*i.e.* on the consideration whether it is to be applied beyond the territory for which it was made, or only within that limit. Sometimes both definitions are taken together. The definition of *statuta mixta* seems to be the least firmly fixed of all. Some understand by the term the statutes that have to do with legal acts; some the statutes that deal with both persons and things; while others again interpret them to mean statutes that have reference to the forms of legal acts (Aregentr. No. 16, 22. Cf. J. Voet, §§ 2-4).

Particular cases, too, are narrowly discussed. The works of Rodenburg, John Voet, and the more recent writings of Boullenois and Bouhier, supply a rich and subtle body of casuistry; and it may be remarked that on many isolated points these authors, in so far as they have the same particular system of law most closely under their observation, draw harmonious conclusions—as, for instance, with regard to the law of succession, the jurists of the north of France, who take as the foundation of their discussions the old French law of “*Coutumes*,” which is at bottom pure German law; and, again, the authors belonging to the Netherlands, who spend their labours more assiduously upon the law of the property of married persons. We shall hereafter take the opportunity of using this *consensus* of jurists, which has frequently been recognised, to support our own point of view, and occasionally employ it as a proof of the existence of a consuetudinary law.

It is instructive to observe that neither of these theories—neither that which derived the limitation of the application of statutes to native subjects and to immoveables situated in the country from the exclusive character of the government of each State, nor that which extended the authority of statutes *de jure* to all persons and things found within the territory, and could only explain the undeniable exceptions to this rule by considerations of *comitas* or neighbourly intercourse—could serve as a foundation for comprehensive principles to regulate the conflict of laws. The former is in open contradiction to that which confines the operation of laws to a particular local limit. Another method of reconciling the theory of personal statutes with the territorial theory, in this sense, that now the former and now the latter is to be entirely left out of consideration, can hardly be thought of; for the territorial principle plainly denies that any person can be accompanied into a foreign country by the law of his native place. This territorial principle—or, as the custom was, with regard to Roman law, to express it, the principle “*extra territorium jus dicenti impune*

Statuta personalia, realia, and mixta; his views, however, really contain precisely the same theory. Cf. Wächter, i. p. 281.

⁵ See upon these definitions, P. Voet, *De Statutis*, cap. 2, No. 3.

non paretur”—is only employed as a shorthand solution of difficulties suggested by the theory of personal statutes, or in order to supply a principle which it was considered necessary to postulate, but which could not be established in any other way.

The second theory, which sets up as the source of the application of foreign laws a voluntary concession by the supreme authority of the State, will disappear into capricious determinations if it is to take this concession purely as a favour and an act of friendship shown to the foreign country. It may easily be seen, in the writings of the different adherents of this school, to what a length may be carried the axiom that foreign laws are not to be allowed to prejudice our own, or to operate disadvantageously to our citizens and our State. That axiom is one by means of which an impassable limit can be assigned to “*comitas*,” and the only question that remains is, whether this limit, if narrowly observed, does not destroy altogether the sphere for the application of foreign laws, or, if it cannot practically be destroyed, shows it to be purely capricious.

With these two leading principles others are connected, now in one way, now in another; for example, statutes are divided into *favorabilia* and *odiosa*, the latter being confined in their operation to their own territory, the former being allowed the like effect beyond it.⁶ But every regulation of private law can be ranked under one of these categories as well as under the other.

A statute by which women are excluded from succession to land by male relations is obviously *odiosum* for the women, but *favorabile* for the men; and if a statute gives the rights of full age on attainment of the age of twenty-one, it is *favorabile* in comparison with the common law, in so far as people of full age can do many acts which minors have not the capacity to do, but it is *odiosum* in so far as it withdraws the rights of minority on the close of the twenty-first year.⁷ What is favourable to him upon whom any right is conferred, seems to be unfavourable to him who is bound to respect or to satisfy the legal right so created.

Others writers reject the division into *statuta personalia, realia, and mixta*, but follow the principles of the division, as Heinrich v. Coechei, Hert, and Hofacker. Their starting-point is, that persons are subject to the laws of their native country, things to the laws of the place where they are situated, and acts to the laws of the place where they are entered upon. The distinction is only a nominal one.

If one puts out of sight these subordinate differences, the object for which the writers of this period strive is this: to discover the principle of distinction between various kinds of statutes. It is obvious to them that there is a threefold manner of subjection to the law of any territory: first, in so far as the individual has his domicile there; secondly, in so far as he possesses property there; and thirdly, in so far as he enters upon trans-

⁶ Barthol. de Saliceto, and after his time others, e.g. *Dassel ad consult. Luneburgenses*, c. 9.

⁷ Cf. Schäffner, § 16.

actions there. Thereupon it seems to them, at the first glance, that there is nothing more natural than to make the individual subject to the laws of his home, property to the laws of the place where it is situated, and transactions to the laws of the place in which they are entered upon. The difficulty, however, lies here, that a law which deals with the legal capacity of the individual and his status prescribes at the same time the conditions under which he may acquire and convey property, and enter upon legal transactions. To solve their doubts, some, such as Burgundus and D'Aguesseau, wished to take as the rule for distinction the words of the statute, in the same way as Bartolus, who has been so much blamed for it, had already done.⁸

Others have recourse to considerations of practical utility or to authorities; and others, a very small minority, make it their object to ascertain the true scope of the statute. Duplessis takes this course (Consult. 26, t. ii. *Oeuvres*, pp. 151, 152), although, upon the whole, he is inclined to follow the more superficial definition of D'Argentré: "*Une attention exacte sur la nature, l'objet et le motif de chaque statut en particulier est souvent le moyen le plus propre pour déterminer si c'est la réalité ou la personnalité qui y domine; s'il suit la personne ou s'il est renfermé dans les bornes du territoire.*" And again (Consult. 47, t. ii. p. 299): "*Ce qui caractérise un statut personnel, c'est quand il concerne directement l'intérêt de la personne, et non pas la conservation de la chose, si ce n'est d'une manière subordonnée et relative à la personne, il faut, que le motif, qui l'a introduit soit fondé principalement sur la condition des personnes pour lesquelles il est fait.*"

It is to be noted that a decisive importance is attributed to the motive of the statute, and whether it has been enacted with a view to persons or to property; and, in isolated instances, a distinction of the same kind is to be found taken by other authors, although it is not at all in keeping with the principles which they postulate. D'Argentré, for instance, thus treats the question, whether the prohibition of donations between married persons is a real or a personal law, pronouncing it to be the latter so long as he is engaged with the prohibition of the Roman law, and the former in connec-

⁸ Burgundus, 1, i. n. 6. *Necesse erit statutum, quo minores immobilia alienare vetantur, non personæ, sed rebus ipsis injungi—conditio minoris non est in dispositione, sed tantum in enunciatione.*

D'Aguesseau, *Oeuvres*, T. V. S., p. 281. *Le véritable principe en cette matière est, qu'il faut distinguer, si le statut a directement les biens pour objet—ou si au contraire, toute l'attention de la loi s'est portée vers la personne, pour décider en général de son habilité ou de sa capacité générale et absolue.* This view is quite distinct; but to demonstrate its falsity more clearly, take the version of the author of the French Repertory of Jurisprudence. *Voce Autorisation Maritale*, § 10, No. 2: "*Pour juger, si un statut est réel ou personnel, il ne faut pas en considérer les effets éloignés, les conséquences ultérieures: autrement comme il n'y a pas de statut personnel, qui ne produise un effet quelconque par rapport aux biens, ni de statut réel qui n'agisse par contre-coup sur les personnes, il faudrait dire, qu'il n'y ait point de statut, qui ne soit pas tout à la fois et personnel et réel; ce qui serait absurde et tendrait à établir une guerre ouverte entre les coutumes: que faut il donc faire? Il faut s'attacher à l'objet principal, direct et immédiat de la loi et oublier ses effets.*" So the thing to be considered is, not the general scope of the statute, but the subject with which its letter deals.

tion with the corresponding title of the "*Contumes.*" He says: "*Finis prohibendarum donationum conjugalium habet personales quasdam considerationes, quod leges 1 and 2 D. de donat. inter virum et uxorem indicant, et quia diversi generis donationibus non eadem leges positæ sunt, sed Consuetudinariae causæ de prohibendis his sumuntur potius a rebus, gentili pecunia et propagatione familiarum, quæ res reales sunt, non ut illæ juris Romani a personis sumtæ—cum dispositio prohibitiva res potius respicit et hæredum æternam in immobilibus successionem.*"

This distinction between the prohibition of these donations in Roman law, which had for its object the purity of the married life, and the prohibition in German law of the alienation of the family property by a husband in favour of his wife, touches the true point; and it is illustrated by the fact that all the writers who take German law as the starting-point from which to discuss the conflict of laws, treat this prohibition as a real statute, while those who are more familiar with Roman law regard it as personal.

If the rules laid down by the adherents of the theory of *statuta personalia*, *realia*, and *mixta* are examined in detail, they are found to correspond in a very few points, and this correspondence is, upon closer examination, often found to be merely apparent. There is no real substantial ground of classification to take up. It is quite true that a conflict of laws occurs, because persons by virtue of their domicile belong to a particular jurisdiction; that things, again, belong to a jurisdiction determined by their local situation; and transactions stand in what looks like a natural and close relation to the law that is recognised in the place where they are entered upon. But granting so much, all that has been disclosed is the state of facts in which the rules of international law find their origin; the principle of law that is to give rise to these rules has not been reached. The real and substantial principle can only be found by looking back upon the nature of the connection between a person, a thing, and transaction, on the one side, and a State and its laws, on the other.

It was thought sufficient, in the various cases that occurred, to postulate the application of the laws of the domicile of the person, or of the local situation of the thing, or of the place where the act was done. And in this way not only did the adherents of this theory contradict one another, but as their rules—although common-sense often led them to sound conclusions—were at bottom quite arbitrary, each author often fell into plain contradictions of his own determinations, as Wächter has clearly pointed out.⁹

Lastly, let it be remarked that, although the later Middle Ages often placed capricious limitations upon the legal capacities of foreigners, yet as time went on, and especially in the eighteenth century, the tendency to let these limitations more and more fall away is making itself felt.

⁹ Wächter, i. § 270; Savigny, System viii. § 361, Guthrie, p. 142.

INDIVIDUAL WRITERS OF THIS PERIOD.

§ 20. It will be useful to subject the different authors of this period to a short review. We shall at present not go further into details than is necessary to exhibit the true meaning of the general principles adopted by each author; the details will be considered subsequently, when we come to discuss particular chapters of law. The technical expressions used by authors in this subject have so many different meanings, that the points of agreement and of difference of the various authors will be made plainer to the reader by this separate treatment of them, than if the adherents of each doctrine were grouped together as that doctrine is taken up.

OLDER FRENCH JURISTS (DUMOULIN, D'ARGENTRÉ).

Dumoulin (Molinaeus),¹ (1500-1566), has exercised² a considerable influence upon later French jurisprudence, although the subject of the conflict of laws is only taken up by him by the way, and is not dealt with in a large connected treatise. He is, however, pre-eminently a Romanist, and is therefore under the influence of the Italian school. This explains his inclination to find personal statutes even in the provisions of the French Coutumes.³ But one must admit that he knows how to meet the traditions, which on this point are very often against him, and it is a point of novelty which we find in him, that he shows that the Roman law is certainly not the common law of France, in the face of which one would have to regard the Coutumes as merely restrictive statutes, with no effect beyond their own territory. He shows, on the contrary, that, in so far as the conflict of laws is concerned, the Coutumes in comparison with the Roman law are of an equal value, and are of just as much effect in questions beyond their own territory.⁴ Another novelty with him is the energetic emphasis he lays on the intention of parties, the operation of which is not to be limited to any particular territory. This observation is in itself correct, but at the same time it leads him to see implied contracts, where the only question is a question of the direct operation of a statute, an operation which may no doubt be excluded or modified by an express arrangement of the parties. Thus Dumoulin certainly presents many points of contrast with the most modern French school. On this account Laurent holds him specially

¹ For sketches of the lives and writings of the principal authors who have occupied themselves with private international law, see Asser Rivier, pp. 267-283.

² See Molinaeus in L. 1, C. de S. Trin and Consilia, No. 53, 31, n. 5. Laurent, i. § 245, criticises him thoroughly, but reproaches me undeservedly with having entirely overlooked Dumoulin in my first edition. I merely gave Dumoulin no place among the writers who are specially criticised.

³ Coquille in a later day, d. 1603, went even further in this direction in a logical fashion. See on him Laurent, i. § 285.

⁴ See Molinaeus; de dignitatibus, magistratibus et civibus Romanis, n. 141-143. *Commentarii in consuet. Parisienses*, i. n. 107, 108.

worthy of notice; but Laurent himself does not fail to notice the caprice of many of his arguments, and in particular the meaningless use of the distinction between the *Statutum favorabile* and the *Statutum odiosum*, a distinction which, however, was not invented by him.

U. C. B. D'Argentré (1519-1590)⁵ stands in strong contrast with Molinæus. He treats of the conflict of laws in his Commentary upon the Customs of Brittany, in connection with the 218th article of these customs, which runs as follows:—

“Toute personne pourvue de sens peut donner le tiers de son héritage a autres qu'à ses hoirs, au cas qu'elle ne ferait pas fraude contre ses hoirs.”

Our author inquires, in his commentary on this article, whether the same rule is to be applied to real property in another country belonging to a Breton.

The rules of the *“ Coutumes de Bretagne ”* are the rules which Argentré has exclusively in view in the course of his discussion of the conflict of laws, and these consist for the most part of rules of the older German law or of feudal law;⁶ it follows, therefore, that Argentré's conclusions can only be very cautiously applied to the rules and institutes of common law. But if one has the skill to discriminate between the institutes of German law, which are especially in his view, and these more general principles, the accuracy of his conclusions on different isolated points will, in spite of the falsity that often affects his premises, be easily appreciated. According to Argentré, every legal relation of immoveables is determined by real statutes, the *lex rei sitæ*; but every rule, the whole of which affects a person, is a personal statute, and can only be applied in accordance with the law of that person's domicile. Where the question is as to the competency or incompetency of a person to perform a particular act, the statute there is a *statutum mixtum*, which is treated by Argentré just as a real statute. This definition, and the conclusion which he founds thereon, are undoubtedly general rules drawn by him from the particular case that is then under his notice—viz. the obligation, drawn from German law and found in Brittany, upon married persons to bestow their property upon each other for the benefit of their next heirs. At the same time, Argentré follows the rule, *“ Mobilia ossibus inharrent ”* (No. 31), and applies to moveables the rules of law that hold good in the domicile of the owner.

We can trace the origin of this theory in the way previously indicated. The legislator of the domicile of any person can, says Argentré, make what provisions he pleases for that person, and, on account of the character so imposed upon him, that power of the legislature follows that person where-

⁵ On him see again Laurent, i. § 275.

⁶ For example, as a rule, debts attach only to the moveable property that belongs to the estate of a deceased person (Arg. gl. 5, ad. Art. 219; Art. 561, gl. 1, c.); the title of heir infers no universal succession (Art. 617-618); and in the Gloss. to Art. 277, No. 4, it is said: *“ Nam præsumptio, immo necessitas veritatis habet, quod omnia feudalia sunt in Britannia. ”* Laurent pays no heed to all this; he criticises nothing but the abstract arguments of Argentré and of Dumoulin, whose positions are often disputed by Argentré.

ever he goes ; on the other hand, however, the legislator can make no rules for immoveables which are not in his territory ; and from this principle Argentré goes on to infer that, if a statute provides that a donation shall only be good to the extent of one-third of the donor's property, real property in a foreign country can never be taken into account in computing this third, because the legislator had neither the intention nor the power of making law for anything but immoveables situated in his own country.

It has already been remarked that the theory of personal and real statutes by no means follows from the principles which Argentré assumes (p. 30) ; it is obvious that it entirely fails to supply a principle for the division into *statuta realia*, *personalia*, and *mixta*, the last of which are simply treated as real statutes. One cannot help, however, admiring the fine practical sense with which, as we shall see in the sequel, Argentré manages to hit the truth in particular cases in spite of his inadequate theory. Otherwise Argentré occupies himself mainly with the law of persons, the law of succession, and the law of married persons' property. Real rights and the law of contracts are scarcely touched by him.

JURISTS OF THE NETHERLANDS (BURGUNDUS, RODENBURG, P. VOET,
HUBER, J. VOET) THE GERMAN HERT.

Burgundus⁷ (1586-1649) is an adherent of the statute theory, which he rests on the same foundation as Argentré. It is not quite clear what general rule Burgundus means to lay down for distinguishing real and personal statutes. He rejects the well-known determination of Bartolus in reference to the conflict of a statute regulating the law of primogeniture with the common law, and prefers to direct his attention to considering whether the provisions of a statute with regard to the *conditio* of a person are laid down *in dispositione* or *in enunciatione*. According to other passages, again, every legal relation that imposes an obligation is a personal statute ; a real statute is one that gives rise to a real action ; and a mixed statute one which gives rise to both a personal and a real action. In so far, then, as real rights in immoveables are concerned—the law as to moveables being determined by the domicile of the owner (i. §§ 40-43, iv. § 26)—the law of the place where the thing is is the ruling law ; but in so far as personal obligations are concerned, although these obligations may be in connection with immoveables, the law of the domicile of the person must be applied (i. § 6 *et seq.*). Thus there follows this strange practical result, that you may have a person who, by the law of his domicile, is a minor, with full power to grant a good conveyance of landed estate that is situated in another country, by whose law he is of full age, while he is not able to undertake a personal obligation to execute such a conveyance.⁸

⁷ On Burgundus and the authors of the Netherlands in general, see again Laurent, i. § 293 *et seq.*

⁸ See, on the other hand, Abraham a Wesel, *ad Nov. Consuet. Ultraj.*, Art. 13, No. 25 ; Merlin, Rép. Vo. Majorité, § 5, *On ne concevra jamais, comment une tradition faite sans titre et sans aucune cause peut être valable.*

To this Burgundus adds the proposition (iv. § 7), that the laws of the place where any legal transaction is carried out are the authority that must regulate the forms of the contract: "*Nam ut personæ, quamdiu in territorio versantur, ejusdem legibus sunt obnoxie, ita et actus personales—citra mentem consuetudinis iniri non possunt.*"

In two cases Burgundus reaches his determination by considering the scope of the statute; in treating of donation and succession between spouses, where he decides in agreement with Argentræus (i. No. 40); and again, subsequently, in some discussions upon the law of obligation (ii. Nos. 23, 24), where he attaches importance to the fact whether the statute was passed *in favorem debitoris* or *creditoris*. It is easy to see that this theory is entirely arbitrary and inconsequent. The distinction, however, between immediate real rights in a thing, and the personal obligations undertaken in respect thereof, is worth attention; although Burgundus makes far too extensive a use of it, as the instance given above of his opinion that the capacity of disposing of a thing depends upon the *lex rei sitæ* shows.

Rodenburg, too (1618-1668), founds the theory of *statuta personalia*, *realia*, and *mixta* upon the proposition that the legislator cannot lay down rules for things that are situated in a foreign country, or for persons who are domiciled there (Tit. i. cap. 3, No. 1), although he is forced to admit that it is possible to lay down such rules indirectly (*l. c.* No. 5).⁹ Personal statutes, according to Rodenburg's view, confer on the person a quality that adheres to him; otherwise, a man might be a minor in one place, and of full age in another.

Rodenburg defines the *statutum mixtum* in the same way as Burgundus; but in the application of this definition he is very far from agreeing with him; interpreting the restrictions upon the alienation of a minor's estate by the *lex domicilii* of the minor, instead of referring them, like Burgundus, to the *lex rei sitæ*. Upon the whole, Rodenburg holds to the words of the statute—"Quid in dispositionem statuti ceciderit"—without caring to consider, "*qua ratione cujusve personæ intuitu*," the law may have been enacted; but yet he has a strong argument upon the intention of the legislator, and on the question whether he had persons or things in view (Tit. ii. p. 2, cap. 4, § 5). In this connection, Rodenburg lays down the proposition, "*Mobilia personam sequuntur*" (Tit. ii. p. 1, cap. 2, § 1; ii. p. 1, cap. 5, § 16), but without fully realising the consequences of this maxim, as will appear on consulting the passage last cited.

Rodenburg's researches, which set out from a discussion of the rights of married persons, and are therefore principally directed to the questions of the capacity, succession, and property of married persons, and have but little concern with the law of contracts, are yet sorely deficient, like those of Argentré and Burgundus, in a substantial and consecutive ground

⁹ The result of this would be that, in the ultimate resort, the legislator would be able, by the force of his own enactment, to put his laws into operation beyond his own territory.

plan, although in many isolated points they are acute and subtle. For instance, Rodenburg carries out logically the distinction between personal and real grounds of action in the sphere of married persons' property, a distinction already made, no doubt, by Burgundus, but thrust too much into the foreground by him. The great collection of actual cases, in which the decisions of the law courts of France and the Netherlands are given, favourably distinguishes this work.

The work of P. Voet (1619-1677) on the statutes deals with our subject in sections 4, 9, 11.

Taking the division into *statuta personalia*, *realia*, and *mixta* as fundamental, he goes on to deduce from the independence of different territories this result—that a personal statute, strictly construed, will not affect subjects of a State who are temporarily absent in another State; while, at the same time, no legislator can lay down rules for foreigners who happen to be for a time in his dominions, as regards their essential characteristics—*i.e.* their capacity or incapacity. From this it follows that the legal capacity of these foreigners is not to be determined either by our law or by the law of their home.

With Voet, upon the whole, a more accurate conception of the independence of different territories leads to complete confusion, so that his true meaning is in many cases hardly discoverable, and nothing is left to him at last, when juristic considerations are exhausted, but an appeal to the *humanitas* and *comitas* of other Powers. It may be conceded, however, that Voet very often hits the truth, but certainly not because of the grounds on which he relies, for these, on the contrary, may often be turned against him.

With Huber (1636-1694), even more conspicuously than with Voet, the independence of different territories comes to the front. The laws of a State, as Huber lays down at the very outset of his inquiry, have no force except within that State; but they are good there for all persons who are found within it. The strictness of this axiom is only modified by the friendly intercourse that exists among the different States, and by the *comitas* which they observe; in consequence whereof, the application of foreign laws is permitted, in so far as it is not repugnant to the supremacy of the sovereign power in our State and the rights of our subjects.

According to Huber's view, it is consistent with these principles that the laws of the place where any legal transaction is entered upon should determine its validity, just as the qualities of persons, which are stamped upon them in the same way, should be determined by the law of their domicile, while all the legal relations of immoveables should be settled by the laws of the place where the thing is. In obedience to the last rule, Huber applies the *lex rei sitæ*, not only to testate and intestate succession in immoveables, but even to contracts that have to do with immoveables.

It is plain that Hubert's theory cannot be deduced from the principles which he postulates. The first principle has only a negative force, and

the second, as it is understood by Huber, is no doubt well fitted to demonstrate the motives by which the application of foreign laws is, as a general rule, determined, but cannot supply any solution for individual problems.

The clearness and brevity with which Huber speaks give his work a notable advantage. Besides that, in his character of *Essenator supremæ curiæ Frisiæ*, he communicates to his readers cases that have actually been decided.

All that need be said of the theory of Hert (1652-1710) has been said already. The validity of the *lex domicilii*, in relation to the status and capacity of persons, he attempts to establish upon the consideration that the sway of a State over foreigners is confined to the transactions they enter upon in its dominions, or to the immoveables which they possess there. Only, if the transactions of foreigners entered upon in our country are to be subject to the authority of our State, it is difficult to see how their persons are not also to be made subject to it while they remain in our State.

It is worth remarking that Hert (sect. iv. §§ 31, 32) introduces *jus naturale* to settle some cases; but it is not clear what he understands thereby as regards the rights of different territories.

J. Voet (1647-1714) is conspicuous by a trenchant and logical adherence to the idea of an exclusive sovereign and legislative authority in each separate territory. He lays down that in strict law no appeal can be made in a foreign court to the *lex domicilii* as determining the status and capacity of a person. Voet is therefore of opinion that, except in so far as special exceptions have been accorded by the free permission of the authority of the State, the judge, who can only carry out the will of his own State, must apply none but the law of his own country. He treats as such exceptions, sanctioned by long practice, the rules that moveables are regularly judged by the law of the domicile of the persons that own them, and the external forms of a legal transaction by the laws of the place where it is entered upon (§§ 11-15). Voet cannot therefore be charged with illegitimate deductions, but it may be asked whether it is correct to say that all theories are insufficient, and that it is necessary to appeal to such a universal practice. At the same time, the exception, which Voet in the ultimate results of his theory wishes to introduce by the assumption that, where no prohibitory laws stand in the way, the application of foreign law to any contract on which they may be entering depends upon the will of the parties themselves, is, from his own point of view, improper; for, by his own theory, with the exception of the special cases sanctioned by usage, all laws are prohibitory, and if they permit in this or that legal relation any *pacta* that parties may desire, then, in the case of such a bargain, we are no longer concerned with the solution of a conflict of laws, but with the interpretation of the will of the parties. Voet, however, confounds the immediate statutory consequences of a transaction with the case of a tacit agreement, an inexact

manner of thought which enables him to escape from some consequences of his principles ; as, for instance, in the subject of the property of married persons, in which he bases the general validity of the *lex domicilii* of the spouses upon a tacit agreement. Besides the chapter specially devoted to the conflict of laws, Voet, in the other parts of his Commentary on the Pandects, gives many other judgments on different points which certainly are often irreconcilable with the exclusion of foreign laws which he postulates, but are at the same time conspicuous for the clearness and precision peculiar to this writer, and for his fine practical instinct.

FRENCH AND GERMAN AUTHORS OF THE EIGHTEENTH CENTURY
(BOUHIER, BOULLENOIS, ALEF, HOFÆKER).

In the works of Bouhier¹⁰ (1673-1746), the theory of real and personal statutes assumes a peculiar shape.

While he assigns as grounds for the application of foreign laws the goodwill that different nations bear to one another, and the general benefits that result from it, he lays down the following rules:—

1. Every statute which deals with incorporeal and indivisible rights is personal; that is to say, is valid beyond the territory for which it is enacted.

2. The same property is to be ascribed to a statute which rests upon a tacit or an express agreement of parties, and also

3. To a statute which, out of considerations of public policy, lays some restraint upon all persons who are domiciled in the dominions of the State.

4. Lastly, every statute is personal to the effect described, which enacts formalities for a legal instrument (chap. 23, Nos. 14-39). All other statutes Bouhier regards as real, and only valid within the territory for which they are made ; but to this he has to add (chap. 23, Nos. 90, 91)—

(a.) The personal statute, which is permissive, is to be subordinate to the real statute, which forbids.

(b.) The personal statute of the domicile is to be preferred to the personal statute of the place where the thing is situated.

One can at once discover that the leading rules quoted above are only abstractions from particular cases, and are not universally applied even by Bouhier. For instance, by the first rule indivisible servitudes over heritage would belong to the class of personal statutes, although Bouhier himself (chap. 29, No. 29) admits that the reverse is true. In spite of this fundamental error, his work is rich in valuable inquiries into details.

The work of Boullenois¹¹ (1680-1768), which is very comprehensive and

¹⁰ On Bouhier see Laurent, i. § 351 *et seq.*

¹¹ Cf. Laurent, i. §§ 337 *et seq.* On the work of the French advocate Froland, *Memoires sur les statuts* (1729), see Weiss, p. 503. Froland represents in particular the so-called personality of the statutes, for instance the determination of questions as to testaments according to the personal law of the testator, not according to the *lex rei sitæ*.

is entirely devoted to the conflict of laws, furnishes a continuous commentary upon Rodenburg's treatise, and gives in its adherence to the principles there laid down, which Boullenois subordinates to the leading principle of the common good of nations (i. p. 49). It is remarkable that although Boullenois, like Rodenburg, in classifying statutes lays stress upon the words of the enactments, he does not leave their motive out of sight.

His accurate treatment of details, his comprehensive acquaintance with the various forms of French customs and usages, the delicate tests which he applies to the decisions of the French courts, which are copiously cited by him, and, besides all this, the independence with which he criticises the results obtained by Rodenburg, although, upon the whole, he adopts them, give Boullenois's work a permanent value: there is, however, often a discursive reasoning, losing itself in vague conclusions, that disturbs this favourable impression.

Among the many dissertations devoted to our subject, or more or less connected with it, that of Alef (d. 1763, Prof. in Heidelberg) is worth remark. The author assails, first of all, the ordinary statute theory. He points out how divergent the opinions of authors are as to whether this or that statute is to be reckoned in this or that class. The distinction between statutes, in the ordinary sense, must be in the end sought for in the words of the enactment, and these must give way to the will of the legislator; for it cannot be that a statute should, for example, be held to have a different meaning and a different effect, according as it should on the one hand refuse to its subjects the capacity of testing upon their property, or on the other provide that an estate should only be transmitted *ab intestato*. Accurately considered, an enactment can never be said to have regard merely to lifeless things, but must always be directed to the legal relations of persons in connection with these things.

If these attacks upon the ordinary statute theory are clearly laid down, the same cannot be said of Alef's own theory. Proceeding on the axiom that the power of the State, on the one side, must always be paramount within its own territory, and, on the other, must always be confined to it, Alef deduces the application of the law of the country to the status and capacity of foreigners, and to the forms of legal contracts made in the country (Nos. 28-31), and demands that, in the case of contracts, the laws of the domiciles of the contracting parties, and the laws of the land in which the contract is made, should be recognised in reference to the question of capacity. The objection to this doctrine—viz. that by it the laws of the domiciles will have effect given to them outside their own territory, since it is possible that an act valid by the laws of a foreign country may be by them declared invalid—is attempted to be met by Alef with this observation, which is undoubtedly wrong, that the incapacity of a person for any transaction is something purely negative, and that therefore the validity of the law of the domicile need not be invoked to maintain it. It is plain that this theory is not only incomplete, for he has hardly

anything to say of rights of property, but rests entirely on arbitrary assumptions, the results of which stand in open contradiction to well-known necessities of commerce and actual fact.

The other writings of this period that touch upon our subject contain, upon the whole, mere repetitions of doctrines drawn from those already mentioned. Any views worth notice, that may be found here and there, will be discussed hereafter when we come to treat of the various legal doctrines; we need only mention that, according to Hofeeker's treatise (*De Efficacia*), the express will of the legislator, or that will as it may be discovered by construction of his laws, to which the judge who pronounces on any case is subject, is to rule, and, *in subsidium*, he proposes to appeal to the Roman law. But, since Hofeeker (1749-1793) does not give any more exact principles for such an interpretation of laws, and besides, as Wächter has pointed out (ii. p. 20), loses himself when he comes to details, his axiom, which is undoubtedly true, cannot be considered of any very great importance.

D. THE NINETEENTH CENTURY.

THE *Code Civil* AND THE FRENCH JURISPRUDENCE WHICH RESTS ON IT.

§ 21. By the eighteenth century the statute theory was already in course of dissolution.¹ One indication of this is the hesitation and doubt which the different authors have in defining the classes of statutes, some defining them by their effects; some by considering whether in a particular case a statute should be applied as the native law of the person or the law of the thing, or the law of the transaction; some by the arrangement of the rules of law in the system of law under consideration; and some by the intention of the lawgiver. Another indication, however, is the circumstance that the decisions of authors on particular controversies are becoming more and more independent of the categories of this theory of the statutes.

It is, however, conceivable that this theory, by the strength of tradition, even apart from its resuscitation by the most modern Italian school, for a time should still assert for itself a kind of continued existence. It is found in the works belonging to the jurisprudence of England and of the United States, but merely as an embellishment: ² German jurisprudence was the first to get rid of it, and did so more completely than any other; it is in French jurisprudence that it still has most real meaning. The explanation is that, although the French legislator has not expressly adopted the theory of the statutes, the authors of the *Code Civil* certainly started from it in combination with earlier French jurisprudence. If we are to take the view that not merely the words of the law, but the theory by which the legislator has reached

¹ Fusinato, *Introduzione*, p. 40, describes it as "*anceps difficilis, late diffusa*."

² Calvo, however, takes a more serious view of it, ii. §§ 921 *et seq.* (ii. §§ 706 *et seq.* of the 4th edition).

these words, are to have the force of law, then the statute theory is still recognised as law in France.³

Fœlix (1791-1853) is most closely allied to the writers who attach themselves to the theory of the statutes. He starts with this principle: that, in consequence of the sovereign power that belongs to each State, the application of foreign laws may be entirely excluded; and where it is admitted, it rests upon a voluntary and friendly concession by the sovereign power, out of regard to the mutual advantages of such a course—upon the *comitas nationum*, as earlier writers called it. Then, without an attempt to discover any general principle for this *comitas*, and rejecting all universal axioms, especially the older theory of *statuta realia*, *personalia*, and *mixta*, he confines the task of any author on the subject to this: that he shall classify the recognised cases in which foreign law is to be applied, in conformity with recorded decisions and the views of different authors; shall pronounce what the usage is; and shall extend that usage to analogous cases. He takes, however, the division of laws into *statuta personalia*, *realia*, and *mixta*, as a starting-point, not because he considers that division exhaustive, but because it is practically useful, and, taken up as it was by earlier authors, has been of real use in the historical development of the view that is recognised by himself (i. §. 20); abandoning any attempt to define *personalia* and *realia*—for the definition which he gives, viz. that personal statutes are those that follow the individual wherever he goes, while real statutes have no force beyond a particular territory, is a mere formal description to illustrate their operation—he includes among the *statuta personalia* or *realia* those laws which have been assigned to the one class or the other by the majority of earlier authors, although with the widest differences in detail; and among *statuta mixta* he includes not merely the laws which deal with the legal aspects of business dealings generally, but also those which relate to procedure and to crime, because these laws are to be considered as the consequences of men's dealings with each other.

If Fœlix's theory is to be adopted,⁴ he has no doubt carried it out consistently by stringing together the different cases that have been assigned to these three kinds of statutes, without any inner or real link among them, as well as by referring to the numerous passages, collected with extraordinary care, which he cites, and the unanimity of authorities

³ Brocher, i. § 45, proceeds upon this theory, which is certainly not ours, and also is not shared by several French authors. In French practice one often meets it. The foundation, too, of the work of Aubry and Rau on the Civil Law of France (4th edition, §§ 30, 31), is the old theory of the statutes. Unger (§ 22, on note 34) expresses himself very trenchantly against this method. Science will have all the freer hand for the very reason that the adherents of the statute theory are not by any means at one.

⁴ Laurent, i. § 404, gives a sharp criticism of the principles on which Fœlix founds, if indeed they deserve that name, and should not rather be called a mixture of arbitrary and in part self-contradictory rules. But we must not forget that Fœlix was the first Frenchman who, after a long interval, treated of private international law in a great consecutive work, and that a diligent compiler need not be an original genius.

and of judicial determinations therein demonstrated. But if this unanimity, which Fœlix so often assumes, is more closely examined, it often turns out that he has had no regard for the grounds of the opinion or judgment which he cites, but only for the result of that opinion or judgment upon the particular case; and besides that in such cases a more searching examination will frequently reveal contradictions, it is inevitable that the reader should feel convinced that the whole system of private international law consists of isolated and arbitrary postulates, and has no scientific foundation to rest upon at all. By the division of the subject he has adopted, we find, in the first place, that the laws which deal with procedure and with crime, in which the public law of a sovereign State may be conspicuously exhibited, are treated under the inadequate conception of a consequence of men's dealings with each other, a conception which would include most things that are to be found in man's existence; and, in the second place, that it is much more difficult to discover the true meaning of the author. Except in his treatment of the law of procedure, which is the most successful part of the treatise, there is no division of his work that corresponds with the ordinary systems of positive law; and the reader is consequently forced to inquire under which of Fœlix's artificial definitions any case must be reduced, before he can discover where he is to find a discussion of it.⁵

In spite of this defect, the work was at one time in many respects of the greatest value, owing to the numerous citations and decisions, and the positive enactments that are adduced—and there are here set out concisely and plainly the legal principles of almost all civilised States on private and criminal international law—and by his interpretation of positive enactments of French law in their international relations the author has done excellent service. Now, however, the work is out of date, although reference is still often made to it, and it need only be taken into particular account for the extensive and acute notes with which Demangeat, after the author's death, furnished the new editions.^{6 7}

Massé (1807-1881) proceeds similarly to Fœlix. In him we miss any general principle. He asserts that in each case convenience and justice

⁵ For example, a reader will hardly discover for himself that the doctrine of the necessity of a husband's concurrence in his wife's acts, the curatorial consent that is required of him, is treated of in a passage that takes up the question of the forms of contract.

⁶ About the same time as Fœlix's works there appeared in Italy the work of Rocco, *Dell' uso e autorità delle leggi del regno delle due Sicilie cons. nelle relazioni con le persone e col territorio degli stranieri* (3rd ed., Leghorn, 1859), a learned book, which was of service in its time, but one that has no sufficient foundation in principle. (Cf. on it Mohl *Geschichte und literatur der Staatswissenschaften*, i. p. 442, Fiore, § 35, the criticism of Pierantoni, *Geschichte d. italien. Völkerrechtsliteratur* trans. by Roncali, 1872, pp. 80 et seq.) This work is now regarded as out of date.

⁷ Spanish jurisprudence, down to the most recent times, has in substance followed the French, as Torres Campos, p. 278, shows, and in a special manner the authority of Fœlix. In Spain, however, more than in France, a one-sided exaltation of the officials of the State, and an exaggerated respect for native laws, have been avoided, a direction taken by the older jurisprudence of France, but often protested against by the modern school. In Spain, an attempt has been made to stand side by side with the general science of the subject "without giving way to petty susceptibilities." Thus Torres Campos, p. 294.

must determine the application of foreign law. He disputes at the same time the right of the State to exclude the application of foreign law from its territory, without, however, denying the force of express enactments to that effect (No. 48). He takes for a foundation the well-known division of statutes in its ordinary acceptation, and, although he declares himself opposed to the class of *statuta mixta*, and to the rule *mobilia personam sequuntur*, his difficulty is purely verbal, and is not seriously argued out. It is, for instance, a *petitio principii* to say (No. 55), "*Il est manifeste, que la capacité d'un individu celle, qui derive de sa position, ne peut être déterminée que par les lois de la société, dont il fait partie.*" His discussion of the law of obligations is disturbed by the definitions he adopts from Fœlix, which are artificial, and in part, as we shall hereafter see, untenable; as, for instance, the division of the results of a contract into foreseen and unforeseen, and of its form into external and internal, definitions and terms which even at the present day play an important part in French jurisprudence.

On isolated points, however, his work, which is of considerable detail, and is most closely associated with French law, contains many valuable investigations, and especially in the subject of procedure, which is discussed with interest and accuracy. The division that deals with the forms of process, a subject that is for the most part neglected by German authors, might in its day have been called remarkably good.

THE POSITIVISTS OF ENGLAND AND THE UNITED STATES.

§ 22. Authors in England and the United States, and in particular Wheaton, Burge, and Story, take their stand as much as Fœlix, and even more, upon pure positivism.

At the same time, the whole of this English and American school of jurisprudence is characterised by a manifold and conspicuous opposition to the jurisprudence of the European continent, and of those countries that lie under the influence of the French school.

On the one side, the English and American jurisprudence gives a much wider extension to the application of the *lex rei sitæ* in questions of family and succession law, in so far as immoveable property is involved in these questions. On the other hand, it is inclined, in dealing with the effects of a legal transaction, to allow the law of the place, where the transaction was entered into, to rule the question exclusively, and to leave out of account the law of the domicile of the persons concerned, even where their personal capacity may be in dispute. The former of these two points of opposition is connected with that feudal foundation for the law of real property, effects of which are still felt, although it is disappearing from day to day, and the result of which is gross falsity; the latter of the two depends upon a certain exaggerated idea of territorial sovereignty. Alongside of these influences, a certain inclination to decide particular cases on grounds of expediency makes itself felt in countries where the

system of utilitarianism has its home. In this it is forgotten that these grounds of expediency, if they are viewed too much as the only grounds of decision, are treacherous in their very nature, and besides it is overlooked that a much greater evil for the intercourse of nations is often to be found in varying decisions upon the same persons and the same legal relations, than lies in a certain measure of concession in recognising the operation of foreign rules of law even within the territory of domestic law.^{1 2}

Wheaton (1785-1848) dedicates but a small division of his work—about 50 pages—to international law; his plan is almost that of Fœlix, except that he avoids attaching himself to the statute theory.

A discussion so short, and one which evades questions of principle and proceeds upon a vague and flexible notion of *comitas*, has at the best little value.³

Burge, too, declines to enunciate a general principle, and commits the decision of particular questions to the instinct of the lawyer (i. p. 11). No doubt he lays down a number (31) of particular rules (p. 25), but these propositions—mainly borrowed from Boullenois, and, although quite unconnected and founded upon many different theories, still assumed to be capable of immediate application—contain nothing but specialities, and, as may be suspected from this description of them, are often self-contradictory. But yet this most comprehensive work, consisting for the most part of a comparison of the different systems of law that are recognised throughout the British Empire, is remarkable for the astounding knowledge of the most various systems of law and of legislation displayed by the author, for the wealth of legal cases and decisions that are cited and criticised with acuteness and great independence, and for many excellent discussions of different questions.⁴ In these discussions, Burge can use the considerations on which the laws of the different States rest most skilfully in reference to their international relation, although the treatment is not always consistent,⁵ and instead of juridical principles, he has to invoke the assistance of considerations of expediency and general approbation.⁶

Story (d. 1845) avoids any statement of a general principle—a matter on which there is perpetual discord—and, like Burge, proposes merely to illustrate, criticise, and establish more decidedly the law that is recognised (§ 16). He only avails himself of the expressions, *statutum personale, reale*,

¹ See Laurent's criticism (i. § 381 *et seq.*), which is keen, and in many respects excellent, but often too exaggerated.

² There is observable, in the very most recent times, more approximation in England and the United States to the jurisprudence of the European continent.

³ For Beach-Lawrence's commentary on Wheaton, see below.

⁴ See, for example, the discussion on the conflict of laws on the question of marriage.

⁵ See, for example, i. p. 132, and i. p. 210, where different determinations are given upon the personal capacity for legal acts.

⁶ See, too, the declaration of Mittermaier in Mittermaier and Zacharia's *Zeitschrift für Rechtsw. und Gesetzgeb. des Auslandes*, vol. ii. p. 283; v. Mohl. *Staatsw.* i. pp. 445, 446.

and *mixtum*, to describe the effects of particular statutes; and as he develops the principle of the paramount supremacy of every State in its own territory to its logical conclusions, he deduces the application of the laws of other countries from provisions to that effect in the laws of the country that allows them to be applied. Such provisions, which must often be put into practice by reason of the mutual profit of the various States, may be, he says, inferred although not expressed; and it is only when foreign laws are at variance with the interest of the home country that they are universally admitted to be inapplicable.

Story, then, as far as the leading features of his theory are concerned, is an adherent of Huber, but in details is highly independent. As may well be understood, he adheres very closely to the American and English *Common Law* in enunciating his own views, but he does not fail to take into view the grounds that foreign authors, especially the older authors, have assigned in support of this or that theory; at the same time, there is no attempt at an historical development of the subject. He gives in a masterly fashion very many reports of interesting cases decided in England and America, setting forth the facts and circumstances of each most clearly, and criticising with great subtlety the details of the grounds of judgment in each. This is most conspicuous in his treatment of the subject of "foreign contracts"—a subject that includes the greater part of the law of obligations, and seems, as a very important division of the whole, to be treated *con amore*.

Less successful, however, are his discussions on procedure; and when he comes to deal with the important questions of capacity of persons and their status, and also of marriage, the want of one leading principle makes itself very much felt, and in these questions the only resource for the author often comes to be, that he shall betake himself to mere utility, or to the very obvious proposition, that every nation may or may not permit foreign laws to be applied, as it thinks best.

On the other hand, the practical division of the subject deserves recognition;⁷ it is not made according to artificial definitions, but according to legal categories, although this division is not always strictly maintained, and one can often note a tendency to diverge to other departments of law, just as the definitions which he lays down are very often wanting in sharpness.

The student will lay down this book with an enlarged knowledge of decided cases, and of the opinions of different authors, and the judge will often be glad to test the case in hand by the help of Story's numerous illustrations and his wondrous power of comparison, and will find profit in doing so; but it will often be difficult for a reader to say from Story's discussion of a subject that the decision must, on legal principle, be what he pronounces it to be, and none other.

⁷ His treatment of criminal international law is very scanty, only occupying ten pages out of eight hundred, and the difficulties of this subject he seems to avoid.

THE LEADING RULES ESTABLISHED BY GERMAN JURISTS.

§ 23. It is among German authors that we meet again for the first time the attempt to solve the question of private international law on a uniform general principle. On the other hand, the first want we feel is a want of monographs dedicated to the subject of private international law: these are comparatively rare in German juristic literature, which in other departments is so rich. We must, therefore, first look at the treatises on Roman civil law and German private law.

Eichhorn (*D. Privatrecht*, § 27), Thibaut (*Pand.* § 38), and Göschel (*Civilr.* i. p. 111),¹ hold that the law recognised in the native country of the person concerned supplies a general rule for him. This conception seems at first sight to be a very natural one in reference to private law, with which these authors are alone concerned. "Every right seems at first to be a power that belongs to the individual, and so a property of the individual. Proceeding from this as our original point of view, we have to consider legal relations as attributes of the individual" (Savigny, § 345, Guthrie, p. 55). But, as has been pointedly remarked by Wächter (ii. p. 10), although the subject of one country may consider himself, when he is abroad, as bound by the laws of his domicile, it does not by any means follow that he must be judged according to these laws when he is brought before the foreign judge. The principle is seen to be quite inadequate, if it is remembered that most of the questions of private law are concerned with the legal spheres of two persons, who may be subjects of different States, with different laws: the consequence would be the adoption of the system of personal laws, as in the Middle Ages.² In practice, Eichhorn cannot carry out his principle consistently. By a second axiom (§ 36), that, in so far as the rights of an individual have their origin without his domicile, or are to be exercised there, they stand in need of the protection of foreign laws, and that this can only be extended to them under certain conditions, his first axiom becomes indefinite, and cannot recover a definite meaning, as will shortly be shown, even although this additional rule be called in to its aid—viz. that vested rights are to be recognised everywhere.³

This last principle, which had been taken up in the eighteenth century by *e.g.* Titius,⁴ appears in the nineteenth century for the most part merely as a subsidiary principle, although one of some weight. Besides Eichhorn, Glück (*Pand.* i. pp. 400, 401) and Maurenbrecher (*D. Privatr.* i. § 144) use it.⁵

¹ Further, Reyscher, *Würtemb. Privatr.* § 82. Mittermaier, too, before him, *D. Privatr.* 27. In his sixth edition, Mittermaier has taken up Wächter's principle.

² Wächter, ii. 12; Savigny, viii. § 345, Guthrie, p. 55.

³ The likeness between this view and that of the new Italian school will not be overlooked.

⁴ *Jur. priv. Romani Germani*, lib. xii. lib. i. tit. iv. p. ii. *de statutis*.

⁵ On other authors tending to the same point, see Wächter, ii. p. 2. At present Holland (*Revue* xii. p. 574, note 2) seems to declare for the theory of vested rights.

It cannot, of course, be denied that the legal intercourse of persons belonging to different States is only possible, if it is admitted that persons and things must be recognised in a foreign country as the subjects and the objects of vested rights.⁶ But the proposition in this plain form yields us, it may well be said, no principle of practical use. In manifold aspects it is true that one State recognises and protects vested rights which have been acquired in another, but as Savigny (p. 132, § 361, Guthrie, p. 147) has observed, the answer to the question whether a right is truly a vested right, postulates that it is already determined by what law the acquisition or vesting is to be judged, and thus the principle so set out runs in a circle.

The principle set up by Schäffner comes very close to that of the maintenance of vested rights; every legal relation, as a matter of right, and without any assistance from the so-called *Comitas*,⁷ is to be determined by the laws of the place in which it has come into existence. Thus questions as to the legal capacity of a person are to be determined by the laws of his domicile, for the view of the law (which law?) cannot possibly go this length, that the legal capacity or *status* is created by a mere temporary stay in any place. As Schäffner does not explain when it is that a legal relation comes into existence, and his principle has therefore no defined meaning, so his determination in particular cases cannot be deduced from it, and many of the illustrations which he adduces can be turned right round.⁸ For instance, he says (p. 51) that the question whether a bastard can be legitimated by the subsequent marriage of its parents, is to be determined by the laws of the place where it was born, because it was here that the birth of the child as a fact took place, and the legal relation came into existence. But it may be just as well maintained that the bastard at the time of its birth stood in no legal relation to its father, and that therefore the legal relation had not at that time come into existence. Schäffner cannot help calling to his aid the spirit and tendency of the laws, the nature of the subject, and other principles (pp. 76, 65). In spite of the fact that the principle assumed by Schäffner is not in a position to solve the questions of international law, while, too, no foundation is laid for it, but it is simply postulated,⁹ yet we must not fail to notice that our author

⁶ On this subject, see below, § 32.

⁷ Schäffner describes *Comitas* as a haphazard and unlawyer-like principle, which proposes to decide legal questions on political considerations. G. Struve had, so far back as 1831, set up the principle that every legal relation is to be judged by the laws of the place in which it is to work itself out. This proposition might lead to a true principle (see below, § 32). But Struve himself had but a vague conception of it, and accordingly the further development of it, in his most unimportant little book, does not correspond with the start. Struve reaches the most curious results (cf. e.g. pp. 70 *et seq.* 90, 116, and Mohl's criticism. *Geschichte und Lit. der Staatswissenschaften*, i. p. 449). Struve, besides, proposes to work out his principle in so absolute a fashion as to deny the power of positive laws, which are at variance with it, to bind the judge.

⁸ See, on the other hand, Unger, *Oesterr. Privatr.* i. p. 160; Wächter, ii. p. 32.

⁹ Wächter, ii. p. 32.

in a concise way sets up a number of learned problems, and by his knowledge and the attention which he gives to the principles of English law, which often diverge widely from the common law, he is often led to excellent observations.¹⁰ The literature of the subject is very copiously used, but certainly not sufficiently thoroughly; mistaken views of other writers he often combats with success. His last chapter contains a short exposition of the law of process, in which, however, he passes over the important subject of the execution of foreign judgments.

Pütter and Pfeiffer propose in the most absolute way that the law of the judge, who is to determine any legal dispute that may have arisen, should rule. The former applies this principle so unreservedly that he is led to consequences that place the security of all international intercourse in the most serious danger; and he can only support his conclusions against generally received theories and the practice of courts of law, by the argument, that these have no clear conception of the relations of different countries in matters of public law, and draw inferences from what is recognised, or has been recognised, in the case of different systems of law within one and the same territory, for application to the case of the laws of distinct sovereign States. Pütter, however, cannot conceal from himself that, by his theory, since it is very much a matter of chance in what country a lawsuit may come to depend, if the principle stated above is to be exclusively and consistently observed, the intercourse of different States would be impossible. The fact that the commerce of the world, notwithstanding this, goes on, is, in Pütter's view, proof that the rule stated above must be correct; especially as the merchant who buys for sale, needs only to sell the goods he has bought to a third party, in order to escape all claims against him for recovery! (p. 74.) As Pütter himself sometimes surrenders his principle entirely (*e.g.* §§ 14, 115, and 140), and has to have recourse to the assumption that the officials of any particular State do not trouble themselves much about the laws of foreign countries, or that the testimony of a foreign judge as to the validity of a transaction entered into under the laws of his country settles all the doubts of the judge who has to decide the question, it is not to be expected that a satisfactory solution of the question should be found in his work, although, on the other hand, one may find there many excellent observations on criminal law, especially in reference to the draft of the new criminal code of Prussia (pp. 93-96).¹¹

Pfeiffer's work, as the title shows, does not go into detail. The principle already quoted is derived by him from the fact of the subjection of the judge to the law of his own country, and from the rule, for which he gives no justification, that the positive law of a State must be applied to all the

¹⁰ See, for instance, his remarks on the law of succession, p. 165.

¹¹ In the *Archiv, über die civil. Praxis*, vol. 37, p. 384, Pütter attempts to defend his theory in a special manner against Savigny's views. As against Savigny's doctrine of the friendly admission of foreign law, he takes up the position that every State jealously guards its own supremacy.

cases that fall within it, without respect to persons or things. Pfeiffer maintains this position on the ground that knowledge of foreign law is as a rule defective, and proposes to exclude its application even where it is sought to further the intention of the parties by allowing them the assistance of a dispositive enactment recognised in some foreign country. The argument on the other side—viz. that the undeviating application of the law of the court that decides the case would allow the pursuer, as a rule, to alter at his own will the legal relations between him and the defender, by giving him the option of appealing at his own pleasure to one court or another—Pfeiffer thinks he can meet with the observation that the defender can exercise no small influence upon the jurisdiction that is to be applied, and upon the legal relations of the parties, by virtue of the power he has of choosing his domicile at his own pleasure.¹² But if the pursuer in the one case, and the defender in the other, have the power of altering capriciously the legal relations that exist between them, that still leaves the element of caprice to embarrass us in either case. It is plain that the author will find just as little support for his theory in the unattainable assimilation of the laws of all States.¹³ The equality of citizens and foreigners before the law, which Pfeiffer in the end appeals to, and which is, as he thinks, the only principle that can be consistently carried out along with the axiom already stated, becomes, if considered closely, in many cases a complete denial of legal rights to foreigners,¹⁴ since we cannot expect our law to be in the minds of foreigners in their own country. In any case, the author should not have passed over as he has done the subject of jurisdiction, if he wished to show more minutely that his theory is capable of being carried out in practice. In its present shape Pfeiffer's theory negatives the possibility of international intercourse.¹⁵

The French writer Gand lays down the same principle in a more moderate way, when he derives from the admitted competency of the court to decide upon a particular legal relation, the propriety of applying the law to which that court may be subject. He infers from the fact that the prevailing practice of French courts as a rule excludes, in cases where there is a question of the application of foreign laws, reduction of the judgment, in respect that no violence has been done to any definite French statute, that it rests with the court to apply or to exclude foreign law, or that it is nothing but a

¹² P. 35.¹³ P. 54.¹⁴ Savigny, § 348, Guthrie. p. 69.¹⁵ It would be well if both of these works were allowed to fall into oblivion. They are completely worthless. Pütter as well as Pfeiffer wrote without any pains on a subject which he neither understood nor had tried to learn.

The theory that sets the *lex fori* so much in the foreground, dates, as a matter of fact, back beyond the Middle Ages. The proposition that the *litis decisoria*, i.e. the determination of material questions of law, are independent of the *lex fori*, is old. Cf. e.g. Paul de Castr. ad Leg. 1. C. de S. Trin. No. 11. Bald Ubald in L. 1. C. *ne filius pro patre*, No. 10. Curt. Rochus, *De Statutis*, sect. 9, §§ 38-42; Mascardus *concl.* 9, No. 8; Burgundus, 7, No. 5, Boullenois i. pp. 533 536; Hert. iv. 70; Merlin *Rép. Vo. Preuve*, T. vi. p. 620.

consideration of convenience and practical advantage that opens the door for its admission. Gand, whose purpose is merely to treat of French statutes and practice in connection with the legal relations of foreigners, and who grapples with general propositions of international law, because these positive enactments are inadequate for his end, combines therewith various propositions taken from the older statute theory (§§ 180, 181, 204-220), and in doing so, greatly extends the category of real statutes. In spite of this defect, and although it is remarkable that the author does not abandon the conclusion he draws from the 14th Article of the Code Civil, which is unquestionably erroneous—viz. that a pursuer, who is a Frenchman, in a question with a foreign defender, may unconditionally elect to have French or foreign law applied to his case—the book contains many details that deserve acknowledgment. Very many judgments of French courts are reported by him, and at great length.

This view is modified in a peculiar fashion by Kori.¹⁶ He makes the substance of the judgment dependent upon the possibility of summary execution, and proposes that the form of a contract executed by a foreigner in our country, and the legal capacity of foreigners within our territory, should be determined by our law; but, as a rule, to this effect only, that the property of the foreigner which is within our country, but not any property beyond it, should be dealt with by the judgment which may be pronounced. It is easy to point out how impossible it is to carry out this theory in practice, and how plainly it conflicts with generally recognised principles of law. To carry it out, a new judgment would fall to be pronounced as often as a new article of property was brought by the foreigner into this country.¹⁷ In particular cases, however, Kori, as Wächter has shown, uses quite different premisses, although he gives no demonstration of them.¹⁸

FUNDAMENTAL WORKS.

1. V. WÄCHTER.

§ 24. We now come to those German authors who have given a new and lasting direction to the whole science of international law.

v. Wächter, in his comprehensive work begun in 1841, sets himself as his immediate task that he shall submit the statute theory to the most

¹⁶ This work is short, and does not enter much into detail.

¹⁷ See Wächter, vol. i. pp. 304 *et seq.*

¹⁸ Brinz appears inclined (§ 23) to found modern private international law exclusively on the principle of the recognition of the legal capacity of foreigners. From this, it is said that the recognition of the vested rights of foreigners, and the rule "*Locus regit actum*" follow. But this latter rule is set up in opposition to the principles of international law as an anomaly, and it is hardly possible, in deciding particular questions, to be satisfied with a completely abstract principle which ignores actual systems of law (see Brinz himself, p. 124, "That is on

searching examination with special regard to the German literature only on the subject. Although his criticism is not just to the historical development of the theory, in that it forgets that Romanistic and Germanistic conceptions must often, and especially in the case of the so-called conflict of laws, lead to contradictory results, still he shows irresistibly the impossibility of holding the statute theory as it is usually conceived; at the same time, he shows that the other exclusive and abstract theories, with which the solution of the problem had, up to this time, been attempted, are equally untenable.

Only two propositions¹ seem to be left:—

First, the proposition that any judge determining a lawsuit is unconditionally bound by the law of his own territory, and,

Second, the proposition, that our enquiry must be, whether that very law, in its true meaning and spirit, does not to a certain extent decline the decision of legal questions, which have reference to foreigners or a foreign country,² and commit it to one or other foreign legal system.

The former of these two propositions is simply a consequence of the subordination of the judge to the law, but on the other side Wächter could not shut his eyes to this, that an unthinking application of native law alone would make orderly intercourse with foreign countries impossible, and would be at variance with the most patent facts and requirements. Now, since statutes do not generally make any express provision as to their application or non-application in international relations (as we may phrase it, for shortness' sake), the only thing left was to extract from the meaning and spirit of the statutes the necessary rules for their application or non-application.

In fact, both propositions are incontrovertible, and at the present day there is scarcely a thorough and reasoned judgment pronounced in any matter that touches on private international law, which does not make use of them in one direction or another.

But there may be very various ideas as to the meaning and spirit of laws in reference to international intercourse; the historical development of private international law itself shows this.³ The ancients interpreted

longer a question of international law," he says of the question of the recognition of adoptions, marriages, etc., entered into by foreigners in a foreign country. Why not?)

¹Cf. i. pp. 236 *et seq.* and pp. 261 *et seq.* Wächter always adhered to the principles which he here enunciated. Cf. Wächter, *Pandekten*, edited by O. von Wächter, i. (1880) § 31.

²For this second proposition there may no doubt, as we have already remarked, be found several points of connection in earlier literature, and even among those who represent the statute theory. Wächter himself calls attention to this (ii. p. 16), see, for instance, Maevius, *ad jus Lubec. Prolog.* qu. iv. No. 26. Stryck, *Diss. de juri principis extra territorium*, C. iii. No. 50, No. 148, No. 166.

³The immediate foundation for the second of Wächter's propositions is, however, supplied from the point of view of the interpretation of particular territorial systems of law, by the proposition, of which Wächter takes no notice, that a process cannot be meant to create new rights, but to declare rights which are already in existence.

their laws in this aspect differently from the Middle Ages, and they again thought differently from the authorities of the present day. Thus an *a priori* enquiry as to the meaning and spirit of laws runs a risk of falling a victim to the caprice of the individual, unless some other fixed points can be reached. These fixed and positive points which general usage and recognition supply to us have, however, in many cases escaped Wächter. He is more alive to differences than to points of agreement, just because he goes to work too exclusively with Romanistic conceptions: it is also a matter of some importance that non-German modern literature, and particularly that of England and the United States, finds no place in Wächter's enquiries. International law is just the science in which one-sidedness cannot be avoided, unless the conflict of opinions is viewed in a mirror set up in some territorial law which differs widely from our own. In this way, then, there is no doubt that, although Wächter, in this field as in others, has made himself conspicuous by a subtle and at the same time practical juristic instinct, his decisions on particular points are not infrequently assailable in details. It is also true that a large part of the merit which he has shown in the general theoretical regions of private international law, has been lost again by the proposition which, in despair with the vagueness of any interpretation that can be put upon the phrase, "meaning and spirit of the law," he has called in aid, viz. that in doubt the judge, to whom application is made to decide the case, has to apply the law of his own territory.⁴ This is the explanation, apart from the obvious influence of a famous name, of the fact that Wächter's laborious work has so quickly and completely receded into the background behind the brilliant exposition and more philosophic conception of Savigny, and is generally in foreign countries less respected.

2. V. SAVIGNY.

§ 25. Savigny, too, does not fail to recognise that the judge must primarily be referred to the laws of his own territory. But he does not appeal to the supplementary proposition of Wächter which we have just mentioned. Instead of that, he holds it as a mere accident and immaterial which court—the court of the State A or of the State B—has to determine the dispute. His ground of decision is that States at this time of day all stand together in a

⁴ Against this last proposition, see Savigny himself (p. 126, § 361, Guthrie, p. 143), "the proposition is said to apply in every case, except when the authority of another local law can be completely established. Thus the conclusiveness of the principle appears to be assumed in advance for the numerous cases in which plausible reasons, weighty authorities, or decisions of courts, can be adduced for one side or the other. Here, therefore, the method of the civil procedure, in which every one on whom the burden of proof lies loses his cause, if he does not succeed in his proof, is to some extent adopted." Wächter besides, in following his principle, has fallen into a difficult position in cases where he has not to deal with the laws of different States, but with the divergent laws of provinces of the same State. For this he has promised a solution, but has not given one. (Cf. ii. pp. 3 and 20, note 208. *Pondekten*, § 31 *ad fin.*)

great community of trade and legality. The natural result of this is not a jealous and one-sided advancement of their own territorial sovereignty, but a friendly recognition, resting upon the nature of the subject, and not therefore merely capricious, of the legal systems of other countries in reference to those legal relations which in their nature belong to these other systems. We can, then, at once retain the first proposition, by which the judge even in private international law must show obedience to the laws of his own territory, and at the same time say, also in accordance with Savigny's conception, that private international law in a practical view is simply a question as to the interpretation of the laws of different States. But this interpretation must proceed as may be demanded by the existence of that general mutual recognition of each other by the legal systems of different countries, within the limits of their jurisdiction, which limits again are fixed by the nature of the subject—*i.e.* the general intercourse of nations. If, then, it must be admitted that there is an opposition between the conceptions of Wächter and Savigny, it is however not so important as, for instance, Reinh. Schmid has assumed. For, if Wächter's particular discussions are followed out, it will be observed that he too, like Savigny, starts from a recognition of the operation of the foreign law in the region to which it belongs; only Wächter is not so fully conscious of what he is doing, and his work is not so comprehensive; besides, he is often disturbed by the influence of that erroneous proposition, which prescribes the application of the native law of the judge in cases of doubt. He is often, too, disturbed by the mistaken belief that all those conclusions which Savigny, in accordance with his fundamental idea, could draw most freely from the nature of the subject, and could set up as law already recognised, are to begin with mere conclusions *de lege ferenda*, which belong to the region of mere expediency, and may be taken up according to his good pleasure by the lawgiver of any territory, but, also just as much at his good pleasure, may be rejected by him.¹

On the other hand, in my first edition I have declared myself against the much admired formula, which is so often quoted, in which Savigny attempted to explain his principle in more picturesque fashion. You must, says Savigny, seek that domain of law to which the particular legal relation in its nature belongs, in which it has its seat. I have

¹ See Wächter, i. p. 240. No one, however, could assert with certainty that it is never on any account permissible to interpret an existing law by grounds of expediency: all that may be said is that the limits to be observed in such cases cannot be fixed *a priori*. On the other hand, every State, as we have already said, has the power of withdrawing itself from the general rule, for the most part to the loss of its own people; the rule, therefore, as Puchta notices, must have exceptions. The safe juristic sense of Thöl (§ 113) recognised this, and saw that in private international law no sufficient foundation for general principles could be laid without an exact enquiry into details (pp. 175, 176); this enquiry could not take place in the introduction to German private law [which was his subject], and therefore Thöl went too far in rejecting general principles, and fell short of the proper points of view, which, however, as details are further mastered, are exhibited with certainty. The subtle, but, I am sorry to say, too short remarks of my honoured teacher, and subsequently my colleague, I shall notice as I come to the particular questions with which he deals.

already said, in my first edition [p. 59 of translation], that this proposition, admitting as it does of the most various meanings, required for its application to particular chapters of law a further development, which is often to be desiderated in Savigny. What, for instance, would hinder us from assigning the legal relation to the State whose judge had to decide upon it, or generally to the territory on which it makes its appearance, and so, under certain circumstances, to a great number of different territories? Savigny, accordingly, can do no more than postulate (p. 134, § 365, Guthrie, p. 166) the application of the laws of the domicile to determine the legal capacity and status of the person. He says again, for instance, in reference to the determination of questions of immoveable property by the *lex rei sitæ*: "Whoever wishes to acquire, hold, or exercise a right over a thing, betakes himself for this end to its site, and subjects himself voluntarily, for this single legal relation, to the local law that prevails in that territory." Now, upon this it is to be remarked, that in this sense all laws touching property rest upon voluntary subjection. Renounce the property in question, and you are no longer subject to the law. But it is nowhere demonstrated why these laws, which are valid in the place where the property is, should demand this voluntary, or more correctly, this necessary subjection in relation to questions connected with them. We shall show, again, that Savigny's proposition is not merely an indistinct figure,² but contains a really erroneous conception. A legal relation, as a general rule, with regard to which we can raise the question whether this or that territorial law should be applied, never belongs exclusively either to the one or the other domain. It may, if we wish to use an image, have its roots or its stem in one, while its branches stretch out into the other.

In spite of this error, in spite of his not infrequent failure to work out details with care, without which no certainty is to be reached in the domain of private international law; in spite, too, of this, that he is not quite just to the opposition of Roman and Germanic legal principles and conceptions in private international law,³ Savigny's merit stands undiminished. That merit is to have been the first to take up with full consciousness his starting-point in the idea of an international community of law which restricts all territorial laws, and defines their competency, and in thinking, not of a conflict of legal systems, but of a harmonious combination of all.⁴

² See, on the other hand, Walter, *D. Privatr.* § 43; Brinz, *Pand.* i. p. 102, note 8; Dernburg, *Pand.* i. § 45, note 6; Torres Campos, p. 306. Thöl also, p. 168, although upon the whole he follows Savigny's views, seems not to have been pleased with the indistinct figure. He conceives the question (agreeing rather with Wächter) as one of the interpretation of statutes or laws. Every statutory provision as to this conflict of laws is a provision *as to* the interpretation of laws. Accordingly, in every doubtful case, one must enquire under the supremacy of which law it falls, *i.e.* which law regulates it. But Thöl's conception implies in one relation certainly, as we have said, a step back from Savigny's position.

³ Cf., for instance, what he says as to succession in peasant properties (p. 306, § 376, Guthrie, p. 279). This rests not upon economic conclusions, but is a remnant of German succession law.

⁴ Cf. especially p. 29, § 348, Guthrie, p. 72. Laurent, i. § 408, gives a peculiar criticism of Savigny's principle. We shall return to it later, in estimating the modern Italian school.

GERMAN LITERATURE FOLLOWING ON SAVIGNY: MODIFICATIONS OF SAVIGNY'S PRINCIPLE; ATTACKS ON IT; RESPECT PAID TO IT IN OTHER COUNTRIES, ESPECIALLY IN ENGLAND AND THE UNITED STATES.

§ 26. In order, however, to be able to treat the principles of Wächter and Savigny as in reality at one, it is certainly necessary to put altogether aside that subsidiary principle of Wächter, which confuses his whole theory, according to which the *lex fori* is in case of doubt to be applied. I mean that it must be put aside not merely if one proceeds from the notion of a certain common bond among the different territorial systems of law—which possibly was in his time not yet recognised—but even if one starts from the point of any one of the territorial systems.¹ I attempted that in my first edition, by pointing to the principle, which is recognised among all civilised peoples, according to which the suit is meant, not to create new rights, but to clear rights which are already in existence. If the law of the court that is to give judgment were, in every case, or even in cases of doubt only,² to pronounce upon the material import of the legal relations that may be in dispute, there can be no doubt, since very different tribunals may come to be competent in a particular case, that in many instances the judge would either have to create, or at least to modify, the legal relation in question. But the issue cannot, in accordance with that generally accepted principle, depend on the place where any legal relation may accidentally come to be the subject of a legal process, even if we leave out of view the very serious practical results of a theory which makes the import of a legal relation depend on the *lex fori*—i.e. in the case where the courts of different States are equally competent, on the pleasure of the pursuer, and, at the same time, attributes an extra-territorial and even a retro-active force to native statutes, by demanding, as Heffter³ remarks, that foreigners, in a foreign country, in bargaining about subjects situated there, should follow the law of the place.

If, then, the application of foreign law seems, under certain circumstances, when express instructions are wanting, to be demanded, and the view of the legislator must be discovered indirectly by a process of reasoning, we cannot recognise as sound the objection that the view of the legislator cannot be objectively ascertained, but must rather be arrived at by subjective and arbitrary conjectures. In reality, I further remarked, such a distinction between objective and subjective demonstration does not exist.

But if the principles that are postulated for the various branches of

¹ This inference has recently been followed by Martens, ii. p. 289.

² In my first edition, it is true that I did not add "or even in cases of doubt only." At that time my argument was mainly directed against Pfeiffer and others; but it holds equally against Wächter's subsidiary principle. I had not at that time seen the criticisms of Reinhold Schmid, which will be discussed immediately: as has been said, he discerns a difference between Wächter and Savigny that goes very deep.

³ P. 71.

our subject are in harmony with each other, and if these principles can be logically pursued into details without contradicting the rules that are generally recognised in practice by all nations, and without doing violence to the natural instincts of justice and equity; and if, besides, it can be shown that the most eminent authors and the decisions of supreme courts agree in their results with the view adopted by the legislator, although not invariably in the grounds on which these results are based, and which are so often inexactly or incompletely expressed, then the author believes that he will have pointed out an objective truth; and, even although our jurisprudence shall concern itself with one particular territorial system only, we can arrive at no greater certainty, at least not in any of those cases in which there is the slightest possibility of a doubt.

Reinhold Schmid, who treats of private international law in one part of a monograph which is not very comprehensive, has taken objection to this way of dealing with the subject. One of his objections we have already considered in paragraph 4. He derives his second from the difference between Wächter and Savigny, according to his erroneous conception of that difference. A third and last objection is directed against Savigny's view and mine alike. We have not hitherto mentioned that Savigny indicated the existence of a particular class of laws, which, in his view, do not find their origin or object in the pure domain of law, but rather rest on moral grounds, or grounds of public advantage, *publica utilitas*. He calls these coercitive (*Zwingende*) laws, and is of opinion that, in so far as such laws are concerned, every State stands out completely separate and distinct; that here, therefore, the legal community of States, recognised though it be in other matters, ceases, or, as one might equally well say, is proclaimed to be excluded from the particular State in question. The judge, then, or the territory in question—and Savigny has not thought out this alternative quite clearly—excludes the application of all foreign rules of law that differ from his or its own.⁴

Reinhold Schmid has used this idea—which in itself is certainly not quite clear, and to which we shall return again below, because the modern Italian school has attached itself to it—as the basis for a far-reaching attack on Savigny's detailed enquiries, and also, if I may say so, on my own. The attack, however, is also made against much that has been adopted by general consent at least all over the Continent of Europe. From this exclusion of foreign law by positive, coercitive statutes, he draws the conclusion that the application of foreign rules of law must as a general rule be rejected if it would disturb or unsettle the native legal order. Schmid does not, of course, fail to recognise that the application of foreign rules of law in every country necessarily introduces a certain disturbance into the uniformity of legal decisions, but that this disadvantage is generally more than counterbalanced by the advantage of an orderly international intercourse. In all cases, however, in which this does not happen, in which the disadvantage outweighs the advantage, the preference, says

⁴ See Savigny, p. 32, § 349, Guthrie, p. 78.

Schmid, must be given to the native law over the foreign law, be the former a coercitive law or be it not. Now, although we cannot in private international law dismiss this last deliverance quite offhand, still in most cases it will lead to a certain amount of arbitrary or capricious conclusions. This caprice discloses itself pretty frequently in Schmid's observations on particular cases, which in many other respects deserve to be highly valued. Nothing but a careful study and use of literature, and of the practice that has disposed of particular cases, can protect one from this caprice in private international law, since theories of international law cannot fairly be charged with the duty of creating law anew. Discussions which are purely general, and which avoid any such laborious enquiry into details, have clearly no value to speak of.⁵ On the one hand, many points, as we have already noticed, are better established in practice than a superficial consideration might lead us to suppose; and, on the other, the author who gives himself up entirely to general observations, fails to notice to what conclusions these will lead him in particular cases. Schmid's work, which does not extend to the law of process, closes the series of German monographs which treat of private international law as a whole. We have only further to mention the wonderfully careful and valuable exposition of international law, as recognised in Germany, which is to be found in Stobbe's *Deutsches Privatrecht* (i. pp. 198-254, 309-326),⁶ and also the short sketch of international law in general, also very careful and very rich in positive information, which A. V. Bulmerincq gave in Marquardsen's handbook of public law, ii. 2, pp. 208-241. I too, in 1882, published a short sketch of private international law for the fourth edition of Holtzendorff's *Encyclopædia of Jurisprudence* (pp. 674-718). Bulmerincq's sketch pays more attention to positive details, while in my sketch I have rather turned my attention to the exposition and criticism of the rules depending on the principles of the science, a method in accordance with the plan of the *Encyclopædia*. German literature has little to say on particular questions of private international law. The French law of respite or delay in payment (*moratorium*), passed during the French and German war, then the case of De Bauffremont, and the dispute which arose with the managers of the Austrian railways in consequence of the demonetization of silver, much excited German literature from time to time. In the department of the law of process, apart from a work of Francke's on the operation of foreign judgments in the German Empire, which belongs more to the positive law of German process, the paper by Lammasch (Innsbrück), entitled, "*Staatsverträge, betreffend Rechtshilfe und Auslieferung,*" in Holtzendorff's "*Handbuch des Völkerrechts,*" vol. iii., must be mentioned as

⁵ As against Schmid, see Stobbe's apposite remark, § 29, note 12.

⁶ Böhlau, *Mecklenburgisches Privatrecht*, i. pp. 420 *et seq.*, endeavoured to deduce the principle of private international law from the equality of foreigners and natives in the eye of the law, but did not win much reputation thereby. (See, on the other hand, Winscheid, *Pand.* i. § 34, note 6, and my notes in the *Münchener Krit. Vierteljahrsschrift für Gesetzgebung*, vol. 15, pp. 14 *et seq.*)

a valuable work. The doctrine of allegiance has been specially cultivated in Germany by v. Martitz.⁷ Savigny's theory, however, may unhesitatingly be described as the prevailing theory; it is followed, although not perhaps in all its particulars, by the most eminent authors⁸ upon Roman and German private law.⁹ And in the decisions of courts there are many references made to this theory. It is no other than Savigny's theory which Bucher puts forward in his "*nouveau traité de droit international privé au double point de vue de la théorie et de la pratique*" (1876),¹⁰ since his conception of private international law is the determination of the competency of the legislatures of the individual States, the foundations for that competency being to be found in the nature of the subject matter, in the interests which constitute the basis of all law,¹¹ in the nature of sovereignty, which is at once a personal and in another direction a territorial bond.¹²

Johann Vesque v. Püttlingen's Handbook of Private International Law, as it is recognised in Austria-Hungary, is at least under the influence of Savigny's theory, and is remarkable besides for an accurate investigation of details. The author, however, is of the opinion that the provisions of Austrian law, although they may not all approach closer to the modern scientific standpoint, yet contain special regulations, or regulations based upon sound principle, for most cases of private international law; as a rule, this makes it unnecessary to go back upon what is represented to be the deliverances of "the law of nature."

THE MOST RECENT LITERATURE OF ENGLAND AND THE UNITED STATES; (PHILLIMORE, WESTLAKE, BEACH-LAWRENCE, WHARTON), AND ITS RELATIONS TO SAVIGNY'S THEORY. THE NETHERLANDS, BELGIUM, RUSSIA (ASSER RIVIER AND V. MARTENS).

§ 27. While Vesque v. Püttlingen, therefore, rather takes his stand on the ground of pure positivism, but in doing so confuses the "law of nature" and "the nature of the subject matter," Phillimore fully recognises

⁷ Stoerk's new work in Holtzendorff's *Völkerr.* vol. ii., must be mentioned in relation to allegiance.

⁸ So Walter, *Deutsches Privatr.* §§ 140 *et seq.*; Gerber, *D. Privatr.* § 32; Winscheid, *Pand.* i. § 34; Beseler, *D. Privatr.* i. § 38; Fr. Mommsen, *Archiv. für d. Civil. Praxis*, 61, p. 149.

⁹ v. Martens, ii. p. 286, may also be called an adherent of this theory.

¹⁰ The introduction is printed in the *Revue*, viii. pp. 35 *et seq.* (An earlier paper of Brocher is in the *Revue* in 1871.)

¹¹ See, on this subject, the critical notice of Westlake in the *Revue*, ix. pp. 606 *et seq.*, with which I am certainly not altogether in accord.

¹² In his comprehensive work, "*Cours de droit international privé suivant les principes consacrés par le droit positif français*" (3 vols.), Brocher (see above, § 21, note 2) thought himself bound to take the statute theory as his basis, because the authors of the Code Civil started from it. All Brocher's works are remarkable for their consideration of the subject from all points: Brocher does not easily forget that everything has more than one side, and any one who proposes to set up a new view on a question of private international law, would do well to see if Brocher has not expressed himself upon it. It is his great caution which in many cases damages the results at which Brocher himself arrives: one not unfrequently desiderates clearness, and in formulating his own views, Brocher is not very successful. Brocher is averse to all hasty and revolutionary theories, but yet he pursues a certain ideal and scientific course.

and respects Savigny's principle as such, and its influence is unmistakably to be met with in the works of Westlake, Beach-Lawrence,¹ and Wharton. All these most meritorious works, of which Westlake's and Phillimore's belong to England, Beach-Lawrence's and Wharton's to the United States, pay more regard to the modern literature of the European continent than the older works of the English and American jurisprudence did. This is more especially the case with the most comprehensive and richest of these works, that of the learned American, Wharton, who at the same time always takes the trouble to enter into the views of the jurisprudence of other countries where it differs from that of his own country, and to be just to it. As a matter of fact, there is no doubt that the jurisprudence of the United States rests upon its old traditions to a greater degree than that of the most modern English school. The active intercourse with the continent of Europe makes itself felt even in the jurisprudence of England.

The works of the Belgian jurist Asser, and of the Russian lecturer on public law, Fr. v. Martens, rest also upon Savigny's principle, although they do not take it expressly for their foundation.

Asser's work,² although it has not a very wide scope, is distinguished by a fine practical instinct, and devotes particular attention to commercial law. In the French edition, its value is materially enhanced by the frequent critical notes of Rivier, which take into account the more modern literature. The chapters of v. Marten's work on public law, given up to private international law, count among the shorter works on the subject; but the author, so far as he could within his narrow limits, has considered and criticised the most modern literature without prejudice or partiality, and the necessities of legal intercourse find themselves appreciated most practically by this author.

Despagnet, the most recent of French writers, attaches himself to Savigny's theory.

THE NEW ITALIAN SCHOOL AND ITS ADHERENTS IN BELGIUM AND FRANCE.

MANCINI, ESPERSON, FIORE; LAURENT, DURAND, WEISS.

§ 28. On the other hand, the new Italian school¹ stands in real opposition to the German doctrine based on Savigny, although happily the practical results to which it attains do not differ so considerably from those of the German school, as might be expected from the way in which

¹ Westlake's private international law is shorter and more positive, but it rests upon a thorough acquaintance with foreign legal publications and literature. In Beach-Lawrence we have a most careful review of foreign literature and legal systems, while the author himself frequently fails to express his own opinion, or merely hints at it.

² German translation of Asser's original work, by G. Cohn (Conrad), Berlin 1880.

¹ Brusa, however, in his excellent notes to the third edition of Casanova, *Lezioni del diritto internazionale*, ii. pp. 325 *et seq.*—Casanova having merely repeated the maxims enunciated by Rocco—defends Savigny's point of view against the Italian school with great breadth and impartiality. In the same way, the Spanish jurist Torres Campos, in his remarkable treatise, "*Principios de derecho internacional privado*," has attached himself rather to the German school (cf., especially, p. 306).

it formulates its principles. In spite of this opposition, there are points of connection between them, and Laurent goes so far as to say that it was due to nothing but the influence of the political circumstances of Germany, which showed themselves to be unfavourable at the time to the development of Savigny's leading idea, that Savigny himself did not reach the principles of the modern Italian school.

Like Savigny, the modern Italian school² starts from the principle of the legal community of nations. Savigny, however, deduces from that no more than a certain limitation of territorial sovereignty, which in the abstract is unlimited,³ a limitation the character of which must be determined by the "nature of the subject," so as to fit this or that particular legal relation which may be in question. The Italian jurisprudence proposes to substitute for this limitation of territorial sovereignty an abstract rule which shall be universally applicable, and it finds this rule by dividing all systems of law into two parts. The one is merely an expression of personality, or, since personality is in its turn determined by nationality, an expression of nationality;⁴ the other takes its rise from public order, the necessary respect that must be had for the whole as distinguished from the individual, for public welfare and for public order. If, then, personality in its national character is to be recognised in foreign countries, the next inference is that the national law of this personality must be also recognised; the one cannot be separated from the other.⁵ But the territorial laws of public order of the community must not suffer. These must always, in case of conflict, be preferred to the individual. Thus, in the view of the Italian school, the same principle which determines, or should determine, the native law of every State, holds good also in international law. The freedom of the individual is the principle, but this must always give way when public order, the welfare of the whole, peremptorily demands that it should do so. But the instance which they prefer to use, in order to make it clear that the laws, which are to follow the individual into a foreign country, are in truth merely an expression of the natural (or national) personality, which depends on the race of the

² Brocher, in the *Revue* for 1880, pp. 531 *et seq.*, gives a temperate but not altogether approving review of the new Italian school (cf. Brocher again, *Nouv. traité*, pp. 52 *et seq.*). L. Strisower, in Nos. 20-26, of the *Wiener Gerichtshalle*, 1881, has a sharper but most opposite review of the school, which has appeared separately under the title, "*Die Italienische Schule des Internationalen Privatrechts*."

³ See especially Mancini, the founder of the school, in J. i. p. 228. To regard foreign law is described as the "*devoir stricte*" of the State, Laurent i. § 402 (p. 593), *La comitè n'a rien de commun avec le droit; elle en est au contraire la négation*.

⁴ Mancini, *ut sup. cit.* p. 285, where the recognition of the individual's nationality is traced back to the recognition of the individual's freedom, by which others are not to be injured. Laurent appeals immediately to God's appointment, by which personality was created (cf. *e.g.* i. §§ 26, 6, 221. See, on the other hand, Brocher, *Rev.* 13, pp. 537 *et seq.*)

⁵ The proposition is also stated in this way: every sovereign power may exercise its rights even beyond its own territory, in so far as it does not thereby trespass on the rights of another sovereign power. In this way the possible operation of the law outside the territory of the lawgiver is made parallel with the freedom of the individual, which finds its limitations only in being forbidden to trespass on the rights of others. So Fiore, § 26,

individual, is that of personal capacity⁶ for legal acts, and in particular that of minority and majority. There is no doubt that the lawgiver desires to place immature persons under tutory, and to allow mature persons to act independently. But maturity is a natural condition of the individual, determined by the race and the climate to which he belongs, and in which he has grown up. The national law in this case merely follows nature, and is an expression of that which lies in the nature of the person. In this way the legislator of a foreign territory, if he recognises the personality of our countrymen as such at all, cannot help recognising it as minor or major, according as the domestic law of the individual may lay down. Personal law is itself the personality; it is, as Laurent says, like the blood which fills the veins, the marrow and the bones.⁷ And since all private rights are recognised for the sake of the persons to whom they belong, so private international law as a whole recognises no other law than the domestic law of the persons⁸ concerned, limited only by the territorial laws of public order.⁹ But, again, the will of the individual in itself is not tied to any territorial limits; individuals may expressly or by implication subject themselves to a foreign law, and this subjection in its turn must be recognised everywhere, in so far as the territorial law of public order is not thereby infringed.

These general rules, which were for the first time set up in a famous introductory lecture by Mancini¹⁰ in 1851, and were repeated and further developed, especially by Esperson, apart from the brilliant and talented rhetoric and dialectic in which they were set out, necessarily awakened all the louder echo in Italy, as the young kingdom had just established her unity, and taken her place in the family of European States under the motto, "Nationality and Freedom." These principles have become in Italy almost an article of faith in jurisprudence;¹¹ and, as Italian juristic science began to treat international law, and private international law particularly, with special zeal, and in its details did much, as must be confessed, that merits the highest recognition, working always in a liberal spirit for the service of trade and intercourse in general, the principles of the Italian school have gained many adherents in France.¹² It makes it all the more impos-

⁶ Laurent, i. § 370.

⁷ Laurent, i. §§ 409, 428. Cf. Mancini, *Rapport, travaux prélim. de la Session, de la Haye, de l'Int. de dr. intern.* (Revue vii. p. 329, and particularly p. 349; Esperson, *Jour.* viii. p. 248).

⁸ Esperson, *Jour.* viii. p. 209. "Toutes les lois étant personnelles." Laurent, i. § 126.

⁹ Mancini, *Rapport in Revue*, vii. p. 353.

¹⁰ *Della nazionalità come fondamento del Diritto delle genti*.

¹¹ Cf. e.g. B. Gianzana, i. No. 29 *et seq.* This enthusiasm leads, as may be understood, to unjust conclusions as to other systems. Thus Gianzana (i. No. 26) is of opinion that the English system of territoriality is a negation of human personality, and robs men of the capacity of travelling over the world and subjecting themselves to other laws. English jurists are of opinion that the English principle of domicile, as distinguished from that of nationality, is the very thing to create the possibility of unlimited travelling, and unlimited subjection of oneself to the laws of other countries.

¹² So, for instance, Durand (cf. especially § 120, p. 238), Weiss, p. 232. Weiss, in place of the word "nationality of law," uses the title, "personality of law."

sible to pass them over in silence in Germany, that that most comprehensive work, which concludes private international law, the work of Laurent, that Belgian law professor who is so much respected in the whole French and Romanistic world, takes them up with enthusiasm.

The theory, too, seems to recommend itself to notice from a historical point of view, for we believe that a connection is to be established between it and the statute theory.¹³ We saw that in France and Germany the supremacy of the *lex domicilii*, or, as it was afterwards called, the *statutum personale*, which had been heralded by the later commentators with a certain amount of predilection, had in the course of centuries gained more and more ground as against the *lex rei sitæ* or *statutum personale*, in consequence of the increasing force of the conceptions of the Roman law. The Italian school and Laurent felt themselves justified in proclaiming the goal of historical development to be that theory which, as a matter of principle, looked upon all private law and rights as an appendage of the personality of the individual, and as subject to the personal statute which was everywhere supreme. And although they could not deny the exclusive authority of the *lex rei sitæ* in certain cases—*e.g.* in true questions as to immoveable subjects, this exception seemed to them to be merely a special application of the restraining force of the laws, whose object it is to protect public order.¹⁴ The new Italian doctrine might therefore be counted as a logical development of the doctrine of the later commentators, and this seemed to have all the stronger foundation, if the new doctrine of the operation of the wishes of the parties, which must be recognised everywhere, were set up as a parallel to the old category of the *statutum mixtum*. The new Italian school has, besides these, still closer points of connection.

It does not much concern this branch of the subject that Mailher de Chassat set up, so long ago as 1845, a doctrine which resembled this theory in many aspects, but which, so confused was it, did not obtain much respect.¹⁵

¹³ Cf. *e.g.* Mancini, *Revue*, vii. p. 354; Laurent, i. §§ 200 and 344. It is certainly true that in the statute theory, as time went on, a wider field was assigned to the so-called personal statute. The cause lies simply in the advance of the idea of the Roman universal succession in the law of inheritance, in the operation of this idea upon the law of the property of spouses, and in the decline and disappearance of feudal law, and the institutions which were analogous and akin to it.

¹⁴ Laurent consistently calls these "*statuts réels*."

¹⁵ He wishes to have a foreigner recognised in the new international intercourse—which in his view rests on the principles of intelligence, humanity, and nationality—as the representative of the nation to which he belongs; private international law is to him simply the law of one nationality within the domains of another, and is to be distinguished in his view from the conflicts of the old statutes, which were, as he thinks, merely the products of egotism and the feudal system (§§ 53, 337). The conflict, according to him, resolves itself into a conflict of the different sovereign powers. Mailher thinks that in this proposition he has discovered the solution of the question, while at the same time he invokes the assistance of a second proposition, *viz.* the independence of nations. It is not clear how these two propositions, the free development of foreign nationality in other countries and its limitation by the laws of these countries—to use Mailher's own expressions (pp. 323, 324)—are to be reconciled with each other.

(CRITICISM OF THE MODERN ITALIAN SCHOOL: (STRISOWER); DEFENCE
AND MODIFICATION OF ITS DOCTRINES BY FUSINATO.

§ 29. It is, however, worth remarking that Savigny (pp. 35, 36, § 349, Guthrie, p. 78) as a matter of fact distinguishes two classes of laws to this effect, that he regards the one class as enacted for the sake of persons who are the possessors of rights—the purely legal enactments in his view—while he assigns to the other class an end and object beyond the province of pure law, an object that belongs to morality or *publica utilitas*. This division has an unmistakable resemblance to that upon which the principles of the modern Italian school rest. That Savigny only used it by the way, in order to found upon it the exception to the rule of international community in law, to justify the special treatment of the so-called prohibitive laws, is not so much to be accounted for, as Laurent (i. § 419) thinks, by supposing that Savigny was deficient in philosophic sense, or was still trammelled by the bonds of feudalism, as by the fact that this idea did not seem to him to be clear enough to found an entire system upon.¹ As a fact, all rules of law have an end and object which lies outside of the pure domain of law, although that object may not have been consciously present to the framers of the law, and although it may frequently be a mistake to assign certain perfectly definite objects to this or that rule of law. Rules of law always serve, or ought to serve, the welfare of individuals, i.e. the welfare of the preponderating majority of individuals, and thus the welfare of the whole commonwealth. In this sense, the motto on v. Ihering's work, "The end and object of law" (*Der Zweck im Rechte*) says truly, "The end of law is in truth that which creates it." No one, after the proof adduced by Ihering in his "*Geist des Römischen Rechts*," can ever again believe that rules of law were brought into existence for the mere pleasure of drawing logical conclusions, and still less that they were so brought into existence for the mere pleasure of completing the steps of a precise dialectic. In truth, Savigny believed nothing of the kind, as is shown by the many expositions which his system of Roman law contains, all pointing at the real objects of rules of law. The distinction mentioned above was only used by Savigny as a means of giving the class of prohibitive laws, in the presence of which international community of law is said to come to an end, a wider scope than truly belongs to it. Savigny, however, required this wider scope, to enable him to preserve many of his propositions which otherwise would have been too universally stated, and he required it specially on the ground that he was still too much occupied with Romanistic conceptions to be able to do justice to the principles of German law, which require quite a different treatment in private international law. It is true that, owing to the far-reaching differences in the moral conceptions of different nations and States, there must be gaps in the international community of law. Our legal

¹ In this sense, see Brusa on Casanova, 2, p. 364.

system can never hold out its hand to help in realising within its territory a legal relation, which from our point of view must be regarded as immoral. But this class of laws must not be further extended. Savigny, however, proposes to reckon among their number, first, all laws in which we can find a politico-economical object; and, secondly, all cases in which our laws do not recognise at all some legal institution of another State. But almost every rule of law belongs to the former of these classes, and thus we should make an end of that community of law on which Savigny has so strongly insisted. An example will make that quite plain. Savigny himself has most energetically maintained that, because the law of inheritance is that of an universal succession to the whole estate, it must be regulated exclusively by the law of the domicile of the deceased, and cannot be subject at once to all the different laws that prevail in the territories through which the different items of the estate are scattered. But politico-economical objects may very well be protected by a diametrically opposite rule of succession.² A different economical effect, for instance, is produced according as you prefer one child of the deceased, say the eldest son, to the inheritance, or allow it to go in equal shares among all his children. Quite different economical results are produced by the Roman order of succession in more distant degrees, according to which the nearness of degree confers a preference, and by a simple ranking of children as in their parents' right, an arrangement which, it is said, may reduce the whole estate to atoms. Indeed, different economical results must be produced according as the term of majority is earlier or later, and the possibility of independent trading thus advanced or retarded; and the same may be said of differences in the conditions of emancipation from a father's authority. In this way we should have to deal with prohibitive laws in questions of inheritance, capacity, and so on, and the application of personal laws would thus be excluded from these subjects; and what would there be left for the legal community of States, or for the extra-territorial operation of personal statutes, to work upon? But as far as the second case, the case of what may be called implicit prohibitive laws, is concerned, it may be that it is intended to take the title of the legal institution in question as the determining point. But to do so would obviously be wrong; for the same title, *e.g.* property in a human being, might be used in two different States to denote legal institutions of such a thoroughly different legal character, that we could not consent to allow the operation of the foreign conditions of things to take place on our territory, as being contradictory to our views of morality. On the other hand, the same legal institution might have different titles in different States. In truth, then, we must always have appeal to the rules of law themselves; it matters not whether we can or will speak of an identity in the legal institutions in question or not.

In fact, the whole doctrine of prohibitive or coercitive laws, as Savigny

² Cf. in this sense Renault, *Journal*. ii. p. 333.

has set it up, is a mere device by which he seeks to deliver himself from the uncomfortable and untenable consequences of what we must call—without doing any violence to the genius of his general conceptions—the very unsatisfactory and untenable deductions which we find in the details of his work.³

The attempt, therefore, of the Italian school to found private international law upon a division of the different rules of law, which does not advance us a step beyond Savigny's division into prohibitive and non-prohibitive laws, must prove a failure in spite of the difficulty of finding the logical flaws, which permeate the foundations of this doctrine, through the dazzling rhetorical polish that covers them.

Fusinato has recently given the best defence of the more modern Italian school, and it can certainly be said that his judgment is more unbiassed than that of any of his countrymen, except Brusa. He is not blind to several of its weak points. In the first place—as Fusinato, too, recognises (*Il principio della scuola Italiana nel dir. priv. internaz.*)—nationality, as a fact in nature, and allegiance to a particular State are, not always nowadays identical conceptions. As the law of the person is to be held to be merely the legal expression of natural facts, *e.g.* of his maturity or his capacity to act, as the case may be, so the same assertion may be made of nationality in the strictest sense, *i.e.* which rests upon descent, but it cannot be made of *Nationalita* in its juristic sense. For, on the one hand, any man may by naturalisation, which is an artificial means, come to belong to a State with which he has no connection by descent; and, on the other hand, the boundaries of States are in many cases not coincident with those of nationality, so that people belonging to various nationalities are united under the same State-authority and legislation. The Italian jurisprudence, however, applies all that it thinks it has proved of nationalities in the natural sense, nationalities resting on the basis of descent, to that nationality in the juristic sense, which is so widely different a thing, *i.e.* the fact of belonging to a particular State.⁴ If it had proposed to take nationality in its natural sense, it would simply be proceeding upon a theory which would be contradictory of existing public law, and purely revolutionary. It does not desire to be guilty of this mistake; but, in avoiding it, it falls into the logical error of confusing its definitions.

Strisower, then, was the first to meet Mancini on this point, Esperson and Laurent carried the opposition further, and Fusinato expounded it still further, in an impartial and valuable fashion. Their point is that in our

³ See, for instance, what Savigny has said on the law of pledge, p. 167, § 368, Guthrie, p. 192. See, on the other hand, Lehr. Journal, ix. p. 262, who very properly expounds the view that, if the institution of adoption does not exist in one country, an adoption which has taken place in another country is not on that account to be declared to be without any legal effect, as being opposed to public order.

⁴ Fiore, *Diritto pubblico internazionale*, ii. § 878. Esperson (according to the quotation given by Fusinato) and Fusinato (p. 28) have protested vigorously against the possibility of

time even those laws which most immediately concern the person, *e.g.* determine his personality, are not in any way dependent on the natural conditions of his development, especially of climate, but are rather the product of considerations of expediency of the most various kinds, or frequently of accidental majorities in the legislative assemblies. Thus Fusinato (p. 50) comes to the correct conclusion, that in the present time even the so-called personal statutes in many cases do not answer to the views of the individual who is under their dominion, as no doubt they did in the old times, when law was allowed to grow and develop quite naturally; and that it may even be the case that in that relation the law of a foreign State may answer the views and the individuality of the citizen far better than his own. Thus he resolutely casts away from him the broken crutch which is pieced together out of the alleged natural identity of the person and the law that controls the person (the law of personal *status*), and deduces the necessity for the general recognition of the so-called personal *status*, in accordance with the law of the home of the person, from the necessities of a legal trade and commerce, which require that the *status* of the person must be uniform, and that it shall not transform itself every time that the person crosses the frontier of another State. But, in doing this, Fusinato has unwittingly abandoned the principles of the Italian school: he deduces his principle for the so-called personal statutes from the necessities of commerce, that is, from the nature of the subject.

Fusinato, then (pp. 60 *et seq.*), expressly declares himself against the high-sounding principle of liberty (Laurent, ii. § 422), by which the law of contracts is said to be ruled. In the sketch of private international law which I prepared for Holtzendorff's Encyclopædia, I declared myself in agreement with the principles which I laid down in the former edition of this book (§§ 66 and 69), and in agreement also with Strisower's excellent expositions, as against the conception adopted by the Italian school and also by Laurent, which pays no real heed in the law of obligations except to the individual will of the parties, which is to be sought out by the judge, or inferred from the circumstances of the particular case. In most cases in the law of obligations, which come up for discussion, the limits assigned by the law to the will of the parties are not in dispute, because there is no doubt that parties have kept themselves within them. But yet, as a matter of scientific principle, the first question is not, What did the parties *de facto* intend? but, What was it within their power to intend in accordance with the law?—*i.e.* to intend in the sense that the law will attach to their intention the legal consequences of a lawful operation of the will, that is, the legal consequences of a compulsitor in one way or another (although not

taking the *nationalita* of the Italian school in that natural meaning. Laurent, ii. p. 109, has certainly strayed in the same direction, when he brings the principle, which has heretofore prevailed in Prussia, that personal *status* should not depend on allegiance but on domicile, into connection with the condition of the Poles in Prussia. As if the same principle did not also prevail over the greater part of Germany—except, for instance, in the kingdom of Saxony—and had prevailed there before the partition of Poland.

always precisely by way of granting decree in an action). The Italian school, and with it Laurent, help themselves over this difficulty by that appeal to the territoriality of the laws of public order, which lies always ready to their hand: we shall come to the discussion of those laws immediately. But this simple juristic error is left standing, viz. that they confuse the so-called dispositive laws, with which we are most largely concerned in the law of obligations, with the intention of the individual parties to any case. "We can only say that, if the parties thought reasonably upon the matter, they would recognise as a general rule as right what the law so recognises, in default of a contrary declaration of intention. We may say, more shortly and more clearly: the so-called dispositive law is that which according to the opinion of the legislator, follows from the nature of the subject, and the result is that, on the one hand, very many consequences attach themselves to a legal transaction, of which the parties never dreamed—what would be the result, if a legal transaction had no other consequences than what the parties meant and wished? ⁵—and, on the other hand, that the regulation of the dispositive law for the individual case may possibly be highly unreasonable (inappropriate)." But if, on the other hand, it were the duty of the law to enquire what in each individual case suited the parties, such a process would mean the end of jurisprudence, and the beginning of simple caprice. It is, then, no trifling matter to confuse the intention of parties in the particular case, although it may not be expressed in words, but may be tacitly understood, with dispositive law.

LAWS OF PUBLIC ORDER, FOR WHICH THE PRINCIPLE OF TERRITORIALITY IS SAID TO GIVE THE RULE: BROCHER'S DEFINITION OF THE LAWS OF *Ordre Public International*.

§ 30. But the new school finds its greatest difficulty in exactly specifying those laws which embody the territorial sovereign power, and limit the law which in other respects is recognised as the *accessorium* of the individual. Fusinato remarks most truly that this specification is all the more important for the Italian school, as it is in this matter dealing with one of its main principles, and not, as in other systems of private international law, e.g. that of Savigny, with an exception to these principles. Fusinato, in the first place, recognises that Savigny's definition is faulty and unpractical (see above, p. 65). But he describes, with as much truth as frankness (p. 74), the expression, "laws which concern public order, *ordre public*," as

⁵ E.g. Non-lawyers, in concluding one of the commonest of transactions, a sale, never think of the question, Who shall bear the *periculum* of the thing sold before the transaction is completed? and even if their attention is drawn to it, they answer simply that it does not often happen that things are damaged or destroyed, for instance, *in transitu*. In this case, there is no such thing present as an individual intention. But, according to Laurent, the freedom of the individual will is the only thing that can decide. See Strisower's excellent remarks, p. 32.

highly inappropriate and ambiguous.¹ Rules of law which belong to *jus publicum* include all such laws as do not give way to the will of the parties (*jus publicum quod privatorum pactis mutari non potest*), include, for instance, all laws that are concerned with *status*. By a definition like this, we should arrive at the exclusion of all laws that touched on *status*, and of the majority of those that are concerned with the law of the family. Fusinato, again, is of opinion, and justly, that the definition of the class as consisting of all laws which touch or concern morality or good manners, is quite as uncertain. All laws which deal with the relations of parents and children, with impediments to marriage, with contracts between spouses, and so on, belong to this class, and thus we come again to an exclusion of foreign rules of law so complete as pretty well to extinguish the vaunted principle of the ubiquity of the recognition of personal laws.² Laurent finally speaks of social law in contrast with private law. But this expression is no better than the other, although Laurent most solemnly guards himself against identifying the "*Droit social*" with the mere interests of society. With such a vague expression as the "interests of society" to use, you might assert as complete a supremacy for the law of the territory as you pleased, for it is always uncomfortable, and in some measure prejudicial, if judges and residents in any State have now and again to inform themselves as to foreign law. But, as Fusinato very truly says (p. 84), if one once gets beyond the region of purely positive law, no distinction can any longer be made between the interests and the laws of society. He gives a complete bouquet of logical self-deceptions,³ by which Laurent, as it suits him, now assumes and now negatives a law of society. Thus Fusinato comes to almost the same conclusion as I reached in Holtzendorff's "*Encyclopædia*," that this whole principle is as yielding as wax and as elastic as india-rubber, and that you can by it prove everything and nothing.⁴

Besides Fusinato, there is no lack of important authorities who have

¹ In his opinion, in which we concur, the phrase used by the Institute for international law in the so-called Oxford resolutions (cf. *Annuaire*, 5, p. 57), viz. "*lois . . . en opposition avec le droit public ou avec l'ordre public*," is no better.

² Fiore, § 168, in fact sets up the proposition that all laws which are intended to preserve morality and discipline in the family are applicable to strangers as well as to natives. But in that case, what is left for the so-called personal statute? (See, on the other hand, Fusinato, p. 76.)

³ One of the most remarkable examples is his frequent assumption (cf. Laurent, iii. pp. 208-511) that if the domestic legislature has carried out a change in a matter of principle in any branch of the law, it has thereby recognised that there is no question of social law or *ordre public* in the matter. Thus if, as was the case in France in 1816, the State abolishes divorce (of course as an immoral institution) in a country where it had formerly existed, it thereby recognises that it is not dealing with public order—a thing that must be maintained inviolate. But the case, as a general rule, is exactly the reverse: we make up our minds to a thorough change in the law because we consider the former state of things socially dangerous, and contrary to the laws of society.

⁴ For instance, in vol. viii. p. 166, the territoriality of laws dealing with public instruction is assumed, the result of which is that the State can compel a foreigner, who is in the country on a mere passing visit, to send his children to a State school. Without further limitations, this is erroneous. See Fusinato, p. 85.

declared themselves at variance with the principle of *ordre public* as one of the main principles of the science.⁵ In the note⁶ the reader will find a small additional selection of specimens of the Proteus-like nature of this principle of "*ordre public*," which is so accommodating and convenient, that is, in cases where, but for it, the juristic inference would certainly be open to doubt. In truth it cannot be otherwise; for each and every law has some relation to the common weal: it is never the case that they exclusively consult the welfare of the individual.

Fusinato (p. 86) finally decides to adopt this formula: he speaks of laws which obviously and mainly (*evidentemente e principalmente*) have as their object morality or political, social, or politico-economical interests. But it is not clear that this formula advances us a step. The laws, for instance, which deal with the equal or unequal division of an inheritance among the children of a deceased parent, or give him a more or less extensive power of dividing the estate which he leaves, have, as their obvious object, politico-economical interests as well. Indeed, it is quite possible that these interests stand in the very first rank, since it is quite conceivable that statutory regulations of this kind were passed for the very object, it may

⁵ Thus Asser, *Revue*, vii. p. 389, says, "*Rien de plus vague en effet que l'idée d'ordre public, de morale publique, de droit public non écrit.*" Clunet, *Jour.* vii. p. 187, "*Cet ordre public si peu défini et d'ailleurs si difficile à définir, cet intérêt assez vague derrière lequel on pourrait abriter le refus de reconnaître l'effet d'une loi étrangère quelconque.*" Clunet goes on to explain that very often there is a prejudice, which declares some particular rule as to a legal relation to be the only one that is consistent with good morals. Duguit, *Jour.* xii. p. 371, "*Nous rencontrons ainsi à chaque pas cette notion vague et flottante de l'ordre public et des bonnes mœurs. On est souvent porté à l'exagérer.*" Vavasseur (*Jour.* ii. p. 9) asks, "*Qu'est ce que l'ordre public? Chose assez variable. Vanité nationale!*" Cf. Folleville, *Naturalisation*, p. 472. Even Laurent, 3, No. 378, says, "*C'est un amalgame de principes qui se heurtent et se combattent.*" And Weiss, p. 517, remarks, "*La notion d'ordre public est par elle-même si obscure, si incertaine.*"

⁶ *E.g.* a judgment of the French Court of Cassation of 5th Feb. 1873 (*Jour.* p. 300), postulates that certain rules as to the invalidity of testaments that have defects of form, belong to "*Ordre Public*," and must therefore unconditionally be applied to testaments even where they have been executed abroad. A judgment of the tribunal of Boulogne, of 20th July 1870 (*Jour.* i. p. 309), lays it down that a clause attached to a foreign contract, regarding the exclusion of responsibility for lost luggage, is opposed to French "*Ordre Public*," and therefore, although the contract was concluded in another country, is absolutely to be disregarded. The Court of Martinique, in a judgment of 18th May 1878 (*Jour.* v. p. 507), counts among the provisions of "*Ordre Public*" the law of succession *ab intestato*, in so far as this is concerned with immoveables. A judgment of the tribunal of the Seine, of 26th July 1877, affirmed by the Cour de Paris on 7th March 1878 (*Jour.* v. p. 606), uses the conception of "*Ordre Public*" to negative the universal or extra-territorial operation of bankruptcy. Again, an appeal to this "*Ordre Public*" proves that a Frenchwoman in France must have the right of guardianship over her son who belongs to the Austrian Empire (Trib. Seine, 5th Ap. 1884; see on this *Lehr. Rev.* 16, p. 247); and again, the English rule of law by which there can be no legitimization of bastards, has been counted as a rule of "*Ordre Public*" in the exclusive sense (Alexander, *Jour.* vi. p. 524), as the immutability of the law of the property of married persons (Code Civ. 1394, 1395) has also been. Cf. *Jour.* xi. p. 42. Glasson (*Jour.* viii. p. 126) holds the law of bankruptcy to be a law of "*Ordre Public*," and in a sense he is right. He goes so far as to describe it as a law of police and public security, but at the same time he desires to claim the character of unity for bankruptcies in international questions.

be, of protecting the authority of the father, or of preventing too minute a subdivision of property as a general rule, and not merely to guard against the partition of particular estates. Again, no one, for instance, will doubt that the forms of acquiring property in land are exclusively determined by the *lex rei sitæ*, and even in cases which concern moveables this is now the prevailing opinion. Is there any better ground for speaking of moral or politico-economical interests in these cases than in those which deal the regulation of succession?

Fusinato takes advantage of this general discussion to enter upon a criticism and an interpretation of the 12th Article of the Statute Book for Italian citizens, which is not very happily expressed. He very properly expresses the opinion that in formulating a principle for a statute book one must be very cautious. That which pleases him most (p. 89) is that which was recently enunciated by Fr. Mommsen (*Archiv. f. d. Civile Praxis*, 61, p. 202, § 19), viz. "Foreign law is not to be applied if its application is excluded by native law, either by the express letter of the same or by its end and object."⁷ But in making an application of this formula, Fusinato passes over on to the ground of the German theory: it is the end and object of the law, *i.e.* the nature of the subject that is to determine.⁸

More satisfactory than Fusinato's attempt to define exactly the idea of those laws that stand in a hostile attitude to all foreign laws is Brocher's attempt in the same direction.⁹ He proposes to make a distinction between the law of *Ordre Public Interne* and that of *Ordre Public International*. It is only the latter that is to bear the exclusive character of which we have spoken, whereas the former is to give place to foreign law when it is at variance with it, and is to apply only to the subjects of its own State, but is to accompany these subjects even when they go abroad. It is true that Brocher has omitted to define with any exactness the criteria by which his distinction is to be tested. But it is undeniably correct, and, as numerous examples given by Brocher himself show, it leads inevitably¹⁰

⁷ This maxim, which may be sufficient for Mommsen, is not nearly adequate for the Italian theory. For Fusinato could never, for instance, deduce from it the supremacy of the *lex rei sitæ* in the law of things.

⁸ Fusinato, at the close of the paper we have cited, points at a new theory which is divergent from that of the Italian school. He proposes to start with the principle of territorial sovereignty, but to admit the citizen of another State into his territory with the quality, with the legal outfit ("*veste legale*") with which he was furnished by his home State. According to this suggestion, the time has not yet come when it is possible to give a satisfactory determination of the question.

⁹ Brocher, *Nouv. Tr.* No. 141 *et seq.* Olivi too, *Revue*, xv. p. 215, says that there are provisions of "*ordre public*" which show a power of operating extra-territorially.

¹⁰ Weiss, pp. 516 *et seq.*, has attached himself to Brocher's view; but as Fiore (§ 28) had already done, he deprecates a more thorough characterisation of the law of *Ordre Public International*, but much prefers to leave the decision to the discretion of the judge. But that is a declaration of the bankruptcy of the whole concern. It is quite permissible, in setting up a theory, to leave the details once in a way to the discretion of the judge, but the leading principle cannot be so treated. The formula enunciated by Brocher (*Nouv. Tr.* No. 143, p. 348) is too vague, viz. "*Il se peut que des nécessités internes, ou certains principes d'un ordre supérieur, s'opposent à ce qu'on laisse cette loi étrangère prolonger son autorité sur le territoire.*" What is the meaning of

to a careful consideration of the end and object of the law—whether that object can as a general rule be attained in the case of foreigners; whether it is prudent to strive to attain it in a question with foreigners; whether legal transactions concluded abroad, or that have to be implemented there, fall under its sway or not; and whether legal procedure as such shall be controlled by the end and object of the coercitive law; whether, for instance, every action arising out of some legal transaction concluded among foreigners in a foreign country must, in accordance with the spirit and aim of the law, be declined by our tribunal. In other words, Brocher's distinction is simply an application of the theory of the German school, which rests on Wächter and Savigny, not very clearly expounded.

PRACTICAL ACHIEVEMENTS OF THE ITALIAN SCHOOL (ITALIAN STATUTE BOOK).
THE MOST RECENT ITALIAN, BELGIAN, AND FRENCH LITERATURE.
(CRITICISM OF PARTICULAR WORKS)—PERIODICALS—ASSOCIATIONS FOR
THE PROMOTION OF INTERNATIONAL LAW.

§ 31. Although we cannot affirm that the principles¹ of the new Italian school are tenable and sufficient, we must, in agreement with Brocher, pay the greatest respect to it for the manifold practical achievements which it has worked out. It is true that the foundation of the so-called personal statutes of nationality (allegiance) is to be found in the *code civil*, and partly too in the Austrian statute book; and, again, the rule as to the equality of natives and foreigners before the law, in relations of private law, is by no means set up for the first time in the Italian statute book. But the former of these two propositions has been, in the hands of the Italian school, set upon a deeper foundation, and carried out more logically—perhaps, as we may hereafter discover, carried too far; and a nation must get much credit for its steady adherence to the latter proposition, and for its championship of it, when we consider how long it suffered under the interference of foreigners in its political constitution. This credit is all the greater in respect that an offensive exaggeration of the idea of nationality, which in recent times has become customary in other quarters, preaches the doctrine of setting foreigners at a disadvantage, and excluding them from the country. Thus the Italian statute book, with its introductory provisions, which were conceived under Mancini's

"*prolonger son effet sur un autre territoire*"? He comes nearer a proper statement of the case when he says (p. 352), "*S'agit-il . . . de droits isolés qu'on prétend exercer dans un pays ou ils paraissent contraires à l'ordre? on peut s'y opposer d'une manière plus absolue.*" We need only put "*actes isolés*" in place of "*droits isolés*," and it will be seen that we have to deal with the contrast between laws, which concern only the permanent subjects of a State, and those that are meant to bind the *subditi temporarii* as well.

¹ Against these, see also Padelletti, *Revue*, iii. p. 471, and Torres Campos., p. 306. The latter, who sees the problem of private international law in the solution of the opposition between the personal and the territorial principles (cf. p. 302), comes very near to the principles of the Italian school, in spite of the controversy he has carried on against it elsewhere.

auspices, generously and intelligently opens its country to foreigners, and even to foreign laws, without departing in the least from the requisite appreciation of its own sovereignty. And so the rich and valuable literature of private international law which we know has developed itself in Italy, although of course it is not all equally valuable;² we have to thank it for excellent general expositions of our subject, and at the same time for subtle and laborious investigations of particular points, all filled with the endeavour to reach impartially whatever is good, from whatever quarter it may present itself, all also free of any narrow spirit of nationality, and concerned to give the most impartial advancement to the general intercourse of nations, and to secure it on the basis of as wide a recognition of foreign law as possible. Finally, the kingdom of Italy has not only already concluded a series of treaties, which have furthered international intercourse, but it has taken special pains to put forward for negotiation more general treaties, with the same object.

We may notice as general expositions of our subjects, apart on the one side from the works we have already mentioned, which are rather devoted to a discussion of principles,³ and on the other from the various discussions on particular points,⁴ which we shall mention hereafter, the following, viz:—

(1.) Pasquale Fiore,⁵ *Diritto Internazionale privato*, 2nd ed. Firenze, 1874 (643 pp. small octavo), a copious work, which makes a thorough use of foreign literature, and commends itself by its thoughtful judgments, and also by its practical views. These latter characteristics are also found in a clearly and concisely conceived work by

(2.) Giovanni Lomonaco, *Trattato di diritto internazionale privato*, 1 vol. large octavo, 232 pages.

The most comprehensive work⁶ which we possess on international law, the work of the famous Belgian law professor Laurent,⁷ in eight volumes, adheres to the principles of the Italian school, and that in a most animated style. The learned author makes an extraordinarily copious use of the literature of the subject, especially that of France and of the Netherlands, reviews the historical foundations of our subject, and undertakes the task of tracing to its foundation every single argument that is adduced for any particular view. This talented work is full of instruction in many

² It is natural that when, as has been the case in Italy with international law, a school of law begins to exercise quite a special power of attraction, a number of immature or borrowed works enlarge the tale of its literature, without in truth enriching it. But such works have their use; they bear witness at least to the living interest of the nation, or at least of the cultured in the subjects which are so often treated.

³ We have also an enquiry by Esperson into the international law of exchange; and a work by Fusinato, on the execution of foreign judgments.

⁴ Here, for instance, we may be reminded of the works of Carle, Norsa, Vidari, de Rossi, and others.

⁵ Fiore is also the author of a more comprehensive work on the operation of foreign judgments, to the first part of which we shall often have occasion to refer again.

⁶ At the same time, this work does not contain the law of process.

⁷ See Brocher's criticism on him in the *Revue*, xiii. p. 531 *et seq.*

directions; it surprises one by its exposition of new points of view and of excellent arguments. It is in truth a marvellous work, and every one who proposes nowadays to take up private international law in a comprehensive way must have respect for it, and esteem it sincerely. But, at the same time, the work is not without its dangers. The author, who in spite of his reading is often entangled in the bonds of the French statute book, sometimes finds it difficult to be fair to other men's arguments⁸ and points of view, and to be just in his historical judgment,⁹ and his criticisms are not free from prejudice and from political, national, and ecclesiastical antipathies. He is fond of compressing his arguments¹⁰ into certain comprehensive expressions,¹¹ and then of working with these in a broad and an unexpected fashion, as *e.g.* with the words *Feudalism* (*feodalité*) and *Realism*. The abundant store of clever and startling thoughts, which, however, are frequently not properly sifted, and look as if they had suddenly occurred to him, give the learned author not infrequent opportunities of confusing the problems which he states, and making their solution more doubtful than it really is,¹² or of struggling after absolutely new and surprising results, in place of the old and tried solutions. Then, again, the author thrusts in long political, social and ecclesiastical discussions, which can hardly be said to belong to the subject, and seems likely to lose himself in repetitions. If these discussions had been omitted, and the book taken a shorter and more concise form, the reading of it would have been less troublesome, and the work would have gained in value.¹³

Durand's shorter work also follows the principles of the Italian school, but it avoids Laurent's exaggerations and condensed phraseology, and is further remarkable for the shortness and pregnancy of expression, as well as for its clearness of thought, and for a certain practical good sense, while Bard's¹⁴ work does not propose to enter on a discussion of fundamental principles, but, taking its stand on certain recognised general rules, it supplies some excellent investigations in points of detail, which are sharply and clearly formulated.

Weiss' work is a prominent treatise, resting again upon the principles of the Italian school, which is modestly described by its author as "*Traité*

⁸ Cf. *e.g.* his peculiar arguments, i. § 417, iv. § 215, vi. § 221.

⁹ The estimate of the historical development of private international law, and the criticism of the English and North American jurisprudence, is a perverted one. On the other hand, Feudalism is described (i. p. 187) as the first source of international law.

¹⁰ Cf. *e.g.* what he says on the rule, "*locus regit actum*," and the forms of the marriage ceremony.

¹¹ Thus, for instance, the divergence of opinions on a very difficult and complicated case (the case of Bauffremont) is used as an argument (i. § 3) to show that there is no science of international law at all.

¹² For example, the ceremony of marriage is to be absolutely considered, contrary to its history, as an *acte solennel*, that is to say, an act with public notification.

¹³ On Laurent's writings cf. the obituary notice by Nys, in the *Annuaire de l'Institut*. 9th year, pp. 42-61.

¹⁴ Not to be confused with Barde; *Théorie traditionnelle des Statuts ou principes du statut réel et du statut personnel d'après le droit civil français*. Cf. on this subject Asser-Rivier, p. 21.

elementaire de droit international" in spite of its rich contents, which are to a considerable extent given over to a comparison of different systems of law. The special features of this work are a clear and concise conception of ideas, a thorough application of literature, and especially that of the French judicatures, practical good sense, and a healthy regard for the necessities of commerce.

The most modern French literature¹⁵ is also very rich in detailed discussions¹⁶ on the problems of our subject. That most excellently edited *Journal de droit International privé*,¹⁷ which was founded in 1874, by Clunet, and is so rich in materials, has contributed in a most marked degree to this growth of literature. It contains original articles, literary notices, and reports of judgments from the courts of all civilised countries, all very practically arranged. It is impartial and international in the best sense. These latter characteristics one may justly claim to the same degree for the *Revue de droit International et de législation comparée*, which has appeared since 1869, founded by Asser, Westlake, and Rolin-Jaquemyns, and now edited by them along with Rivier. It must be admitted that it is not so rich in original papers and in reports of decided cases as the *Journal de droit International privé*, because it serves at the same time for the law of nations and for public law generally; on the other hand, the literary criticisms and the notices which it supplies are very complete.

There are also two scientific societies, which were both founded in 1873 at Brussels, which are occupied with private international law, viz. the *Association pour la réforme et la codification du droit des gens* (open to all), which is in the custom of publishing annually in London a "*Report of the Annual Conference*;" and the *Institut de droit international*, which consists only of a limited number of scientific brethren from different countries. Up to this time (April 1888), besides its original meeting at Ghent, held eleven meetings in different countries of Europe (Belgium, the Netherlands, Switzerland, Italy and the German Empire), and has published its works, deliberations, and resolutions in the *Annuaire de l'Institut de droit International*.^{18 19}

¹⁵ Positivism is represented by the work of the Belgian jurist Haus, which in many respects is meritorious. He proposes to found private international law on the *Droit des Gens*, that is, on its traditions, and, in particular, on the results of the statute theory. However, we may often doubt whether in the conflict of opinions a trustworthy tradition can be found for us to accept. Haus often proceeds with some caprice in his use of the "*Droit des Gens*," and the operation of Savigny's theory of the "seat of the legal relation" may be often noted in his work.

¹⁶ Here Cogordan, Folleville, L. Renault, Lyon-Caen, Constant, and Moreau may be principally mentioned. But L. Renault should not be described as an adherent of the new school; he throws off the statute theory, and proposes to apply in every case "*la loi compétente d'après la nature des choses*" (see especially Jour. ii. pp. 334, 335).

¹⁷ Clunet's short illustrative, and critical remarks on the reports of decided cases are worthy of the best attention.

¹⁸ Besides, the *Revue* is the organ of the Institute.

¹⁹ Cf. the statistical information in the *Annuaire*, vii. pp. 290 *et seq.* and ix. pp. 393 *et seq.*

The comparative science of law or jurisprudence is, of course, an important auxiliary study to that of private international law. The *Bulletin de le Société de législation comparée* (Paris 1872, 16 vols. up to this date), and the *Annuaire de législation comparée publié par la Société de législation comparée* (Paris 1872, *et seq.*), are the most important works for modern times. The periodical edited by Bernhöft, Cohn, and Kohler, which appears in Germany, treating of comparative jurisprudence (1879 *et seq.*), has, up to this time, paid less attention to the law of modern times.

E. PRINCIPLES OF THE PROJECTED INQUIRY.

OUTLINE OF PRIVATE INTERNATIONAL LAW PROCEEDING ON THESE PRINCIPLES.

§ 32. It is now possible and practical to sketch more sharply the principles by which the enquiry that lies before us will be conducted.

In the first place, we are, as we have already explained, of the opinion that to pay regard to foreign rules of law to a certain extent is the legal duty of every State, and is not a matter of mere caprice and goodwill—the duty of every State, that is, which wishes to maintain the commercial relations of civilised peoples. If now and again the word *comitas* is still used for the considerations on which the application of foreign rules of law ought to depend, that is rather a difference of expression than of real meaning.

Private international law, then, as it is to be inferred from what has been already said, is not a product merely of the sovereign legal system of each particular State, but is a result of the nature of the subject itself, claiming recognition as in a sense necessary, a result of the requirements of commerce, and of the reciprocal recognition of their legal systems by the different States. No doubt each individual State may to a certain extent permit itself to deviate from the rules of international law, and these deviations, however perverse they may be, are for the time positive law for that State, which can be carried out so far as the sphere of its power in fact extends.¹ But capricious deviations of this kind generally bring great disadvantages in their train, even for the State which allows itself to practise them. They are not truly law, any more than the deviations from the law of nations in its technical sense, *i.e.* public international law, which a State may allow itself to practise, are law, although it may see that these deviations are carried out, so far as its own power extends, by its officials and official machinery against private persons.

The material principle of private international law, as we have figured it, requires no further sanction from special statutes or international

¹ The third proposition of Torres Campos' conclusions (p. 308) is intended to express this, viz.: "Every State has its own idea of law, and must have it, and can only apply force to protect what it so understands to be the law."

treaties, because the nature of the subject, by its inherent reasonableness as a principle, will obtain recognition and prevail by its own strength. But that principle may no doubt be modified in many points by the law of custom and special treaties. The principle is simply the nature of the subject, in the sense in which we are assisted to recognise it by means of traditions and propositions of customary laws, which serve as landmarks and finger-posts. It is possible that without such assistance we should be left too much to grope about among uncertainties. But, fortunately, they are not altogether wanting; *e.g.* there is the proposition that foreigners, as a general rule, have full legal capacity in the relations of private law; there is the rule *locus regit actum*; and specially there is the proposition that legal process is not meant to create new rights or to destroy existing rights, but merely to declare rights which already exist: with the aid of this proposition, we ensure protection of vested rights.

But in our enquiry we must not start from the idea of the "legal relation." To do so would be to proceed in a circle. For in order to know whether certain facts present or bring into existence a legal relation, we must measure them by some particular statute or rule of law as the regulative authority on the subject; that is to say, we must know beforehand the rule of law or statute by which they are to be controlled, and that is precisely the thing which for the time we do not know. Accordingly, Savigny's much used proposition as to the seat of the legal relation, is in itself as wrong and as misleading as the theory of vested rights which he himself attacks. We must rather start from pure facts or from legal relations, the existence of which does not depend on their being recognised by private international law, relations which are supplied to us by the law of nations in its narrower sense of public law. Now, if we start from that point—and it is a proposition of the law of nations that every State has a certain territory—the facts we require can only be, *first*, the actual place where a person is found; and, *second*, the actual place where a thing is found in the territory: to these we add the legal relation of the law of nations, that persons stand to States not merely in that relation which is produced by their actual local situation, but also in a relation of permanent loyalty on their side, and a certain permanent protective care on the side of the State to which they belong: a relation which is not dissolved by a temporary or merely passing stay in another State. In other words, the local situation of a person or a thing, and the citizenship or domicile² of a person (which of these two relations is to be decisive, we leave undetermined at present), are the only criteria on which the determination of the questions with which we are here concerned can be founded, if we wish to avoid falling into a *circulus vitiosus*. The idea of an "act"³ is not at this point

² The domicile of a person is in the same way a condition of the possibility of a private international law, and not a consequence of it.

³ Torres Campos (p. 300) makes the solution of the question more difficult for himself from the fact that he takes the idea of the "act," as well as that of the "person" and of the "thing," as a starting-point.

within our reach, and for this reason. We cannot determine *a priori* whether this or that sum of a man's movements—capable as it is of infinite sub-division, but also capable of being at pleasure considered as an unity, along with all its antecedent conditions and its consequences, which again in the same way may be united or divided at pleasure—is in a juristic sense an unity, or an act. We can only learn this by trying it by the test of some particular positive law or statute, and that is precisely the thing of which we are in search.⁴

There is only one act⁵ of which we make an exception, and it, by its very nature, is assigned to the territory of some particular State: that is procedure: procedure is truly an act of the court, and every court by public law belongs to a particular State and its sphere of law. The local situation and the citizenship (or domicile) of persons, the place of things and the place of legal procedure, or of the particular lawsuit, as the case may be, are then the facts on which alone the determination of the competency of the different legal systems or legal authorities can be made to depend.

The fact that, as a general rule, a person or a thing, by changing his or its local situation, comes under the dominion of a different territorial system of law and legal authorities, by no means justifies us in inferring that he or it is subjected at once to all those various rules of law which are in force in this territory. That inference is no more legitimate than to suppose that it follows, from the ideal relation of subjection which is based upon the nature of a legal process, that the material law which prevails at the seat of the court must necessarily control the legal relation which is in debate before it. On the contrary, what we must say is this: the local situation has the effect of placing persons and things within the grasp of all those rules of law, the object of which is to seize upon all persons and things that by any means whatever are found on their territory. There are certain rules of law which, no doubt, attach themselves to all persons and things at once, the moment they enter upon their territory, as, for instance, the rules of law which concern the immediate protection of persons and things against crime, and those which are concerned with the maintenance of the state of possession in things, and so on. But, in the case of other rules of law, we should give them an absurd application if we were to assert they are to be brought into force

⁴ If, as we proceed, we speak for shortness' sake of the law of the place where the act is done, that means the law of the place in which a person was when he spoke the words that are alleged to be decisive, or wrote them, and so on.

⁵ Whereas the local situation of the person or the thing exemplifies a real relation of subjection to a particular territorial system of law, we might say that a process is merely an ideal relation for the purpose of enquiry. As a fact, every court which affirms its own competency, and does not in any measure decline the decision of the case, necessarily proceeds upon the view, that the persons who appear as parties, or the things with which it is to deal, are, in so far as this legal issue is concerned, under its power. This view may be incorrect, if the court has no real power of compulsion because the persons and things are in another country, and that other country will not lend its compulsory powers for the execution of the judgment.

simply because the persons or things, as the case may be, have come into the territory. In such cases we must rather assume that the legal relations which were established by their former local situation, and the system of law that prevailed there, are to continue in spite of the change of locality. This is the true meaning of the theory of vested rights in private international law, although, no doubt, it is a narrow meaning. We cannot exalt this theory to the rank of a fundamental principle, and we cannot go so far as to say that a legal relation is to be recognised and upheld everywhere, even if we assume that its origin falls to be adjudicated upon by some particular system of law which approves of it. The contrary is proved by the familiar instance of the refusal of countries, in which slavery does not prevail, to recognise the relation of master and slave which has originated in another country. But this much is true: if we desire a regular intercourse with foreign countries, if we are minded to recognise the legal system of these countries within their own territory, we are barred from saying that, because a thing or a person which formerly was present in a foreign country, fell under or entered into some particular legal relation in accordance with the system of law which prevailed there, and because the same result would not have happened, or happened in the same way, in our own country, therefore we refuse to recognise that legal relation.⁶ We must, then, when we have to deal with some question of private international law, that is to say, with a case in which there may come to be a question as to the application of a foreign law, or of the laws of different territories, put the points more exactly, thus: *First*, what are the facts which can possibly be brought into consideration for the decision of the legal point; and, *second*, in what territory the things or persons, as the case may be, with which the legal relation is concerned, were at those points of time at which each of these facts came into operation, or in the case of persons, to what territory they belonged at those points of time, either by virtue of their allegiance or of their domicile, as the case may be?

Thus it may no doubt happen that the legal relation which is brought up for decision is, in truth, the product of a whole series of influences, each subject to a different territorial system of law.⁷ The chief difficulty in determining questions that belong to private international law lies in the separation of these successive influences one from the other, and in the solution at the same time of all the difficulties that have been created by the different systems of law, the last of which is presented by the

⁶ In so far as it is possible for the true theory as such to be laid down in a statute book, this has been done in the revised statute book for Zürich of 1887, § 1. "The private law of Zürich binds, primarily and solely, persons, natives or foreigners, who live in the Canton of Zürich or are temporarily present there, or seek a legal remedy there; and it controls all private relations which come into operation in the country, except in so far as the peculiar nature of the special legal relation requires either the application of a foreign law upon this territory, or the extension of the law of this territory to a foreign country." The first part of this paragraph would be better deleted.

⁷ In this connection, see the excellent remarks of Torres Campos, p. 301.

institution of the process,⁸ or it may be the execution of the decree.⁹ For instance, a right of pledge is validly constituted over a thing which happens to be in territory A, according to the law of A; the thing is subsequently brought into the territory of State B, and here the owner, who lives in this State, becomes bankrupt; the right of pledge itself is to be tested by the laws of State A, while the rights of preference in the bankruptcy are to be tested by the laws of State B. For, as regards these rights of preference, we have to deal with the effects which subsequent legal circumstances, developed after the thing came into State B, have had upon the right of pledge already constituted. And in every case that legal system, with all its effects, to which the thing by its actual local situation is subject in the later stages, or in the last, as the case may be, must be allowed the precedence. So that, in the ultimate resort—and on this point all are agreed—the result which the law of the tribunal really desires is that which must prevail.¹⁰ The reason of this is that, in every practical decision, the question is not about a right which once on a time existed, or at some future time may come to exist by some change of locality, but about a right which is or is not to be found in existence at the moment; and so the law, under whose jurisdiction the question last falls, will always have a preponderating voice in its decision.¹¹ But, of course, it may be that the last change of locality, or many of the changes, are unimportant and inconsiderable because it cannot possibly be supposed that any circumstances of legal importance occurred subsequently to these changes. For instance, some one has acquired a thing in A, and then has simply carried it about with him on a journey, in the course of which there has been no change of possession, and has brought it back again with him to A or to X, where it is proposed to claim it from him. In this case the law of A or of X may be taken into account, but not the law of any one of the intermediate places. From all this it will be seen how inappropriate and confusing the figure, which Savigny uses, of the discovery of the seat of a legal relation, is. In very many

⁸ A process does not, it is true, require the presence of the person or thing in the territory of the court; but this exception simply rests upon the fact that by modern law the principle of the so-called direct representation is recognised. This is, in truth, a fiction, of which the older Roman law knew nothing, since it treated the procurator as the party, and only in a roundabout way brought the results of the process back again to the true original parties.

⁹ Thus also Westlake, very truly, says, § 178: What alone private international law gives or can give is a rule "depending on the total result obtained by appreciating each fact in the case according to the law appropriate to it." Westlake, in opposition to the prevailing doctrine of English jurisprudence, makes this very proper application of what he has said, that the question as to the legitimacy of a child is not to be determined by the *lex rei sitæ*, because in the process the final question is as to an inheritance which is to be settled according to that law, but that even for this purpose the antecedent question of the legitimacy must be determined according to the personal statute of the child or of the father, as the case may be.

¹⁰ See above, § 24. The law of the court that is to carry out the sentence may, however, to a certain degree take precedence of the law of the court that tries the case.

¹¹ There is some agreement here with the conclusions of Torres Campos (p. 309), which in my opinion are not quite distinct. He lays stress upon the physical force of the one State or the other; but then speaks of a greater and a less physical force affecting the legal relation in such a way that the former must prevail.

cases, as we see, the legal relation has not an exclusive connection with one territorial law only, but with many,¹² and it is one of the greatest mistakes which can be committed, in solving the problems of private international law, to refer the whole series of questions connected with any concrete legal problem to the law of the territory that governs the last of the series, for no better reason than that it is the last of the series that is so governed.¹³ The following considerations may serve to clear up the great problem of private international law.

In ancient times the legal authorities of the different States maintained a strictly exclusive attitude one to another, something like different spheres, which demolish everybody that passes into them from another sphere, or resolve it into its constituent atoms. As a matter of principle, they refused to recognise the legal stamp which a person or thing had acquired in another State. This is the view which lies at the bottom of the deliverances of the Roman law as to persons or things that come into the power of "*hostes*." In modern times all this is changed. Men desire an orderly and peaceable intercourse with each other, and on that account, as a matter of principle, they recognise the legal stamp which a foreign country has impressed on a person or thing, while that person by his allegiance or his domicile, as the case may be, and the thing by its local situation, belonged to that foreign country. But this recognition, as matter of principle, of the legal stamp or character which has been impressed by the foreign law, does not of course prevent the person or thing in question from being subjected to the influence of the legal system of our country, if the conditions necessary for that subjection are present. In other words, what we have to ascertain is the effect to be given to each of the legal systems concerned, which shall correspond to the nature of the subject under consideration, in conformity with the local situation, or the domicile of the person in question (or it may be in conformity with his allegiance or the law of the tribunal that is trying the case).¹⁴ This principle of decision according to

¹² Consider, too, this example, viz.: A, who, like his son, is a citizen of State X, finds himself with his son in the territory of State Y; the law of State X will decide whether A still has paternal authority over his son, but the law of State Y will decide whether in virtue of that authority he can throw his son into gaol.

¹³ This mistake is committed by the older writers, and partly at the present day by the jurisprudence of England and North America, in cases where the final problem concerns a real right in an immovable article. In this connection it is frequently committed by Haus, cf. *e.g.* § 146 *ad fin.* and § 147.

¹⁴ See, too, the just observation in a judgment of the Supreme Court of Austria, of 7th March 1883 (Collection of civil judgments, edited by Unger, Walther, and Pfaff, vol. xxi. No. 9338, p. 123): "Legal transactions and contracts of all kinds, which are concluded by foreigners in a foreign country, are not, by that circumstance alone, withdrawn from the jurisdiction of our courts, but may in any particular case be subject to the determination of Austrian courts, if it is proposed that they shall exercise in Austria some legal effect, or if a decision seems to be demanded by considerations of public law." In accordance with this, the State can certainly, by virtue of its sovereign power, stamp on every person or thing found in its territory a legal character, and, strictly speaking, it does this invariably in certain relations, although these relations do not always come into account. (For instance, the general duties and rights of a person to his fellows, and to the commonwealth, change at once so soon as he

the nature of the subject is not any capricious discovery, and is no mere theory; it is really recognised law, although perhaps in many cases it may be difficult to ascertain with certainty. Could it possibly be said that a decision contrary to the nature of the subject—an exaggerated application of the native law, it may be, of the tribunal that has cognizance of the case, which should not correspond to the nature of the subject—was law, or better law than what we have proponed as the law? We can conceive how much mischief might be done by a system of law which should undertake to settle questions of international law by special enactments, not in accordance with the nature of the subjects with which it had to deal. We can also see how cautiously international treaties should be concluded, these treaties from which so many persons, accustomed exclusively to lean upon the crutch of positive enactments, expect that the true progress of private international law is to come. As soon as we pass beyond a few general, and therefore vague propositions, and out of the region of a few subjects, which lend themselves more easily to an arbitrary regulation (*e.g.* copyright, patent right, regulations as to citizenship, etc.), we discover how much harm may be brought about by an attempt to fix details upon a theory which is not clearly conceived, to say nothing of the case where the theory is entirely wrong. This will lead invariably to determinations contrary to the nature of the subject, that is to say, contrary to the logic of legal institutes, and directly opposed to the requirements of commerce.

In truth, very few legal topics stand so little in need of detailed regulation by enactment as private international law. Those countries, in which it is committed in substance to the care of scientific jurisprudence and practice, have little cause to envy such countries as France, where jurisprudence and the practice of the courts have to maintain a fight in the interests of commerce, and even of the French legal system, against legislative enactments which in part are faulty. The Italian legislature, with a wise self-restraint, in many points rather hints at the principles than completely sketches them.

COMPARISON OF THESE PRINCIPLES WITH THOSE OF THE NEW ITALIAN SCHOOL.

§ 33. Our conception of private international law, we must admit, stands in opposition to some extent to that of the modern Italian school. There is perhaps an inclination to object that a theory, which proposes to treat persons and things according to the same principles, is not a worthy or a correct conception. But let it be observed that, even according to the theory maintained by us, this well-marked distinction exists, that in the case of the person it is not merely the actual local situation, but the

sets foot on another territory.) We may, in truth, speak of a second or counter stamping. Hamaker, in his treatise, "*Das Internationale Privatrecht, seine Ursachen und Ziele*" (p. 25), overlooks this.

allegiance (or domicile, as the case may be), which is already in existence, that has been described as possibly the decisive element in very many aspects. Again, it may well be that the legal systems which have to be taken into account, will with one voice describe the place of the thing or things with which we happen to be dealing as irrelevant for certain legal consequences, so that the things are, for instance, regarded as an *annexum* of the person, who up to a particular day was undoubtedly in right of them. Or it may be that, without regard to the place of the thing, they with one voice will pronounce the will of a particular person to be decisive as to the fate of the thing. In this way the preponderating force of the so-called personal statute will display itself. But truly this is not an inference from any abstract principle of international law, which cannot be proved to be true: it is a deduction from the meaning and the spirit of the particular territorial systems of law which are concerned. If this spirit changes, the practical results of private international law must change with it. If, for instance, the Italian statute book should again give up the principle of an universal succession in the law of inheritance, and should betake itself again to the principle of the older law of succession known to the German law, with a distinction between immoveable and moveable property, the new Italian doctrine would certainly not be able to prevent the *lex rei sitæ* from asserting its supremacy in the determination of questions of succession in immoveable property in Italian practice. The principle of private international law must be so conceived that, assuming the recognition of foreign legal systems in their own domain as a fundamental proposition, and assuming also the recognition of the legal capacity of foreigners, it shall be able to explain different historical developments, and even the possibility of contemporaneous divergencies in development, where the domestic legislation of a State differs widely from the usual rule, as, for instance, in the case of the law of England and of North America. But the Italian school fails in this, that it cuts the principle of international law too fine for the present state of those countries where the theory of the Roman law is still supreme, and too fine sometimes even for the theory of the *Code Civil*,¹⁵ of which the Italian statute book presents a new edition, although it has been in many ways undoubtedly improved or modified.

But in reality the division of the whole law into personal statutes and laws of public order is in many cases, where particular cases are investigated, a mere formula or fashion. The authors of the new school, who give us the more thorough discussions of the various subjects, make the true object of their investigation the meaning and the spirit of the particular laws which they have to consider. They ask themselves, for instance, what would be the consequences, if the adjudicating court should or should not apply its own domestic law to some legal act done in another country—a marriage, for instance, or a divorce—that is to say, they decide

¹⁵ *E.g.* in asserting the absolute necessity of an *acte solennel* for a marriage,

according to the "nature of the subject." We find, then, in the most careful and thorough authors, that their results do not differ from those that will be attained by following our method. German jurisprudence is not infrequently led astray by Savigny's erroneous illustration of the "seat of the legal relation," by means of which, as has been said, we can prove everything and nothing.¹⁶ The new school of Italy, France, and Belgium, however, sometimes is exposed to the temptation of preferring an appeal to that formula which they have set up to a thorough and calm consideration of the whole subject. This is particularly the case with Laurent.

OUTLINE OF A THEORY OF PRIVATE INTERNATIONAL LAW.

§ 34. The following sketch of legal principles in their international aspects will serve to show clearly what are the problems of private international law and the method of solving these, which we propose to follow. But it must be noted that detailed inquiry will alone solve the question, what particular legal propositions belong to this or to that branch of the subject, and this outline cannot be directly employed to determine particular legal problems. This remark suggests a further observation, that in strictness there should be a special inquiry into the international relations of each separate rule of law: such a task, however, would never be brought to an end, so infinite is the list of rules of law, and so constant are the changes in the law itself. Most rules of law, however, are merely logical deductions from general principles, for even new positive enactments are logically and historically bound up with others, and thus we can by a natural process pass from the international aspects of one rule of law to those of another which is akin to it. But though such a process is permissible, it is as little possible to lay down general rules for it, as it is to say generally how the language of statutes is to be read. Interpretation, as Savigny remarks, is an art to be applied to each case by itself. Our task must therefore be considered to have been exhausted if, in the course of the enquiry, we shall discuss those prominent questions of detail which have been found of special importance in international intercourse, and with which the authors on the subject, as well as the long list of judgments that are before us, are principally concerned.

Finally, it should not be left unnoticed that in some points a special law of custom has modified the logical deduction from the nature of the subject, and of course all reference to this law of custom, just because it concerns merely isolated points, belongs to the special inquiry into the various branches of the subject.

The laws which concern the incapacity of certain persons to act,¹

¹⁶ Could we not, for instance, even go so far as to say that, where a suit is depending before a particular court, the seat of the legal relation is in that court? Against this theory of "the seat of legal relations," see particularly Mancini, *Journal*, i. p. 287.

¹ From this must be distinguished the laws that concern capacity to have legal rights; on this point we accept the generally recognised rule—viz. that foreigners and natives, in relations of private law, have the same capacity to have legal rights. See below.

have for their object merely to provide a permanent protection for these persons. In conformity, therefore, with the nature of this subject and the object of the laws that are concerned with it, subjects of our State remain under the sway of our laws, although they may be temporarily resident in a foreign State, and remain so in respect of all their property, even although it may lie in a foreign country. On the other hand, this object cannot be attained in the case of strangers who have only a temporary residence in our State, or happen to have property there. Subjects of our State, therefore, will be treated before our courts as of no contracting capacity, even although they may have entered into contracts abroad; and, conversely, strangers will never be treated as incapable of contracting by our courts, because, according to our laws, they would not possess such capacity.²

The object of laws relating to things can only be attained if either the law of things that prevails in the domicile of the parties interested, or that which prevails at the place where the transaction takes place, are left out of account; but, at the same time, the design of the legislator can only reasonably have reference to property that is situated within his territory, and so the *lex rei sitæ* alone rules.

In the law of obligations, in so far as it deals with legal transactions, those rules of law, which will not give way to the desire of the parties to dispense with them, are to be distinguished from those which do not come upon the scene except when parties have failed to declare their desire to be otherwise, a thing which does not always require to be expressly done.

The rules of law of the former kind have, as a general rule, the protection of the debtor as their object: thus as a rule we must assume that their object is that they shall be applied to obligations, which have been undertaken by natives to foreigners even when in a foreign country. But this is only a general rule, which necessarily suffers very many exceptions. For it may be that we should attribute a less absolute character to this measure of protection. We may have to say: other facts and circumstances exist in the foreign country, as to which the foreign system of law is the best judge, and an appeal to the restraining domestic law of our subject, as against an obligation which he has assumed in a foreign country, may possibly be contrary to the *bona fides* of the rules of commerce. In this way a judge even of our own country may sometimes come to the conclusion that an enactment of his own law, which so confines the desire of the parties, is not applicable to the case of a legal transaction on which a citizen has entered in a foreign country; while it is quite reasonable to suppose that a foreign judge will come all the sooner to that conclusion, if there is no such restrictive provision in his own law. On the other hand, the character of a provision which so restrains the wills of

² These logical conclusions are modified by a general consuetudinary law for the States of Europe, as we shall afterwards have to remark.

the parties may be so absolute that we are forced to declare that this provision has application to all obligations, wherever and between whomsoever they may be entered on, if any attempt is made to enforce them before our courts.

As far as legal rules of the second kind are concerned, the parties may as a matter of bargain subject themselves to any territorial law they choose. If all such declaration is wanting—a declaration which may, no doubt, be inferred from the actings of parties—then again the nature of the subject must decide. That is to say, we must enquire what law the parties would probably have had in view, if they had considered the matter reasonably.

Obligations *ex delictis* arise from offences against public order in the proper sense; this public order must rule in its own territory, without respect to any other considerations. These obligations, therefore, as a matter of principle, are subject to the place where the act was done.

The aim which the law of the family has before it can only be attained if the subjects of our State, even when temporarily absent abroad, remain under its authority; and conversely, it would never be attained if it were to be applied to persons that do not permanently belong to our State, and are only temporarily resident in it. The law of the home, therefore, claims authority in such questions.

According to the axioms of Roman law, the heir represents the person of his predecessor in all legal questions relating to his property. This entire personality, with all the relations attaching to the property, can, as a legal conception, exist only at the centre of its legal activity, and therefore only at the domicile of the person, or in the State to which he permanently belongs. The transmission, therefore, of the legal person of the predecessor to the heir takes place according to the law of succession prevailing at the domicile or the home of the predecessor. On the contrary, by the conception of English law, the law of succession, so far as immovables are concerned, is merely a special variety of the law of acquiring things; and therefore by English law the *lex rei sitæ* rules.

The law of process prescribes the conditions and the forms under which the sovereign power of the State shall set itself in motion to ascertain and to vindicate private rights. And from this the converse follows, that the State will not set itself in motion under any other conditions or forms, and therefore, in questions of process, the law of the place where the tribunal is, is to be applied.

APPENDIX I.

LAWS OF INDEPENDENT STATES, AND PARTICULAR SYSTEMS OF LAW WITHIN THE BOUNDARIES OF ONE STATE.

§ 35. We have already noticed that private international law has also to concern itself with the fact of different territorial legislatures, and different systems of law, being recognised within the boundaries of one

State. The question may be asked whether any problem requires a different answer in such a case from the answer it will get in a case where the laws of different independent States are the subject for consideration.

This question¹ is answered by the older authors almost without exception in the negative. Sometimes this is by implication, in respect that they take the examples which they select for use now from different particular systems of law in one and the same State, and again from the different laws of separate States, and decide both on the same principles.² Sometimes they answer the question expressly;³ and in modern times the overwhelming majority of authors express themselves to the same effect.⁴ Feuerbach,⁵ Puchta,⁶ Pütter,⁷ Maillher de Chassat,⁸ and especially Wächter,⁹ demand an entirely different treatment for the particular laws of the same State, and the laws of different States.

No reasons are for the most part given by the supporters of either the one opinion or the other. The supporters of the latter opinion do not, as a general rule, say wherein the difference consists; only Puchta, Feuerbach, and Wächter express themselves somewhat more distinctly.

Different particular systems of law may arise within one and the same State in three different ways:—

First, A territory which formerly was independent, or belonged to another State, is incorporated with the State in question.

Second, The State authority concedes autonomy to a certain extent to a particular district.

Third, The one State authority passes a law applicable only to a particular division of the country.

In the case of the incorporation of an entire State or of a province, in the first place, the supreme administrative and legislative authority passes to the State which acquires it. The functions of those factors which have up to this time made up the supreme power of the incorporated State are extinguished with it, and, as a matter of public law, from this time onwards the incorporated territory is represented by the State which acquires it. No other changes, however, are matters of course; they rather depend on

¹ Many pass over the whole question, e.g. Schäffner, Felix, and Story. We may conclude that these authors see no distinction between the two cases.

² As early as *Bartolus*, in L. i. C. de S. Trin.; Albert Brunus *de Stat.* art. 6, §§ 3-5; Argentaureus, art. 218, gl. 6.

³ Burgundus, i. § 45: "*Non fortassis vis est quod Principis auctoritas visum leges firmaverit.*" Huber, l.c. § 11; J. Voet. *de statut.* § 1 *ad fin.*, Titius, i. c. 10, § 59; Mevius, *Decis.* ii. 185; Boullenois, i. p. 521.

⁴ Zacharia, in Elver's *Thémis*, ii. p. 96; Hauss, p. 11; Merlin *Rép. v. autorisation municipale*, § 10 *ad fin.*; Roysker, *Wörterb. d. Privatr.* i. § 81; Phillips, *D. Privatr.* i. § 23, p. 186; Beseler, § 38; Gerber, *D. Privatr.* § 32, note 3; and especially Savigny, p. 27, § 348; Guthrie, p. 70; Unger, § 22; Windscheid, § 34; Stobbe, § 29, p. 299; Muheim, p. 98.

⁵ *Thémis*, p. 283.

⁶ *Pandect.* § 113.

⁷ P. 20, *Archiv. f. d. civil praxis*, vol. 37.

⁸ § 201 *ad fin.* 227 (p. 308).

⁹ i. p. 274, note 80, ii. p. 3, and especially *Pandect.* i. § 31 (end).

the provisions which the acquiring State has made—possibly, too, they may depend on the conditions under which the acquisition took place.¹⁰ This practice of public law, which has been followed in the most recent times,¹¹ allows the acquired territory to pass over into the possession of the State which has acquired it, for all the purposes of public law as a whole, with all its legal system complete, although it does not by any means forbid a gradual approximation of the legal condition of the one State to that of the other. The opposite view could only be carried out in a case where the legal conditions of a country were in a very primitive state. Indeed it points at the acquisition of territory under public law being treated on the same principles as the acquisition of an estate under the rules of private law. If the same person acquires two estates, which up to that time belonged to different owners, the special legal relations, such as servitudes, which up to that time belonged to the one as against the other, are no doubt extinguished. But if, putting aside the supreme power of the constitution, the legal system of the incorporated State remains standing, while of course that of the incorporating State also does so, each must continue to possess the same force and meaning in its relations towards the laws of other territories that differ from its own, for if it did not it would have suffered a change. Legal propositions which imply the rejection of all other legal systems, the so-called coercitive laws, such as the proposition that no compulsitor can be used to enforce an undertaking to marry, do not cease to have their full effect, either in the one territory or the other, merely because both territories are united under the same supreme authority. In the first case, then, which we have put, the theory which proposes to assign a peculiar treatment to the laws of the provinces of an empire, must be rejected as in contradiction of the proposition to which reference has just been made.

In the second case, the case where an autonomy has been specially constituted, the particular district will be recognised by the supreme authority of the whole empire State as independent, in so far as the law in question is concerned. It follows, from this independence, that in the case in question a province will be regarded in the same light as an independent foreign State, and we must return the same answer to the question in this case as we did in the first case, and as we must do in the third case, the case, that is, where some particular law is enacted by the State as applicable to a particular district only.

What looks like an exception must be recognised in the first case, viz.

¹⁰ The subjects of the acquired territory, as a general rule, are no longer held to be foreigners in the State which acquires them, although even this consequence is not absolutely necessary, as we shall see below. (See the doctrine of Naturalisation.)

¹¹ Extracts from a number of interesting judgments of the Italian courts, upon the questions here considered, are given by Norsa, *Revue*, vi. p. 254. A judgment of the Court of Cassation at Florence, on 20th June 1868, claims an *ipso jure* operation for political laws (*i.e.* laws that serve to carry out the constitution) and for international treaties in the newly acquired territories. Cf., too, the judgment of the Court of Cassation at Turin, of 30th Sep. 1875 (*Jour.* iii. p. 217, and the older French judgments there cited).

when the application of some rule of law is made to depend on the person whose rights are in question being a native or a foreigner. All the inhabitants of the newly acquired province are regarded as subjects of the State, and therefore, in the case in question, a different rule of law from that formerly applied comes into play. But this is no alteration of the rule itself, it is merely an alteration in the circumstances of the individual who is concerned.

English practice offers numerous examples of the law of a dependent province or colony being treated on the same footing as the law of a foreign country.¹² Judgments pronounced in Scotland, for instance, are not recognised in England as English judgments;¹³ and in a well-known case a married man, who had obtained a divorce from a Scottish court and afterwards had married again, was condemned for bigamy because the English court did not recognise that divorce.¹⁴

In the territories of the Russian empire, too, various territorial systems of law are in force, but one does not observe that any distinction is taken between these various provincial systems of law and the laws of foreign States.¹⁵ In such matters, German practice recognises no distinction apart from the question as to the execution of decrees.¹⁶ But on this subject of execution certain considerations of reciprocity and retaliation come into play, which are truly of the character of matters of public law.¹⁷

The arguments against our view used by Pütter and Mailher de Chassat are quite vague, particularly as neither of them ever points out in what the difference of treatment in the two classes of cases consists.

¹² An interesting decision of the Court of Cassation at Turin, on 27th March 1885, corresponding entirely with this view, is reported in the *Journal*, xiii. p. 617. [By the Judgment Extension Act of 1868 (31 and 32 Vict. c. 54), judgments of the Supreme Courts of one of Scotland, England, or Ireland, will have the effect of judgments of the Supreme Courts of the other two if duly registered, as directed by the Act, in the other two territories. This enactment applies to decrees in absence as well as to decrees *in foro*, unless when the decree in absence is pronounced in Scotland after jurisdiction has been founded by arrestment.]

¹³ Burge, iii. p. 1057.

¹⁴ Burge, i. p. 672. [Lolley's case, 1812. Russ and Ryan, p. 237.] The judgments of the Court of Cassation at Paris of 18th Thermidor, *anno* 12, and 12th August 1812 (Sirey, xii. 1, p. 73, and xiii. 1, p. 226), are to the same effect. The first is to the effect that the union of two countries in one State does not make judgments pronounced in one of them before the union capable of execution in the other, and the second to the effect that the union of two countries under the same sovereign in the same way does not touch this question, although the judgments in both countries run in the name of the same sovereign. A judgment of the Supreme Court at Berlin, of 5th August 1841 (Decisions, ix. pp. 381-391): "According to § 4 of the introduction to the Prussian A.L.R., the subject of a foreign State, if he lives in Prussia, is to be judged by its laws, and if two different systems of law are in force in different parts of Prussia, the obligation of reparation is to be regulated by that system under which the act which caused the damage took place."

¹⁵ See the paper by Lehr: "*De la force obligatoire de la législation civile russe au point de vue du droit international*" (*Jour.* iv. p. 205).

¹⁶ See, below, the doctrine of the execution of judgments.

¹⁷ Cisleithanian Austria and Hungary are counted as two foreign States *inter se* in so far as civil questions are concerned; there is an Austrian and a Hungarian citizenship. Cf. Vesque von Puttlingen, p. 33.

According to Feuerbach, a provincial system of law is given, not to the province as a geographical district, but to its inhabitants, and the geographical boundaries are only named in so far as by them a certain section of the subjects of the State, on whom these laws are to be obligatory, is intended to be described. According to this view, a measure of police confined to a province would affect none but inhabitants who were domiciled there, and the inhabitants of the other provinces might transgress it with impunity: the system of personal laws would be recognised in the case of provincial systems of law differing from each other.

Puchta's opinion is that, in cases of conflict between different provincial systems, that which is required by the nature of the subject is to have its full effect; whereas, where the systems of different States come into conflict, the application of the foreign law constitutes an exceptional rarity, since the judge's duty is to apply none but the law of his own people and his own State. But, in the first place, the reason why the judge applies a foreign law is not that it is the ordinance of a foreign power, but because his own legal system desires that the case in question shall be determined by foreign law. In the next place, a judge appointed to any particular province is just as much bound to apply the law that is recognised within its bounds,¹⁸ as the judge of a foreign State, in which there are no particular provincial laws, is to accommodate the rule of his decisions to the laws of his own State.

In Puchta's view, in this second case, some other principle than a decision according to the nature of the case must step in, a decision, therefore, which must either be meaningless or inconvenient.¹⁹ It will certainly not be disputed that the central authority of the State can give definite rules for the application of the different provincial systems, nor will it be disputed that such rules may grow up by a course of custom, nor that in many cases they do exist by the operation of both these causes. Thus, for instance, judgments which have been pronounced in one province or in one division of a great State are—not infrequently by the operation of a mistaken theory, or owing to too high an appreciation of the conveniences of such a course—carried into execution over a wider area than should reasonably be allowed.²⁰ But a condition of complete confusion would

¹⁸ The supreme court of the country judges its cases just as the court of first instance was bound to do. The reason assigned by Puchta (Lectures, § 113) for rejecting the application of the rule that every judge must primarily apply the law which is recognised in his own country to this case, viz. that the division of the territory into different jurisdictions under one supreme court is merely an administrative rule, which has no bearing on the conflict of laws, is therefore inapplicable. Besides, it is not invariably the case that the different provinces of a State have one supreme court.

¹⁹ See, on the other hand, Burgundus: "*Nam et Hannorum statuta principali auctoritate in contrarium sancita sunt; at in ambiguo, nonne ea potius accipienda est interpretatio, quæ vitio caret?*"

²⁰ The subsidiary law of the North German Bund of 21st June 1869, afterwards declared to be a law of the German Empire, is so expressed, § 1. It introduces a general duty of giving assistance in all civil disputes to the court of the Bund (or Empire): "The court to which application is made is not entitled to refuse its assistance, even although it holds the jurisdiction of the

arise, if we were to try to apply those principles at which Wächter in his *Pandects* has pointed. Rights and relations, says Wächter, which were established in one district of a State in conformity with its particular law, must be judged of according to that particular law all over the entire State: if they are properly founded, or acquired according to the law of the district, they must be recognised and protected all over the State in the same way. For it is the duty of the State to recognise and to protect every legal relation in the way in which it has been established by the aid of a particular law recognised by the State.²¹ According to the last rule, the limits even of absolute prohibitive laws, as between the constituent provinces of a State, would be destroyed; if slavery were recognised in some distant colony of an empire, it could be carried into effect in the empire State, the old civilised country, according to Wächter. But the unvarying and unanimous practice of all the European States, who used to have the institution of slavery in their colonies, contradicts this result. A slave brought from an English or a French colony to England or France, was treated as free. The right of the master, although well founded according to the law of the colony or province, was in this way not recognised in another part of the same State.^{22 23}

All those theories are simply overcome by the observation that, in private international law generally, nothing is recognised that does not correspond with the nature of the subject. Thus a theory which assumes as a matter of principle a difference in the way in which the laws of different States, and the particular laws of the same State, should be treated, can have no other foundation than this, that it proposes either in the one case or in the other something that is at variance with the nature of the subject, that is, something which is unreasonable. Besides, any such difference in principle is at variance with the fact of the manifold diversities of State constitutions which can be conceived, or which actually as facts exist.

There are composite States, to which we cannot with complete accuracy apply the conception of a union of different provinces in one State, or of a union as if of personality, or, lastly, of a federation or Bund.²⁴ In Wächter's

court making the application not to be established;" and this in spite of the fact that (until the comprehensive judicial code of the German Empire came into operation) there was one common supreme court devoted to commercial matters.

²¹ Very properly the Court of Cassation at Rome decided (20th February 1885), that patents for discoveries could not be recognised as a matter of course in newly acquired provinces, if the patents had not been taken out according to the law of these provinces (Jour. xiii. p. 619).

²² See Story, § 96, on this subject.

²³ Even the enactment as to the constitution of the courts of the German Empire provides, § 159 *ad fin.*: "The request (for assistance from one court to another) is to be rejected, if the transaction which is to be undertaken is forbidden by the law of the court whose assistance is asked."

²⁴ Not one of these conceptions is applicable to the case of Austria-Hungary. See on the so-called real unions, Jellinek: "*Die Lehre von den Staatenverbindungen.*" Wien 1882, p. 197.

view we should have to discover all sorts of intermediate theories in such cases, whereas our theory of its own accord fits into the facts of every case, and we can *e.g.* in the simplest way ascertain by inference what effect the existence of a supreme court must have on the question of the recognition and execution of foreign judgments in the different parts of a composite State.

It is, however, quite consistent with the theory we have adopted that a statute book, by means of express and exceptional enactments, should treat the legal systems of different provinces (or divergent rules of particular systems) differently from foreign laws. It may declare, for instance, that in one case the law of the domicile of the contracting party, who belongs to another province, is to be regarded rather than the *lex loci actus*, while it refuses to pay this respect to the law of the domicile of a foreign contracting party. To this category the provision of the 84th article of the general German statute²⁵ as to bills of exchange, and of the German code of procedure, *Civilprozessordnung* (§ 53), belong.

A supreme court, which unites different provinces under its jurisdiction, is bound to decide, as the lower court, from which the process comes, was bound to do; and if in the district of the inferior court itself there are different systems, then according to the law of the place to which the parties belonged. (See judgment of the Supreme Court of App. at Jena, 26th Oct. 1826. Seuffert, i. No. 154.)²⁶

²⁵ . . . "But a foreigner, who by the laws of his own country is not capable of incurring an obligation by bill, will be bound by undertaking such an obligation in this country, in so far as, by the law of this country, he has such a capacity." The sense of this paragraph, it must be admitted, has not been established beyond all doubt.

²⁶ In Hannover the applicability of municipal statutes on matters of private law, to districts newly attached to a town, has been often discussed, and has been answered by Francke and Laporte in the same way as in the text (*Magazin für Hannoverscher Recht*. 1853, p. 370. *Neuer Magazin für Hannov. Recht*. 1861, p. 203). Cf., too, Leonhardt, "*Zur Lehre von den Rechtsverhältnissen am Grundeigenthum*," Hann. 1843, p. 45. A singular exception exists with regard to the statutory rule of succession between spouses in the town of Hannover by virtue of a special Royal Ordinance of 7th Oct. 1856. Cf. judgment of the Sup. Ct. of App. at Celle, 6th Jan. 1865 (Seuffert, 19, No. 209). Further, a judgment of the App. Ct. at Flensburg 5th March 1867 (Seuffert, 21, No. 1). Judgment of the Sup. Ct. at Hamburg, of 17th June 1886 (Seuffert, 42, No. 182). "It can certainly not be asserted absolutely that when the territory of a State or of a town is extended, the principles of private law which were recognised in the original territory will be applied in the territory now added. If, on the other hand, the rule of law in question is to be construed as being intended to rule within the territory of the State or town in question, whatever that territory may at any time be, then it must be applied in the land that has now been added to the territory."

If the object of a treaty be merely to define a doubtful or obscure frontier, then, according to the order of the Prussian ministry of 29th March 1837, those Prussian laws, which are applicable to the jurisdiction to which the hitherto debatable land has been definitely annexed, will be applicable within the newly defined frontier from the date of the original publication of the treaty onwards. As I think, the soundness of such a proposition is by no means self-evident. I should be inclined to think, apart from such express enactment, that it must be left to parties, by the ordinary civil procedure, to establish what laws or legal rules have really been recognised up to that moment in the debatable ground. For an international treaty as to boundaries, although its language may be declaratory, will in itself regulate the future only, and cannot prejudice the rights of private persons in the past.

NOTE A. ON § 35. RELATIONS OF THE LEGAL SYSTEMS OF ENGLAND AND SCOTLAND.

[The courts of England and Scotland are completely independent of one another, although they have a common Supreme Court of Appeal in the House of Lords, and, although the fact of their being subject to the same sovereign allows judgments pronounced in the one country to be easily executed in the other, regulations to ensure this being enacted by the Judgments Extension Act 1868 (31 & 32 Vic. c. 54), see *supra*, note 12.]

Lord Chancellor Campbell (*Stuart v. Stuart*, 1861, 4, Macq. p. 1, Session Cases, 2nd ser. xxiii. p. 904) has said that, "as to judicial jurisdiction, Scotland and England . . . are to be considered as independent foreign countries, unconnected with each other." Lord President Inglis (*Orr Ewing*, 1884, Sess. Ca. 4th ser. xi. p. 601) repeats and approves of this doctrine, and it is also approved by the House of Lords in that case (1885, Sess. Ca. 4th ser. xiii. H. of L. p. 1). Lord Blackburn says (p. 17) that it may not be an accurate use of language to call them foreign countries, and Lord Fitzgerald takes the same position, but on their absolute independence of each other, in so far as their judicatories are concerned, no doubt can be cast.

In these circumstances, it is held that where the House of Lords, the common Court of Appeal for England and Scotland, is administering an English doctrine of law which is different from Scottish doctrines, or perhaps antagonistic to them, its authority is not binding on the Scottish court. The converse case will also, of course, be true. In so far as the judgment of the House, however, proceeds upon principles of general jurisprudence, it will be held to be an authority even although the case may be an appeal from the other country; and, *a fortiori*, if the judgment is an interpretation of a statute common to both countries, it must be recognised as an authority in both. (See *Orr Ewing*, *ut cit.* and *Virtue v. Police Commissioners of Alloa*, 1873, Sess. Ca. 4th ser. i. p. 285.)

It is assumed, in the reasoning by which this latter doctrine is supported, that the supreme court, in judging an English case, applies English law and practice, and, in judging a Scots appeal, the laws and practice of Scotland. It is only when the laws of the two countries are identical, or when principles of general jurisprudence are invoked, which are superior to all positive legislation or interpretative of it, that a judgment in a case proceeding from the courts of one country will be an authority to which the courts of the other must conform. It is manifest, however, that the courts of each country may often find aid, by way of analogy or illustration, from the judgments pronounced by their neighbours, just as they derive assistance from decisions of the courts of the United States or any foreign country. English decisions are more used in Scotland for this latter purpose than the judgments of foreign courts, since the principles on which they proceed, and the language in which they are expressed, are more easily and thoroughly intelligible than those of a foreign court would be.]

APPENDIX II.

ON THE SO-CALLED COERCITIVE OR PROHIBITORY LAWS.

§ 36. There is a generally recognised rule that in certain cases foreign rules of law are neither applied nor taken into consideration, that is, when they are at variance with the so-called coercitive or prohibitory laws of this country.¹ We saw that the modern school of Italy, France, and Belgium use this rule as a means of setting up a fundamental principle in private international law. But they have hardly succeeded in defining those prohibitory laws with much exactness; while Brocher and Weiss, in order to reach a sharper and more apposite definition of the idea, have set up a distinction between *Ordre public interne*, on the one hand, and *Ordre public international* on the other.² It cannot be disputed that such cases of conflict do arise; slavery, or a right of property over another person, cannot be put in force by the vindication of a person in a country in which institutions of that kind do not exist, or rather are regarded as immoral. But these cases are much less common³ than people think. In the first place, it is observed that, while our law may regard a legal relation as unwarrantable in our economical and social circumstances, the circumstances of a foreign country, differing from those of our own, may cause it to seem quite justifiable. For instance, in country A a certain rate of interest may seem usurious, which, in country B, may have its justification. It would be unjust to dismiss in country A, a suit depending on a contract to pay interest which belonged to country B, merely on the ground that the maximum rate of interest allowed in country A had been exceeded.⁴

¹ We must not confuse the class of laws alluded to here with those which merely refuse to give way to the wishes of parties, as is the case with Thöl, § 74. Laws which settle the limits of majority and minority do not give way to the wishes of parties, and yet Thöl himself, § 78, proposes that the *lex domicilii* should be the rule in such matters even in foreign countries.

² *Codice civile Italiano disposizione sulla publ.* etc. art. 14: "Notwithstanding the provision of the preceding articles, in no case can the laws, the documents, or the judgments of a foreign country, or private dispositions or contracts, derogate from the prohibitory laws of the kingdom which concern persons, things, or documents, or from laws which concern in any kind of way public order or morality." Resolutions of the institute of international law, at the Oxford Conference of 1880, No. viii. (*Annuaire*, 5^{ème} année, p. 57): "*En aucun cas les lois d'un état ne pourront obtenir reconnaissance et effet dans le territoire d'un contre état, si elles y sont en opposition avec le droit public ou avec l'ordre public.*"

³ Even Phillimore, § 15 *et seq.*, emphasises the exceptional character of these cases.

⁴ For this case, see the chapter on the law of obligations. The grounds for a divorce, in a judgment of the Supreme Tribunal of Commerce at Leipzig of 25th June 1872 (Seuffert. 27, No. 156) touch a peculiar case: they bear that, although the application of native customary law be excluded by some prohibitory enactment of the native legislature, this enactment does not extend to a foreign law of custom. The first article of the German Commercial Code has made an order of precedence only for native legal authorities, but settles no such order as between native and foreign authorities. Native and foreign authorities are necessarily mutually exclusive. We may add: What would happen if by chance the law of State A, which is completely codified, excluded on principle the application of all rules of customary law, while in State B customary law was the generally prevalent order?

The question, then, must be more sharply defined. The fact that our laws, or our legal ideas, reject the rule of law or the legal relation which another country recognises, can never prevent that rule or relation from receiving effect. The only question that can arise in any case is whether the effect of the rule of law, or of the legal relation which is to operate within the domain of our legal system, is in contradiction to absolutely imperative rules of our law, or to moral principles which obtain among us. It is just at this point that it is specially important to observe that, as we have already pointed out, a legal relation need not necessarily belong exclusively to any one territory, but may very possibly in its operation branch out into several different territories. Our rights are always confined to this, that we may treat as non-existent, cut off and put out of sight, those branches and offshoots only which come to light on our territory. The trunk of the tree, which is rooted in a foreign system of law, is beyond our power, and if the branch or offshoot, which came into existence in this country, had no power to produce any mischievous results, if it could not come into conflict with our legal system, it would be wrong and unjust to destroy it, simply because the trunk from which it sprung could not be tolerated, if it had its roots in this country. For instance, polygamy cannot be suffered to exist in this country; but can we deny to the sons of a Mohammedan, who has lived after the law of his own country in polygamy, the right of property in a thing belonging to the father's succession which happens to be on our territory? Certainly not.⁵ Polygamy is in this case only the remote foundation of a claim, which in other respects does not come into conflict with our legal system; it is a condition precedent to the process for asserting that claim. Polygamy exists, and did exist in these foreigners' country, and the decisions of our judges cannot touch it. But if our system of law refused to recognise legal relations of the kind, which are illegal in this country, even as facts or conditions precedent to other legal claims, the final result of this view would simply be to throw intercourse with the foreign country in question into complete confusion, and in truth to do away with any settled intercourse. In view of slavery in particular, Story, § 96, *ad fin.* says: "In an important case in America, it was held that civil incapacities and disqualifications, by which a person is affected under the law of his domicile, should be held valid in other countries so far as applicable to acts done, or rights acquired in the place of his domicile, but not as to acts done or rights acquired within another jurisdiction where no such disqualifications exist." But it is certain, and this seems to be the true test, that our legal system and our courts cannot lend themselves to the direct realisation of legal relations or claims, which would be rejected by our law as absolutely untenable. Thus a slave who has been brought into this country, or has escaped into it, cannot be claimed here; a woman, who has escaped from the harem of a Mussulman,

⁵ On this point, see the agreement between Lomonaco, p. 60, and Laurent, 4, § 293.

cannot be constrained by our courts to continue her polygamous marriage;⁶ the betrothal of a Mussulman, who is living in polygamy, to a second or third wife will not be allowed to take place in this country; and an action founded on some unlawful game, for instance, will be absolutely rejected by the tribunals of this country. So far as the principle has been formulated up to this time, *i.e.* has found expression in positive enactment, it has not been remembered that to recognise a law as a fact, and to assist it directly in extending its operations by carrying it out to practical conclusions, are two different things. The new draft of the Belgian Code (see below, note 8) is the best expression of these considerations that we have, while the conception of the Oxford resolutions of the Institute of International Law is far less complete. If the question is guarded in this way, the determination of the particular cases which it would be impracticable to enumerate *à priori* may be left to judicial discretion. In our view, we are not concerned with any fundamental principle of private international law, but only with the decision of a few exceptional cases, which are of rare occurrence among nations which stand upon approximately equal stages of civilisation.⁷

Laurent (viii. §§ 95-121) has, with particular regard to the law of obligations, undertaken a very searching enquiry, with the object of accurately characterising those rules of law, on which the present question turns. But this attempt, too, is unsuccessful. The formula "laws, which

⁶ See Wharton, §§ 120, 129. This case has recently come up for decision, on the occasion of one of the wives belonging to the harem of the Khedive Ismail-Pacha, who had been forced to abdicate, falling in love with a Neapolitan, and escaping to a small village in the province of Naples. On production of a deliverance by the Italian ministry, the civil functionary proceeded to celebrate the marriage. This was perfectly right. To have refused to marry them, in such a case, would have been simply to give effect to the operation of the law of polygamy, under which the runaway woman had lived (Jour. vii. p. 338).

⁷ Savigny, p. 37, § 349, Guthrie, p. 80 (but see also Unger, § 22 *ad fin.*) asserts besides that there is no room for the application of foreign rules of law, if the whole legal institution to which they refer is unknown to our law, as *e.g.* slavery, or the so-called civil death, which is imposed as a punishment. But, apart from the consideration that, in the cases immediately in Savigny's view, the application of the foreign rule of law, or more properly its realisation, is inadmissible on the grounds already considered, it is to be remembered that legal institutions of different countries which go by the same names are yet, in so far as their results are concerned, very different from each other. Are they then identical, or are they distinct legal institutions? If we decide in favour of the former alternative, we regard, in the scholastic style of Bartolus, the name as the determinant; if in favour of the latter, we may exclude, in a most arbitrary way, the application of any foreign rules of law we like (see above, § 29). Savigny himself supplies an eloquent example of this arbitrary procedure. He thinks (*cf.* p. 196 *et seq.* § 368, Guthrie, p. 191), and rightly thinks, that it is inadmissible that a right of pledge in a moveable thing, founded on the common law of Rome in country A, should be successfully pleaded against a possessor of that thing in country B, where rights of pledge in moveables can only be enforced against third persons in possession, if they have been previously completed by delivery. Instead, however, of settling this determination on the ground that the right of the possessor, which took its rise in country B, is superior to the right constituted by the pledge, he says that a right of pledge founded on a mere contract is a different legal institution from one founded on delivery. But in that way a right of property, founded according to the law of France upon a simple bargain, would not be capable of being pleaded within a territory ruled by the common law of Rome, because tradition is necessary there.

have reference to the rights of society" (*lois relatives aux droits de la société*), is no more distinct than the formula "laws which concern *Ordre Public*;" and for the most part the other particular rules which he adds as elaborations of the principal proposition are just as vague.⁸

If it were necessary, in framing some code, to lay down rules for the application of foreign law, we could not, it is certain, dispense with some proposition which should express the protection to be given to the laws of our own country against those of foreign countries, which rest upon moral or social theories which differ violently from our own. It is by no means easy to hit upon the exact language which would be proper to such a proposition. Fortunately, we should only have to have recourse comparatively seldom to such a clause of exception, which would serve as a safety-valve: that is, if our other principles were correctly formulated. Perhaps we might put it thus: "The application of foreign rules of law is excluded in so far as it would serve to bring into operation in the territory of our State legal relations which cannot be permitted according to our legal system, or to compel the performance of acts and services which, in accordance with our legal system, should not be compelled."

APPLICATION OF FOREIGN LAW ON THE MOTION OF PARTIES ONLY OR *ex officio*. PROOF OF FOREIGN LAW. IS THE OMISSION TO APPLY A RULE OF FOREIGN LAW, OR THE ERRONEOUS APPLICATION OF IT, ACCOMPANIED BY THE SAME RESULTS AS EMERGE IF A RULE OF OUR OWN LAW IS LEFT OUT OF CONSIDERATION OR ERRONEOUSLY APPLIED?¹ TREATIES, IN SO FAR AS THEY TOUCH ON PRIVATE LEGAL RELATIONS.

§ 37. According to the strict view that once prevailed,² foreign law is simply, as far as the judge is concerned, a fact, and in any suit must

⁸ See p. 155, § 98, and *Avant-projet belge*, art. 26. "Cette règle s'applique :—

(1.) Aux lois qui dependent du droit public (?) et du droit pénal.

(2.) Aux lois qui concernent les bonnes mœurs.

(3.) Aux lois qui abolissent les privilèges politiques en matière de succession."

We may remark, in passing, that it seems to us that it is too much to ask (§ 108, p. 169) that a rule of law shall only be looked upon as in conflict with *boni mores*, if the views of all civilised nations agree in taking this view. If, in State A, X cannot marry V because they are related by blood or marriage to each other in a particular way, it is irrelevant in such a matter that there is some other State, with other laws, which allows such a marriage. The more recent draft of a civil code for Belgium, which was worked out by a commission appointed in 1884 (see *Revue*, xviii. p. 442), contains in its 14th article this simple idea, which in my opinion is also more correct, viz.: "*non obstant les articles qui précédent, il ne peut être pris égard aux lois étrangères dans les cas où leur application aurait pour résultat de porter atteinte aux lois du royaume qui consacrent ou garantissent un droit ou un intérêt social.*"

¹ The practice of the old German Imperial Court of Commerce, in reference to the questions described in this title, is put together and illustrated in a paper by Sachs (*Revue*, vi. p. 230 *et seq.*). See, too, Goldschmidt, *Handbuch d. Handelsr.* § 38 *ad fin.*, whose views are entirely in accord with the propositions worked out in the text.

² Oppenheim, *Völkerr.* p. 381. Langenbeck, *Archiv. für die civilistische Praxis*, vol. 41, 1858, p. 132. Judgment of the Supreme Court of App. at Lübeck, of 10th December 1835

be treated as such: the judge, therefore, does not seem to be entitled to apply a foreign rule of law unless the parties expressly direct his notice to it. It may be that, as a matter of history, this theory is connected with those legal doctrines to which appeal was frequently made towards the end of the Middle Ages, and especially at the time of the reception of the Roman law by learned jurists and Universities.

A second theory, but one that has a limited currency, regards the judge as plainly entitled to apply foreign law, but not bound to do so.³

According to a third and last theory, the application of foreign law, wherever there is an indication of such a thing, becomes *pars judicis*. This third view, which in modern times is adopted more and more widely,⁴ and with which it will at present be found possible to a certain extent to reconcile the demand that the parties shall furnish proof of the foreign law, is correct. Its foundation is that the judge is called upon to respect foreign rules of law by virtue of an express or implied direction of his own law, which commits the decision of the concrete case in question to the foreign law. The opposite view leaves it to the good pleasure of the parties to say what rules of law are to be applied, and forces the judge to decide in certain circumstances on the strangest principles,⁵ because the foreign law is viewed simply as a fact, and can only be understood according to the statements of parties in the process;

(Seuffert, 8, No. 85). The rule "*Locus regit actum*," according to this judgment, must be pleaded as an objection on behalf of the defender, if the law of the place where the bargain was made differs from that of the court. Accordingly, the Supreme Court of App. at Lübeck, on 14th September 1850, also held that a plea upon this rule could not be introduced in the court of appeal (Römer, ii. p. 400). Judgment of the Supreme Court at Berlin on 19th May 1857 (Striethorst, 26, p. 49) runs to this effect: "It seems, too, that in regard to transactions, which are to be judged by foreign law, in the first place the existence of the statute or the law must, if it is questioned, be proved as a fact" (Draft of a commercial code for Würtemberg, Art. 997). A judgment of the Supreme Court of App. at Darmstadt, 12th October 1850, runs thus: "The simple averment, that the bargain was invalid according to the law of the foreign place where it was concluded, is not to be held sufficient" (Seuffert, 9, No. 210).

³ Kört. Erörterungen, iii. p. 29.

⁴ Wächter, i. p. 310. A more recent judgment of the Supreme Court of App. at Lübeck, of 13th January 1857, recognises, in contradiction of the earlier decisions of the same court already cited, that the judge may at once apply foreign law which is known to him. The practice of the Supreme Court of Appeal at Cassel (Strippelman, i. p. 57) followed the same principle. Among the adherents of this theory are to be counted all those who, like Savigny (i. p. 191), Mittermaier (*Archiv. für die civil. prax.* xviii. p. 67), Seuffert, Comm. i. p. 235, and Unger (i. p. 306, note 40), look upon foreign law as being on the analogy of a customary law in this respect. Laurent, too, declares himself quite distinctly for this view (ii. §. 262). Especially valuable as an illustration is a decision of the old Imperial Commercial Trib. of 9th November 1872 (Dec. viii. p. 12). It is explained, in that case, that a pursuer is not barred from complaining in the Court of Appeal that by mistake native law had been applied instead of foreign law, although in the lower courts he had himself pleaded for the application of native law; for the application of foreign law follows as *pars judicis*. For an instance of its application *ex parte judicis*, see a judgment of the same court, of 26th April 1879 (Dec. xxiv. p. 51).

⁵ See, on the other hand, Kritz, *Rechtsfälle*, ii. p. 95, Schäffner, p. 208.

the intermediate view, which commits the matter to the good pleasure of the judge, is at variance with the nature of the judicial office.⁶

Nor is it any good objection to our view that the party who does not in a suit appeal to foreign law, impliedly thereby submits himself to the native law. Because, as a judgment of the Supreme Court⁷ notices, we must suppose that the party who is worsted according to the course of the native law has omitted to appeal to foreign law from no other reason than forgetfulness.

From the practical point of view, objection has been taken to our theory, that it must often involve the judge in unprofitable difficulties,⁸ and that you cannot require from him a knowledge of foreign law. The latter objection is right to this extent, that as a general rule neglect of duty cannot be imputed to a judge, who, where neither party having appeals to foreign law, omits to apply it.⁹ But the former argument really proves nothing at all; very many rules of law, which serve solely for the protection of some legal principles beyond themselves, lead in many cases into minutiae which are of no use, but yet these rules must be observed.

But this much may be conceded: if the conclusions of the parties are well founded in native law, and if the judge has no special knowledge that any of the conclusions is, according to foreign law, which in strictness must be the foundation of the decision, unfounded, he may proceed in his judgment on the footing that the foreign law on the point in question is at one with his own law, and the question whether foreign law must be applied, and, if so, what foreign law, may be disregarded in the judgment as immaterial.¹⁰ This follows from the fact that a great number of rules of law contain provisions that are in correspondence with the nature of the subject with which they deal,¹¹ and that therefore

⁶ See, on the contrary, Wächter, i. 310.

⁷ Judgment of the Supreme Court of App. at Lübeck, of 30th January 1850 (Seuffert, 9, No. 248).

⁸ Motive for the 997th article of the sketch of a commercial code for the Kingdom of Würtemberg, p. 764.

⁹ See judgment of the Supreme Comm. Court of the Empire, 14th February 1871 (Dec. 2, p. 27).

¹⁰ See the harmonious judgments of the App. Court at Celle, 31st May 1876, and of the old Supreme Court of the Empire, 28th June 1875 (Seuffert, 31, No. 303; 32, No. 1). See the judgment of the latter court, of 11th January 1875 (Dec. 15, p. 427), to the effect that it may be assumed that the foreign and the native law are in conformity, if none of the parties avers the contrary. See, too, Sachs, *ut cit.* p. 233. Further, a judgment of the Court of the German Empire, 28th September 1885 (Blum. *Annalen*, iii. No. 152, p. 345), in which it is assumed without more ado that there is a certain identity of the foreign law (Swedish) in the matter of joint-stock companies. If none of the parties makes reference to foreign law, the court does not require any special justification for the application of its own law (Ger. Imp. Court, iii. 21st June 1886); but the application of local law cannot be ensured by an agreement of parties in the course of the process (Ger. Imp. Court, v. 6th October 1886. Bolze, *Praxis*, iii. No. 15 and No. 1303). On the other hand, if the parties are at one as to the application of native law, and there are no special circumstances pointing to a foreign law, the judge may apply the former at once (Ger. Imp. Court, ii. 2nd December 1884; Bolze, i. No. 29, p. 7). In England, too, it will be presumed that the English law does not differ from the foreign law (Westlake, § 353; Wharton, § 779).

¹¹ See this reasoning in the judgment of the Supreme Comm. Court, 26th March 1878 (Seuffert,

there is a great number of rules of law in the divergent legal systems of civilised peoples of the same stage of culture that entirely agree with each other: the judge may, therefore, with good reason assume the existence of this agreement, if the contentions of parties, according to the facts which they assert, are in conformity with the native law of the tribunal, and at the same time there has been no appeal to foreign law. If this assumption were not made, the simplest rules of law, which are indispensable in the legal system of any civilised State, would require to be remitted to proof.¹² The presumption, however, will have no application in cases where the native rule of law which comes up for consideration must plainly be recognised as a particular rule of law only.¹³

It follows, too, from the principle of the application of foreign law by the judge as part of his duty, that a party may, at any stage of the case, appeal to a foreign rule of law that is to his advantage.¹⁴ But a true exception (*exceptio*) raised by the applicability of the foreign rule of law must, as in other cases, be pleaded, and it may be a good ground for repelling a plea of nullity urged against the judgment of a lower court, if the party in that lower court has omitted to appeal to the foreign rule of law, and if, therefore, there is no ground for asserting that there is any legal mistake or oversight in the judgment brought up on appeal.¹⁵

NOTE B ON § 37. APPLICATION OF FOREIGN LAW.

[In cases in which it is necessary in the course of an action in the English or Scots Courts to ascertain what is the law of any foreign country, England and Scotland being for this purpose considered as foreign one to another, parties now commonly resort to the provisions of the statutes 22 and 23 Vict. c. 63, and 24 Vict. c. 11. The former Act applies to cases where Scottish courts desire information as to English law, or *vice versa*, the latter to cases where courts in the United Kingdom desire to be informed as to foreign law. The provisions in both cases are, that where it shall be the opinion of any court that it is necessary or expedient for the proper disposal of any action to ascertain what is the law applicable to the facts of the case, as administered abroad, or in any part of Her Majesty's dominions, other than that where the court is situated, the court may

34, No. 172). The judge, too, may require an exposition of the foreign law sufficient to guide him in its application. So Goldschmidt, *Handelsr.* p. 38, note 18, and the judgments of the old German Supreme Comm. Court there cited; in particular, a judgment of 24th April 1874 (Dec. 8, p. 208).

¹² Laurent does not propose to recognise this presumption; but, as a matter of fact, it is universally applied, and in practice things cannot go on without it.

¹³ See the judgment cited above (note 11) of the Supreme Comm. Court (Seuffert, 34, No. 172), and Westlake, § 353 *ad fin.*

¹⁴ Cf. judgment of the Supreme Court of App. at Lübeck, 18th Dec. 1853 (Seuffert, 8, No. 85).

¹⁵ See, too, the excellent exposition of these doubtful questions in Goldschmidt, *Handelsr.* § 38, note 18.

direct a case to be prepared and laid before one of the supreme courts in the other part of the queen's dominions, or in the foreign country whose law is to be ascertained, in order that that court may give an opinion upon it. The court is to apply the opinion of any other court in the queen's dominions when obtained, but in the case of a foreign court may re-remit the case for further consideration, or may make a fresh remit to any other superior court of the same country before proceeding to apply it; the explanation of the difference is, that power is given to consulted courts within Her Majesty's dominions to take for themselves, before returning their opinion, such further procedure as they may think fit. No such power can, of course, be conferred by the British statute upon foreign courts.

In spite of these enactments, it is still competent to ascertain the foreign law, either by the examination of foreign lawyer as witnesses (Parnell *v.* Walter, 1889. Ct. of Sess. Reps. 4th ser. xvi. 917. Ross, Oct. 29, 1891. Ct. of Sess. Reps. 4th ser. xix.), or by a judicial remit to a foreign legal authority, *e.g.* a professor of law (Goetz *v.* Aders. 1874. Ct. of Session Reps. 4th ser. ii. 150). Where both parties concur in a judicial remit, they are bound by its result (Welsh *v.* Milne, 1844. Ct. of Sess. Reps. 2nd series, vii. 213).

The practice of the English courts is stated in the passages in Mr Westlake's work referred to in the author's notes. The English and Scottish courts, however, adhere to the view that foreign law is a fact to be averred and proved like any other fact. No amount of familiarity with the legal system to which reference is made will entitle a judge to decide how the law of another country, be that other country no more remote than Scotland or England, as the case may be, stands, if there is any dispute on the question between the parties. Even the fact of the Scottish judge *e.g.* being a member of the English bar, will not entitle him to decide a question of English law, without some such procedure as is narrated above. If the evidence of the witnesses adduced is insufficient or contradictory, the court may investigate the law for themselves either in the light of foreign decisions, or the opinions of foreign writers, or even by examining for themselves the text of the law (Concha *v.* Murrietta, 15th Feb. 1889. L. R. 40, Ch. Div. 543, and Bremer *v.* Freeman, *ib. cit.*). There may, of course, be cases in which the law is so familiar to all that it will be assumed, just as in the region of facts judges and jurists may assume, and must assume, without proof facts that are in the common knowledge of all. The judges of a Scottish court may construe an English will, if there is no technicality of English law involved, all that is necessary being to follow the ordinary rules of grammar and logic (Thomson's Trs. *v.* Alexander, 1851. Ct. of Sess. Reps. 2nd ser. xiv. p. 217). That being so, it would seem impossible to hold with the author that it is *pars judicis* to apply foreign law. Unless parties appeal to it, he must, it is thought, determine the case by the only law of which he has any knowledge, *viz.* that of his own country; and even although he may be of opinion that the one party or the other should have appealed to foreign law, he cannot avoid deciding

the case by his own law, any more than he would, in deciding a case on evidence, be entitled to import into his opinion some fact which he had happened to witness, or some piece of scientific knowledge which he chanced to possess. It is not meant that the court may not throw out suggestions to the parties that this or that foreign law should be pleaded: such suggestions are matters of common occurrence. But if neither party is prepared to plead foreign law, it is thought that the court can neither refuse to adjudicate, nor at its own hand introduce the doctrine of a foreign law as the *ratio* of its judgment. The House of Lords, however, as the appeal court of the United Kingdom, and versed in the laws of the three kingdoms, in deciding appeal cases will apply its own legal knowledge of the different systems. It will not look at evidence as to English law given to a Scottish court, for example, but decide the case from its own knowledge of English law (*Douglas v. Brown*, 1831, 2 Dow, and Cl. p. 171, 5 Wilson and Shaw, p. 47. *Cooper v. Cooper*, 1888. Ct. of Sess. Reps. 4th series xv. (H. of L. p. 23).]

§ 38. II. In truth, as Laurent (ii. § 269) correctly remarks, foreign law is no more pure fact for the judge than his own law is.¹⁶ The maxim which rules in native law, viz. "*jura novit curia*," cannot, of course, be set up as an assumption when foreign law is in question. The proof of the law (in so far as proof is not rendered superfluous by reason of common knowledge¹⁷) which parties furnish is not, as in the case of other facts, an indispensable necessity, but merely an assistance, which is intended to protect the judge from laborious enquiries, and save him time and trouble. Although, therefore, in earlier civil process the proof of foreign law was as matter of solemnity imposed upon the party who appealed to it, and although at the present day it is left to that party to furnish proof of the alleged foreign rule of law,¹⁸ the judge is by no means excluded from an independent investigation for the purpose of establishing the foreign rule of law.¹⁹ He may collect and use, according to his discretion, materials other than

¹⁶ Especially not if *e.g.* the application of the foreign law in question is prescribed in a State treaty published as a statute. Pierantoni calls attention to this in his paper cited *infra*, note 31.

¹⁷ It would seem almost ridiculous if *e.g.* the court could not apply a well-known legal rule of a neighbouring State without further procedure. See, as to the admissibility in such cases of what is notorious, the judgment of the Supreme Court of Austria, 25th February 1880 (Jour. xiii. p. 467).

¹⁸ Cf. Wetzell, *System des ordentlichen Civil-processes*, 3rd edition, § 20, note 8. This is now the rule in England (see Westlake, § 358, and Phillimore, iv. § 346, the latter expressing himself somewhat indefinitely), although foreign law as a fact is subject to the determination of the jury (Westlake, § 354). The practice of the Supreme Court of the Netherlands holds foreign law to be a fact (Judgment of 21st April 1876, communicated by Hingst, Rev. xiii. p. 402).

¹⁹ The presumption of legality will be accorded to foreign official documents just as it would be to such documents in this country, provided that their official character is established. In such cases, as exceptions to the general rule, the burden of proof lies, not on the party who produces them, but on his opponent, if the manner of the execution of such documents does not correspond with the law that is recognised at the seat of the court. Cf. Borchardt, *Die allgemeine deutsche Wechselordnung* on Art. 86, Zusatz, 846.

those furnished by the parties, and any limitation of time for leading evidence,²⁰ or restrictions of the mode of proof, applicable in other cases, is not to be strictly applied in this case, any more than in proof as to a law of custom in the country of the court itself, so as to cut short the enquiry. Everything may be used as evidence²¹ which can convince the judge of the validity of the alleged rule of law at the time of the enquiry,²² but no evidence is admitted the weight of which substantially depends on the agreement of parties. Admissions²³ in such matters are not, as in other branches of civil process, regarded as settlements of the questions at issue, but simply as evidence in the same way as in criminal processes,²⁴ and references to oath are excluded. An exception is made in cases in which these references are to be used to prove particular facts, which go to establish a foreign customary law.²⁵ To admit such evidence would be to force the judge in certain circumstances to decide contrary to his conviction, and on rules of law which have no existence.²⁶ The best evidence of the existence of a particular rule of law is undoubtedly the testimony of foreign courts and eminent foreign lawyers,²⁷ since even in the case of laws that have been formally published there may be a divergent practice, or an interpretation of them sanctioned by usage, which the judge, with nothing but the text of the law before him, might never discover; and besides the judge may not have sufficient material at his command to

²⁰ So the judgment of the Supreme Court of Appeal at Lübeck, 23rd October 1868 (Seuffert, 25, No. 1). I have in truth said nothing to the contrary in my former edition, § 32, note 13, p. 119; Menger, *System des oesterreichischen Civil processes*, i. p. 176, 1876, has misunderstood me.

²¹ Vesque v. Püttlingen, p. 128, proposes to admit no evidence but that of the proper foreign authorities, but he stands almost alone in this view, which confines the evidence within too narrow limits. In many cases, too, it would hardly be possible to get such testimony. The ministries of justice in Austria and in Hungary give it readily, as v. Püttlingen notes.

²² Story, § 639.

²³ There is no doubt that, when both sides agree, it may at once be assumed that the foreign law which is under consideration has or has not a particular import. Cf. judgment of the Supreme Commercial Court of the Empire on 16th May 1871 and 4th December 1872 (Dec. ii. p. 294, and viii. p. 150), also judgment in the Supreme Court of England of 9th May 1876, reported by Westlake in *Revue*, x. p. 546 [Meyer v. Ralli, L. R. 1, C.B. Div. 358. Where both parties admit that a foreign tribunal has failed to apply its own law correctly, the English Court will hold that the judgment is not binding].

²⁴ See Schäffner, p. 209, who, however, proposes to allow reference to oath.

²⁵ Mittermaier (*Archiv. f. d. civilist. Praxis*, xviii. p. 80) as a rule excludes reference to oath, but allows (p. 75) admissions to be taken.

²⁶ Admissions can in any case only be considered in so far as they really convince the judge. The peculiar and absolutely binding force of judicial admissions in civil process is not recognised in such matters. It follows from § 410 of the German Code of Procedure that there can be no reference to oath on the direct question of the existence of a rule of law. Such a reference, however, would be conceivable in the case of acts of the opposite party or his predecessors, in so far as proof of these acts is intended to be used as proof of a law of custom prevailing in a foreign country. See Seuffert, *Comm. zur deutschen civilprozessordnung*, § 265.

²⁷ A rescript of the Royal Prussian Ministry of Justice, of 18th December 1819, declared for the courts of Prussia that the proof of any English doctrine of law could best be obtained from the opinion of two English counsel of eminence, but the repute of these persons as counsel of

enable him to understand the law.²⁸ But yet, especially when well-known and complete codes are concerned, a decision may be given on their authority directly. The citation of an isolated passage, however, must be regarded as insufficient, without the testimony of a foreign court or counsel to explain its meaning, since the import of a rule of law is substantially affected by its relation to other kindred propositions.^{29 30}

It is, however, often a matter of the greatest difficulty to prove foreign rules of law which come up for consideration,³¹ and it may be said that it is by no means rare for courts to make mistakes on such matters. In the same way it is often very difficult, in concluding important legal transactions, to get with sufficient certainty the necessary information as to the law of the foreign country. It has accordingly been contemplated to set up an international office, to be supported by the governments of

eminence must depend on notoriety, or must be properly authenticated, and the opinion must be properly attested: the other party is permitted to adduce an opinion in the opposite sense, to refute the one first obtained. Since the code for the German Empire came into force, this rescript has lost its binding force.

The rule for the German Empire is now the very well conceived § 265 of the Ordinance for civil procedure. "The law in force in another State, customary law and statutes alike, only require to be proved in so far as they are unknown to the court. In ascertaining these rules of law, the court is not confined to the evidence laid before it by the parties; it is entitled to avail itself of other sources of information, and to make such orders as may be necessary for that object."

²⁸ English practice in recent times requires the person learned in the law to have an official, or at least a recognised position as such (Westlake, § 357, and Wharton, § 775). The practice in the United States is less strict. There the evidence of non-lawyers, men of business, etc., is sometimes, no doubt, in cases of necessity admitted.

²⁹ But if it should happen that the same source of legal principle is recognised in the foreign country, as in the *lex fori*, then a mere difference in procedure is not allowed to come into competition with the views which prevail in the court that is trying the case. The German Supreme Court of Commerce has very rightly assumed this in a judgment of 7th December 1874 (Dec. xv. No. 61).

³⁰ [The rules of practice in English and Scottish courts, as to the interpretation to be placed on foreign codes or enactments, are much the same as those stated in the text, with this qualification, that it would require a very special case to induce the court to undertake for itself the interpretation of them, without evidence. See above, note B. p. 102]. The courts of England and Scotland, and the United States, are not satisfied with the text of the enactments, without special ground for believing that the ruling proposition of law which they desire is therein contained. Foote, pp. 435 *et seq.*, cites cases to show that, according to English practice, unless both sides submit some particular enactment as the only ruling authority, or refer to it in that sense, foreign law can never be proved, except by the evidence of foreigners learned in the law, whose authority then becomes binding on the English judge. The English Legislature has hit upon an expedient in the statutes 22 and 23 Vict. c. 63, and 24 Vict. c. 11, which is peculiar, but may be practically very useful in the case of a great empire with territorial laws which differ widely from each other (see *supra*, note B. p. 101; Westlake, §§ 359, 360; Foote, p. 439).

³¹ See on this subject Pierantoni: *Della prova delle leggi straniere nei giudizii civili. (Estratto del Filangieri)*, Ottobre 1883, Roma, Torino 1883. Pierantoni also calls attention to the mistakes which not infrequently occur in the translation of foreign documents. In preparing such translations, no one should be employed if he is altogether ignorant of the foreign law under consideration, or at least if he is totally uninformed in law. It would be worth while to send the translation for revision to a trustworthy person in the foreign country, who is skilled in its law.

different States, which should ascertain with official authority the existence of legal rules, statutes, etc., and communicate them to officials and private persons.³² But the operations of such a general international office would be too difficult, and not sufficiently certain after all.

It is plain that the best information on the law of any foreign State, which may alter very quickly, can be obtained directly from the State itself. The difficulty chiefly lies in this, that one does not know the names of those trustworthy specialists and learned persons, who are at the same time ready to give such opinions as are desired. Mutual communications between governments as to the addresses of such persons might perhaps, if made sufficiently public, serve simply and better the object of giving information as to foreign law. But a non-judicial office could not well lay claim to authority which should be formally binding, even under the limitation that its attestation was only asked to establish authoritatively the formal existence and continuance of some particular paragraph in a statute; for even in such matters a decision on difficult legal problems may be involved. In so far as courts are called upon to give a decision on foreign law, it would be better to proceed by a direct requisition to the foreign court to determine the special questions of the pending process. This is a way to which the English legislature has already had recourse [see note B., p. 101]. But it presupposes a treaty, and cannot as yet be looked upon as a possibility that is within sight of realisation. This method requires a deep mutual confidence in the administration of justice in the different countries concerned, if the court is to be restricted to it, or if it must look upon the answers of the foreign court as formally binding.³³

It would be a convenience to facilitate the settlement of barristers or attorneys of foreign nationality under certain securities, in the great centres of population, where there is a specially lively intercourse with other countries.

In this way the public who were in search of law would be best served, and the courts could indirectly inform themselves by their assistance on points of foreign law. At the same time, governments might certainly supply public libraries better with collections of the statutes of other countries than has hitherto been the case. There is, as yet, far too narrow an exchange between different nations in this matter.

§ 39. III. As regards mistakes in the application of foreign rules of law or the non-application of them, we must make this distinction, viz.:

(a.) Suppose that the court has erroneously assumed that a particular question of law is or is not to be determined by foreign law. In other

³² Norsa in 1885 made a recommendation of this kind to the Institute of International Law (see report of it in the *Annuaire de l'Inst. 8ème année*, pp. 235-270). This proposal was not adopted, but in 1885 a more restricted proposal was, which contemplated merely the exchange of the texts of enactments and administrative regulations of special importance, and merely desired a trustworthy collection of these publications in every State accessible to the public (see the resolutions passed at Heidelberg in 1887, *Annuaire*, ix. pp. 305 *et seq.*).

³³ The English court does not do so in the case of courts beyond Her Majesty's dominions.

words, violence has been done to the principles of private international law; in such a case, of course, the conception of the principles in question which has ruled the case is that which the *lex fori*, the legal system of the judge, entertains. As the principles of private international law are to a certain extent also principles of the native law, the consequences of a violation of those principles must be the same as the consequences which follow upon the violation of other native rules of law. It is, for instance, beyond a doubt that, according to § 511 of the Code of Civil Procedure in the German Empire,³⁴ an appeal in such a case—under the conditions required in all appeals—is competent up to the highest court. The opposite is the case, in some instances, when we turn to the French Court of Cassation, although in France, too, the principles of private international law must be regarded as principles of French law. An appeal to the Court of Cassation requires that some law should have been violated. A violation of a rule of law, which cannot be referred to some definite French enactment, does not found such an appeal. Now, as there are many principles of private international law which have been specially sanctioned by the *Code Civil*, and also by public treaties which have a legislative force, or must be treated as if they had been so sanctioned, while others are not, it comes to pass that in many questions of private international law, a decision of the highest court in France may be had, while in others its jurisdiction is excluded.³⁵ This distinction has a foundation in history, *i.e.* in the peculiar origin of the Court of Cassation, but none in reason.³⁶ It comes to this, that, in many of the most difficult questions that can arise, the jurisdiction of the supreme court is excluded, while a want of uniformity may come to prevail in the judgments of the different subordinate courts of appeal. It is, besides, hard to lay down a line between what the written law has enacted and that which, without being so enacted, is still law; for the results or inferences from an enactment are themselves law, and we can only determine what these results or inferences are to be by setting the enactment itself alongside of the whole legal system to which it belongs. In truth, the French Court of Cassation, following the natural result of development, has gone on subjecting to its review the principles of private international law, as these are applied by the French courts, to a greater and greater extent. A similar state of things would result if the legal remedy, such as the old suit at common law on account of what was called a curable nullity, were attached to the violation of a clear rule of law. Only in that case a clear course of practice may take the place of the positive enactment, which, according to the French idea, requires to be violated.

³⁴ Cf. *e.g.* Seuffert, Comm. on this paragraph; Struckmann and Koch, § 511, note 5.

³⁵ See, on the practice in France, Pardessus, v. § 1494; Brocher, i. § 51, especially p. 155, note; Demangeat, *Jour. i.* p. 12. The Supreme Court of Spain, too, in a judgment of 29th Jan. 1875, has laid it down, that a violation of the principles of private international law never constitutes a ground for cassation (cf. Torres Campos, p. 283).

³⁶ Demangeat expresses himself to this effect *ut sup. cit.* Fusinato (*Introduzione*, p. 107) is of a different opinion, excepting the case where the native law contains an express provision.

(b.) Suppose that the court in its decision has done violence to that territorial law, by which it meant to determine the question at issue. The theory, which discovers a fundamental difference between the application of native and of foreign law, and desires to have foreign law treated purely as a matter of fact, must in this case refuse that legal remedy in dispensing which the judge of the superior court is confined to a review of the law of the case appealed to him. French jurisprudence in this case again proceeds according to the principle³⁷ already mentioned (note 35). According to the Code of Civil Procedure for the German Empire, however, all and every kind of review of judgments, in which legal rules which are said to belong to a foreign law and are not recognised in Germany are wrongly assumed, or foreign law is wrongly interpreted, is excluded. But these limitations are unreasonable. They must disappear as the view begins to prevail that the distinction between native and foreign law in such matters is only a practical expedient to assist the judge. There is no practical end, assuredly, attained by withdrawing legal questions involving foreign law from the review of the supreme court; all the less that on the one hand, as a general rule, a knowledge of foreign law is more easily and more naturally to be found there; and as, on the other hand, the uniformity in the administration of justice within the State may suffer by the variety of interpretation that may be put upon foreign law within the various minor jurisdictions.³⁸ Pierantoni³⁹ and Gianzana (ii. § 45), and a German practitioner also,⁴⁰ have pronounced for the competency of the supreme courts in questions of foreign laws as in other questions.⁴¹

³⁷ The supreme court has held cassation to be admissible if a mistaken application of the foreign law has resulted indirectly in a mistaken application of French law, or in its non-application. Cf. Brocher, i. pp. 154, 155. Fusinato, *Introduzione*, pp. 107, 108, proposes to make no difference between native and foreign law. The latter is positive law as much as the former.

³⁸ Cf. the paper by Fels, cited in note 40. If, for example, according to § 662 of the Code of Civil Procedure in the German Empire, civil judgments of foreign courts are only to be executed on security for reciprocity, the different courts of Germany might be of different opinions on the nature of reciprocity; and so, judgments of the same foreign State might be carried out in one district while in another they were rejected.

³⁹ In his paper, cited more than once, p. 19, Italian practice seems still to follow the opposite course. Cf. Gianzana, ii. No. 44.

⁴⁰ Fels, *Revisionsrecht und Sonderrecht, ein Beitrag zur Lehre von der Revision in bürgerlichen Rechtsstreitigkeiten*, 1884.

⁴¹ Fels *ut sup. cit.* p. 123, rightly remarks that the absolute want of all power of reviewing foreign law found in the German Code of Civil Procedure, is merely a thoughtless copy of the corresponding provision of the law of the French Court of Cassation. (On the point that, according to the law of France, the application of a wrong foreign rule of law does not in general found a right of appeal, see the judgments of the Court of Cassation of 23rd February 1874 and 31st November 1875, reported in the Journal, ii. p. 117, and iii. p. 272. The former bears, "*La Cour institué pour maintenir l'unité de la loi française . . . n'a pas la mission de redresser la fausse application des législations étrangères.*") See, on the other hand, Demangeat, Jour. i. p. 12. Brocher, i. p. 55, seems to be more for the exclusion of the right of cassation. He repeats that the object of the process of cassation is to maintain legal uniformity; but the maintenance e.g. of an interpretation of a foreign law, which was disapproved by the courts of that foreign country, might cause a serious conflict. The Court of Cassation can alter its views, and certainly can do so to the effect of afterwards attaching itself to the foreign interpretation of the foreign law.

§ 40. IV. Provisions contained in treaties which have a direct bearing on private international law, or indirectly rule its questions, are to be treated by the courts like statutory enactments. A treaty as such does not bind a court, but only in so far as it is published as a positive law or as a regulation that is to take the place of positive law.⁴² Accordingly, courts interpret⁴³ the provisions of treaties according to their own convictions, just as in the case of positive enactments,⁴⁴ and the views which may have been expressed by a government or diplomatists have no force to bind the courts; they may claim a certain authority on matters of fact, but that is all, unless they have been published along with the principal treaty in the proper form. From this it follows that the court must test the validity of treaties which have been published, or of some of their provisions, as the case may be, just as they do in the case of enactments or regulations of the ordinary kind.⁴⁵ It also follows that contradictions between State treaties and other provisions of the law are to be treated just like other antinomies.⁴⁶ Thus, so far as the decisions of the courts are concerned, a more recent statute takes precedence of an antecedent treaty,⁴⁷ although the State which publishes a statute, doing violence to a treaty which is still in force,

⁴² So, too, Ernst v. Meier, "*Ueber den Abschluss von Staatsverträgen*," 1874, esp. pp. 115 and 112; Laband, "*Das Staatsrecht des deutschen Reichs*," ii. p. 156, 2nd ed. i. § 62; H. Schulze, "*Lehrbuch des deutschen Staatsrechts*," ii. p. 326; Alderson Foote, Jour. ix. p. 478.

⁴³ On the interpretation of public treaties with reference to questions of private international law, the clever expositions of Durand (p. 509) are worth attention. It is particularly to be noticed that in treaties which deal with private international law you generally find that there are certain leading principles, which appear to be all of the same validity, but that some of these are subsequently, in exceptional cases, deliberately departed from. Thus the "most highly favoured nation" clause, which now so frequently comes under view, is important. If certain rights are withheld from the subjects of a State which has stipulated for this clause, we may conclude from that, that these rights have never yet been given to any one, in spite of provisions of an earlier treaty with another State which may seem to import the privilege.

⁴⁴ So, too, a decision of the French Court of Cassation, of 27th July 1877 (Jour. v. p. 166); Judgment of the Court of Pondichery of 21st Jan. 1873 (vi. p. 554); Resolution of the Institute of International Law (session 1875 à la Haye); "*Les règles de droit international privé qui entreront dans les lois d'un pays par suite d'un traité international, seront appliquées par les tribunaux, sans qu'il y ait une obligation internationale de la part des gouvernements de veiller à cette application par voie administrative.*" Wherever an independent judicature exists, government has discharged all its international duties in the administration of justice when it has invested the treaty with the force of law. Cf. Asser Rivier, p. 145, note; *Annuaire de l'Inst.* 1877, pp. 80-84, p. 126.

⁴⁵ Cf. Norsa, *Rev.* vi. pp. 256 *et seq.*, and the decisions of the Italian courts there cited.

⁴⁶ So, too, Norsa, *ut cit.* p. 258.

⁴⁷ See Wharton, *Commentaries on Law*, § 383, and *Dig.* ii. § 138 (pp. 72, 73). The fact that treaties of the individual States of the German Union with foreign States lose their validity by a supervening and contradictory provision of the legislature of the German Empire, follows from the circumstance of the subordination of the individual States under the central authority. See H. Schulze, *Preussisches Staatsrecht*, ii. p. 231; Laband, *Staatsrecht des deutschen Reiches*, ii. § 66, 2nd ed. i. § 63 (p. 668). Decision of the First Criminal Senate of the German Imperial Court of 2nd June 1881 (*Entsch. in Strafsachen*, iv. p. 274). There is at least an apparent contradiction in a decision of the old Court of Appeal at Celle, 21st May 1860 (Seuffert, 14, No. 1), the arguments of which cannot be passed over. The case of the territories of the old German Empire cannot be cited in this matter, because these territories had no full sovereign

is not thereby relieved of its obligation as a matter of public law,⁴⁸ and in a case of doubt a law is to be interpreted so that the provisions of a treaty which has been concluded at an earlier date shall be preserved intact. So, for instance, even the treaties which individual States of the German Union have concluded one with another, or with some foreign country, are no longer binding on the court in so far as they are at variance with laws of the German Empire, unless their continued validity is reserved in some way in these laws. On the other hand, courts of law determine nothing but the particular question of private or criminal international law before them, at least in the view of State rights that prevails in France and Germany. A decision on the meaning of the provisions of public treaties which shall directly bind the administrative officials is not within the competence of those courts.⁴⁹

power. It must be distinctly shown, however, that there is really a contradiction. But no such contradiction is held to exist, at least in cases of doubt, if an antecedent treaty with some particular State has stipulated for a more thorough deference being paid to the legislation of that State than is provided by a general supervening enactment (Norsa, *Rev.* ix. pp. 235, 236, and the judgments of the Italian Courts cited there). Torres Campos (pp. 35-37) describes it as the prevailing doctrine in Spain, that treaties rank before legislative enactments.

⁴⁸ The guiding rule for the courts of law is always the view which the legislative authority has of the duties of a State to its neighbour States.

⁴⁹ *E.g.* on the question whether a consul has particular rights under a consular treaty. See decision of the French Court of Cassation, 30th June 1884 (*Jour.* xii. pp. 307 *et seq.*), and decisions of the same court 27th July 1877, v. 166; and again, the Tribunal des conflits, 30th June 1877, v. p. 266.

Second Book.

DOMICILE AND NATIONALITY.

INTRODUCTION.

VARIOUS RELATIONS WHICH A PERSON MAY BEAR TO A TERRITORY.

§ 41. Three grounds on which a person may be subjected to the law of any particular State are conceivable. These are actual residence, residence taken up with an intention that it shall be permanent, and, lastly, another kind of connection with the country, which has also a tract of time in view, a connection which originally may very well have depended in every case upon ties of race, but subsequently could be established by means of other facts, *e.g.* birth in the territory. This connection we call nationality (*Staatsangehörigkeit*, *nationalité*, allegiance). Let us note at once that we have here no concern with nationality in the ethnological sense of the term. A nation in that sense, by which we understand a body of human beings held together by means of certain common characteristics,¹ and a common civilisation, has as such no law of its own. International law only recognises the existence of true legal communities, or constituted States;² it does not recognise communities which may some day become legal communities, or in times past were so, or may again become so.

It is obvious that certain extra-territorial effects must attend domicile and nationality;³ were this not the case, the tie between the State and

¹ These characteristics are besides far from lasting. See Ahrens, *Naturrecht*, 2, § 111.

² See Brocher, *Jour.* vii. pp. 289, and Weiss, p. 4.

³ Notwithstanding the importance of allegiance or nationality, and notwithstanding all the exertions of the more modern developments of public law, to give each individual a certain nationality, Stoerk's assertion in Holtzendorff's *Handbuch*, 2 § 114 (p. 589), is an exaggeration, which is disproved by history: he says, "nationality constitutes the portal which the individual must reach, before he can emerge into the light of recognition by public law." According to him, men whose allegiance or nationality could not be established, would have no legal existence in the regard of public law. A more searching confutation of his theory can only take place in a discussion on public law, not here.

the persons who belong to it would be undone so soon as its territorial limits were passed, and the composition of the State, so far as its subjects were concerned, would depend at any moment on accident. The State would necessarily make use of a resource which it is scarcely possible to put into practice, viz. a hermetical seclusion of itself from all other States. We may, no doubt, for a time leave it undetermined whether the effects of domicile and nationality are exactly co-extensive with the region of proper private law. Even if this were not the case, we might still be sure that a permanent connection with a particular country, whether that be rested on domicile or on some other fact or legal act of the person, must be attended by some other important effects for the individual, which belong to the domain of law. Apart from actual presence in the territory, there exists a certain attachment, and in connection with it a certain loyalty of the individual to the State, and of the State to the individual. The State must protect the individual who belongs to it even in a foreign country, but at the same time may prefer certain claims against him, *e.g.* the claim for service in her defence; while other States, for the sake of reciprocity, will refrain from making claims upon the foreigner, which are absolutely irreconcilable with the demands of his own country, *e.g.* they will not require of him service in their defence. On the other hand, however, every State will guarantee certain privileges to those who have a permanent connection with her, at least in the domain of public law, in so far as we can speak of the political rights of individuals. The State will not give strangers, persons who are only temporarily present in her territory, an influence upon the political destinies of the country. If, then, as a preliminary, we turn away altogether from private law in its proper sense, there are numerous other effects of a permanent connection with any particular State left, which show that a more careful investigation of the essence or nature of nationality and its conditions is indispensable.

I. DOMICILE (PLACE OF ABODE. *Wohnsitz*).

CONDITIONS OF DOMICILE IN GENERAL.

§ 42. The Roman law has substantially become the rule for the determination of the law of domicile¹ all the world over, just for the reason that the views of Roman law on this point correspond com-

¹ Cf. the article *Wohnsitz*, by Hinschius, in V. Holtzendorff's *Rechtslexicon*, iii. 2; *Code Civil*, 102 *et seq.*; *Codice civ. Italiano*, 16 *et seq.* The jurisprudence of England [Scotland] and the United States deals with the doctrine of domicile most elaborately. That is explained, on the one hand, by the importance which these legal systems attach to domicile, for, according to them, the so-called personal statutes are dependent on the domicile; but, on the other, by the fact that Britons and Americans, and the former no doubt in particular, are just the people who often spend long periods abroad or in the English colonies. See Story, §§ 39 *et seq.*; Wharton, §§ 20 *et seq.*; Phillimore, iv. §§ 170 *et seq.*; Westlake, pp. 284 *et seq.* Dicey has published a monograph, "The Law of Domicile," London 1879. It contains a large part of the subject of international law.

pletely with the nature of the subject. But there is no doubt that, however simple the definition of domicile seems to be, it is yet often difficult to decide whether the conditions of a real domicile are present in any particular case. The result of a more exact enquiry may be that the practice in England and the United States, although it starts from the same basis as is assumed by the jurisprudence of the continent of Europe, not unfrequently reaches different conclusions. In particular, it is less inclined to allow a change of domicile.

"That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode, and thus for the centre at once of his legal relations and his business."² "*Et in eodem loco singulos habere domicilium non ambigitur ubi quis larem ac fortunarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde quum profectus est, peregrinare videtur, quo si rediit, peregrinare jam desiit.*"³

There are thus two things⁴ which go to establish a man's domicile, viz.:

First, the intention to choose a place for a permanent abode, and thus to make it the centre of his relations. Thus an abode which is looked upon as merely temporary is not sufficient to found a domicile, although the actual residence may be from time to time prolonged.

Second, the realisation of this intention by acts that correspond with it, e.g. taking a house. The actual length of residence matters not, neither do interruptions of it by absences from time to time.⁵

EVIDENCE OF INTENTION. DOUBTFUL CASES. LOSS OF THE OLD, AND ACQUISITION OF A NEW DOMICILE.

§ 43. As, however, the intention is not, as a rule, expressly announced,⁶ and as even an express declaration, which does not correspond with the facts, will, according to the true theory, be regarded as meaningless,⁷ the

² Savigny, p. 58, § 353; Guthrie, p. 97.

³ L. 7, *C. de incolis*, 10, 40; L. 203, D. 50, 16. "*Alfenus . . . eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet suarumque rerum constitutionem fecisset.*"

⁴ L. 20, D. *ad municipalem*, 50, 1 (Paulus), "*Domicilium re et facto transfertur, non nuda contestatione.*"

⁵ Dernburg (*Pand. i.* § 46) particularly clearly, and correctly to this effect. See, too, Dicey, p. 76. Residence as a student will not found a domicile, L. 2, *C. de incolis*, 10, 40. [So held in *Steel v. Lindsay*, 1881, Ct. of Sess. Reps. 4th series, ix. 160, in a case of domicile of citation, the elements for determining which are, as Lord M'Laren remarks, the same as for determining a domicile for *status* or succession.] But yet, according to an *Epistola Hadriani*, a ten years' residence as a student was to do so. In Germany this particular provision has not been regarded as practical, cf. Dernburg *ut cit.*, Wharton, § 56. "No matter how long a residence in a particular place may be, it does not confer domicile, unless there be an intention to remain in such a place permanently." In England, however, it has been rightly assumed that in cases of a very long residence the *animus remanendi* may arise gradually and even unconsciously (Dicey, p. 79, note g, p. 80, note d).

⁶ Cf. Supreme Court of Appeal at Lübeck, 18th Oct. 1859 (Seuffert, 14, No. 65). According to § 104 of the Code Civil, it must be declared at the municipality either of the old or of the new domicile. Dicey, too, § 78, notes that the chief difficulty lies in judging of the intention.

⁷ See Dicey, p. 85. Thus in England an express declaration by a testator that he desired to retain his domicile in England, although he had in fact transported it to Hamburg, was

intention is in many cases a matter of extreme doubt. Is it what is in the person's own mind that is to decide, or is it what would correspond to a reasonable view of his acts?

Westlake, p. 304, very accurately remarks on this point: "According to that doctrine," *i.e.* the doctrine of *Moorhouse v. Lord*, 1863, 10, H. of L. p. 272, "a domicile of choice, even in a Christian country, is not acquired by any residence, however preponderant and however permanent, unless the person in question has the intention of subjecting himself and his moveable succession to the law of that country, or, at least, if he does not think expressly of the law, the intention of so incorporating himself with the population of that country that the application of its law to him and to his moveable succession must be considered to be in accordance with his feelings." These remarks of this careful English jurist disclose to us that it is by no means a matter of indifference for the acquisition of a domicile, or—a point which as a general rule will be ruled by the same considerations—for the change of one, what the consequences are which are looked upon as connected with the acquisition or change.⁸ At least, these consequences must count for a good deal, if any consideration is to be given to what the individual thought and intended. This is in fact the explanation of the divergence of the English and American jurisprudence from that of the Continent of Europe, which we have already mentioned. The latter often considers merely the question of the establishment of a general jurisdiction over the person when a question of a change of domicile has to be dealt with. [The former, at least in Mr Westlake's view, requires something more than an intention of unlimited residence, *viz.* an intention to submit his personal law to the law of the place of that residence.]

But in German practice, too, there has been no lack of doubts in questions as to the place of domicile. In the first place, it is certainly not necessary that one should have a complete intention of remaining for ever at the residence which has been chosen. An intention to stay there indefinitely, so long as no external inducement to change it befalls (*Si nihil avocet*), is sufficient.⁹ It is this indefiniteness, in that which need only exist in the mind of the person concerned, that so easily makes the very existence of the intention a matter of doubt.¹⁰ One is in this way forced to have recourse to indications of different sorts, which admit of very

held to be inept [*in re Steer*, 1858, H. & N. 594, 28 L. J. (Ex.) 22]. To the same effect, Foote, p. 14.

⁸ [The courts of Scotland have held that it is no bar to the acquisition of a domicile which will give jurisdiction to divorce, that the pursuer of that action distinctly avows that it was for that purpose that he came to Scotland. *Carswell v. Carswell*, 1881, Ct. of Sess. Reps. 4th ser. viii. 901. *Stavert v. Stavert*, 1882, do. do. 519. See the remarks of Lord Young in *Low v. Low* (Nov. 19, 1891, do. do. xix.) as to the vagueness of the terms used in connection with the law of domicile.]

⁹ See the decision of the court at Lübeck, in *Seuffert*, 14, No. 65. Dicey says, very truly, that the best definition of intention that can be given seems to be the negative one, *viz.* the absence of any present intention not to stay at the place in question.

¹⁰ Cf. Story, § 43, note 6. Judgment of the Supreme Court of Appeal, Lübeck, 23rd Mar. 1863 (*Seuffert*, 16, No 74).

various interpretations. Thus, for instance, the transference of a merchant's business to another place is not held to be enough to infer a change of domicile; even although the merchant, who is a married man, betakes himself with his business to that place. It has very properly been the custom to enquire in such cases whether his family went with him to his new place of residence, or stayed at the old one:¹¹ and at the same time the fact that the family have stayed behind may seem of no importance, because there may for instance have been cause for that in temporary matrimonial disagreements, or some other matter of that kind.^{12 13} One is also obliged to set store upon the purchase of a house, the payment of personal municipal dues, the acquisition of a special local franchise—unless this is a mere formality to facilitate the acquisition of landed estate.

Domicile once established, however, only ceases when both of its necessary conditions cease to exist. It continues if the intention alone remains, while actual residence has ceased, and it continues also in the same way, if there is merely an intention formed to change the domicile.¹⁴ But it also ceases if the domicile is quitted, while no intention of returning to it subsists. An intention to acquire a domicile in some other place is not requisite. A man may wish to live as a traveller or a vagabond.

LEGAL DOMICILE. FORCED RESIDENCE. FORCED ABSENCE.

§ 44. Intention to establish a domicile in a particular place may find an equivalent in compulsion, or in the direct provision of the law. According to Roman law, persons who were banished to a particular place had their domicile there.¹⁵ The common law practice in Germany has often extended this rule incorrectly to the case of persons who are detained in gaols.¹⁶ On the other hand, where persons are transported for life to a

¹¹ For different views on the question whether the tenant of a farm retains his domicile at the place where he has hitherto resided, or whether it passes over to the place where his farm is situated, see the judgments given by Seuffert, 11, No. 103. On the case of servants, see the judgment of the Supreme Court of Appeal at Lübeck, of 19th April 1845, Seuffert, 4, No. 254.

¹² See the judgment of the court at Lübeck, cited in note 10.

¹³ From German practice, see the remarks in Düring's paper in the *Mag. für Hannoversches recht.* vii. pp. 48-51, and the decision of the Old Supreme Court of Appeal at Celle there cited, and the paper in the same Magazine, 4, extra number, p. 80. But in doubt, if there is no preponderating reason for the application of the local law of the later residence, the law of the earlier is to be applied. Düring, *ut cit.* p. 48.

¹⁴ Cf. Dicey, p. 44; Wharton, § 56. Dicey gives this clear and correct definition, viz.: A person's domicile is that place or country either (1) in which he, in fact, resides with the intention of residence (*animus manendi*); or (2) in which, having so resided, he continues actually to reside although no longer retaining the intention of residence (*animus manendi*); or (3) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*) though he in fact no longer resides there.

Even formal declarations before some authority of an intention to change a domicile will not work that change, unless an actual change of residence follows. Decision of the Imperial Tribunal of Commerce, 22nd May 1874. Dec. 13, p. 363, reported in the Journal, ii. p. 369. There are some French decisions to the same effect cited there.

¹⁵ L. 22, § 3, D. *ad Municipalem*, 50, 1.

¹⁶ Cf. e.g. Schmidt, *Handbuch des gemeinen Civil processes*, i. p. 81. But, on the other hand, see Hinschius *ut cit.*; Wetzell, *System des ordent. Civil processes*, 3rd ed., § 40, note 48;

penal settlement, in which prisoners can set themselves up with a house and a business, the English practice holds correctly that there is a change of domicile.^{17 18}

The case of persons who are banished from their native country for political reasons seems particularly doubtful. It is plain that they do not at once acquire a domicile in the place where they live, although it may be that they live there for a considerable time. In the same way, it is just as plain that, if, as matter of fact, they enter on a course of life in another place, which indubitably requires an *animus remanendi*, they do set up a domicile for themselves there, and that thereafter there is no need to enquire what the cause for their originally leaving their homes was. But we must at the same time say that we cannot associate with a case of such enforced absence a continued intention to retain the former place of residence as the centre of the citizen's life and action. One cannot set up with any sort of certainty the indefinite hope, that the sentence of banishment may one day be removed, and there is therefore no juristic ground for presuming any such prospect or intention of return. Although the English decisions¹⁹ are based on this hope of return, that again proceeds on the consideration that the question with which they are concerned is the determination of the personal law of the exiles. They have not acquired a new domicile, and if the persistence of the old domicile be denied, there would be no so-called personal statute to apply to them at all. This, too, shows us that the question as to what effects are to be attached by the law to the domicile, is not without a bearing on the question as to the existence of that domicile. There is certainly a clear distinction to be taken between a true exile and the fear of an emigrant that hardships may befall him if he stays in his own country. The monstrous threats of punishment which at the time of the first French Revolution were uttered against the emigrants turned what was at first a voluntary emigration into a true exile.

LEGAL DOMICILE OF OFFICIALS, SOLDIERS, AND PERSONS IN A DEPENDENT POSITION IN A FAMILY.

§ 45. The law of Rome assigned a domicile of necessity, besides that of exiles, to the public official at the seat of his service, and to the soldier at the place of his garrison, and made persons in certain dependent positions in a family follow the domicile of its head, so that in those cases there

Hellmann, *Lehrbuch des deutschen Civil processrechts*, 1886, p. 93; Supreme Court of Appeal, Munich, 12 Aug. 1870 (Seuffert, 24, No. 274), and Phillimore, §§ 186, 187; Dicey, p. 129; Carré, *Loir de la procedure civile*, i. No. 358. Wharton, § 54, holds that in cases of imprisonment for life a change of domicile takes place.

¹⁷ Phillimore, 191; Dicey, 129.

¹⁸ The result is different if, as in the case of prisoners in a gaol, there is no free activity as of a citizen, and, for instance, no setting up of a home. Detention in a lunatic asylum, therefore, will never set up a domicile there for the lunatic. See judgment of the Appeal Court at Darmstadt, on 6th Dec. 1852, Seuffert, 10, No. 12. It is another question whether the curator of a person of unsound mind can change his ward's domicile. On that question, see below.

¹⁹ Cf. Wharton, § 54; Phillimore, §§ 188 *et seq.*; Dicey, pp. 130 *et seq.*

could be no question either as to the true place of residence, or as to the intention of the person.²⁰ No international importance can, however, be allowed to the former grounds of jurisdiction. If we were to recognise them in any cases beyond those²¹ in which a domicile would be set up at the place in question in any event, *i.e.* on general principles, we should allow the condition of a soldier or an official an extra-territorial operation, which would, putting aside the cases of extra-territoriality which public law recognises, be contradictory of the principles of public law. The fictitious domicile set up, by § 16 of the German Code of Procedure, for officials of the German Empire, or of one of her States established in a foreign country, has a direct recognition in the view of public law only in the case of those officials who can claim rights of extra-territoriality, and only to the extent to which that privilege of extra-territoriality goes. But there is no doubt that the office which the official fills in the foreign country may be one that is at variance with the supposition that he will hold it for an indefinite period. Thus in English practice it is held that the acceptance of an ambassadorial or consular post in a particular place will never found a domicile there, but that plainly by accepting such a post the domicile already established at that place will not be dissolved (cf. Dicey, pp. 137 *et seq.*). [*Udny v. Udny*, 1869. Ct. of Sess. Reps. 3rd series, vii. (H. of L.), p. 89. The case of a person holding consular position in Italy for forty years, but not thereby losing his Scots domicile.]

On the other hand, those necessary domiciles which rest upon the natural dependence of some members of a family have a claim for international recognition.

Thus the wife shares the husband's domicile, even although he shifts it after marriage.²² An actual separation, although it subsists with the consent of the husband, cannot according to English decisions²³ enable the wife to acquire an independent domicile. The result will be different if

²⁰ No doubt we must assume that the soldier or official had entered upon service at the place of the garrison or of the employment, or had gone there for that purpose. A pure fiction is not intended. Cf. L. 23, § 1, D. 50, 1, in relation to the soldier, *ubi meret*; Wach (*Handbuch des deutschen Civil processes*, 1, 1885, p. 404), who assumes in such cases a real but a forced jurisdiction.

²¹ *E.g.* the soldier may desert, the official at his own hand give up his post and settle at once in the foreign country. The jurisprudence of England and the United States, too, always enquires whether in the case of an official, with reference to his place of service, the general requirements of a domicile are really to be found. As a general rule, the official will *de facto* on general principles have the centre of his activity as a citizen at the place of his service, unless his service can be seen from the first to be only temporary at that particular place. See Dicey, p. 137. [Thus the doctrine of Anglo-Indian domicile by which officials of the East India Company, who took up their residence for an indefinite period in India, were held to have a domicile there, will not apply with the same force to officials of the present day, since all India is under the Government of the Queen, and officials do not therefore require *exuere patriam*, as they did when the Company existed, with many of the attributes of an independent sovereign. See Jopp. 1865, 34, L. J. Ch. 212. But see also *Abd-ul-Messih v. Farra*, 1888, L. R. 13, App. Ca. 431.]

²² Cf. L. 65; D. 5, 1; L. 38, § 3; D. 50, 1; L. 9, *C. de incolis*, 10, 40; L. 13, *C. de dignitate*, 12, 1.

²³ Phillimore, § 86; Dicey, pp. 104, 105. [*Low v. Low*, Nov. 19, 1891, Ct. of Sess. Reps. 45th ser. xix.]

there be a permanent judicial separation of the spouses, although no decree of divorce has been pronounced.²⁴ If in the circumstances of any particular case we shall negative the duty of the wife, which, as a general rule,²⁵ must be affirmed, to follow her husband to another domicile, we must then necessarily hold that the former domicile continues to subsist for her.²⁶

In the same way, a child under age and *in patria potestate* follows the father's domicile.²⁷ The domicile of bastards is the domicile which the mother had at the date of their birth. The question whether the child, in the case of a subsequent change of domicile by the mother, necessarily follows her domicile, must depend upon the question whether the mother can have ascribed to her a right which shall be equivalent to the *patria potestas*.²⁸ By the common law of Rome, this question must be answered in the negative; the bastard child is under curatory; this question at once arises, Can the curator—and under what conditions—change his ward's domicile? ²⁹

²⁴ Wharton, § 46. English jurisprudence seems doubtful (cf. Dicey, *ut cit.*). [Lord Fraser states the law of Scotland to be that under a decree of separation "the rule of law that his domicile is hers also, no longer holds." Fraser on Husband and Wife, p. 907.] French practice has laid down that a wife *separée de corps* may certainly choose her own domicile, but cannot change her nationality. See below.

²⁵ This duty ceases, if the husband is not in a position to offer her a house and maintenance in his new domicile. Cf. Supreme Court of Appeal, Wiesbaden, 15th February 1837; Oldenburg, 1857 (Seuffert, i. No. 237, 18, No. 257); Supreme Court of Appeal, Darmstadt, 1867 (Seuffert, 21, No. 129). We may also negative the duty, under certain circumstances, if the husband emigrates to distant countries with a widely different civilisation. Cf. judgment of the Supreme Court of Appeal at Dresden, 24th October 1850 (Seuffert, 4, No. 126).

²⁶ See, too, the German Code of Civil Procedure, § 568, subdiv. 2: "A suit" (for divorce, etc.) "may be brought by a wife in the Court of the husband's last domicile in the German Empire, when he has deserted her, and has no domicile save abroad." Cf. the decisions of the English Courts to the same effect cited by Phillimore, § 88. Phillimore himself remarks that the rule that the domicile is that of the husband must not be stretched so far as to create an injustice, *e.g.* to make it impossible for the wife to appeal to a court which can give effect to her claim. [But it has been held in Scotland that, in a case where a wife has been deserted by her husband, she cannot, by returning to the country of her origin, subject her husband to the divorce law and the courts of that country, in which he and she never lived *stante matrimonio*. Redding, 1888. Ct. of Sess. Reps. 4th series, xv. p. 1102.]

²⁷ L. 3, 4, D. 50, 1. The subsequent establishment of a separate domicile with the father's approval is not excluded (Savigny, p. 62, note 1, § 353; Guthrie, p. 100, note (t); Phillimore, §§ 89 *et seq.*; Dicey, p. 97). If a child is legitimated, it obtains the domicile which its father had at the time of the legitimation (Westlake, § 247).

²⁸ In such cases in England the mother is held to have the right when the father is dead, even if the children are lawful (Dicey p. 97). [By the Act 49 and 50 Vict. c. 27, § 2, the mother is entitled to be guardian jointly with any guardian named by the father, or by herself if the father has named none.] Wharton, § 41, note 2, describes it as the view of American practice that, in the case of lawful children, after the father's death the mother can alter the domicile, and even the national domicile, if she acts "reasonably and in good faith." If the mother has entered on a second marriage, it seems to be necessary for her to obtain a decree from the court which exercises the supreme power of guardianship. The practice of the State department at Washington, however, seems to hold that the widow cannot in any case, without the special permission of the proper court, cause her children to lose the citizenship of the United States (Wharton, Dig. 2, § 183 *ad fin.*).

²⁹ It is obvious that a minor, like any other person who in a legal sense is incapable of an exercise of the will (*e.g.* one who is unaccountable for his actions, or one who is a declared prodigal), cannot by himself change his domicile. A change of domicile is a legal disposition.

This last question, in so far ³⁰ as the change of domicile is supposed to work a change on personal law, or on the law of nationality, has for a long time been in dispute. If the choice of nationality is conceived as so entirely a personal matter that, as in the law of France, no one can exercise the right for any other, then the question cannot be raised. But apart from this new theory, which first came into existence with the French code, many held that a child in minority kept the last domicile of his dead father.³¹ Others allowed the possibility of a change of domicile, in so far as the curator had no fraudulent intention, *e.g.* to avail himself of some foreign rule of succession against his ward.³² Others, again, pronounced generally in favour of allowing such a change by an act of the curator.³³ From the point of view of the Roman law, we must assent to this latter view. A change of domicile, however, is not a regular act of administration, and can therefore only take place under the sanction of the supreme curatorial authority.³⁴ But, under this limitation, the question of change of domicile for the minor by his curator is unimportant; the minor and his relations and heirs are, by the approval of this authority being required, kept safe from any treacherous proceedings of the curator with a view to affecting his ward's succession. The opposite view, on the other hand, which would not permit any change of domicile during minority, might at times be very prejudicial to the ward.^{35 36}

PLURALITY OF DOMICILES? PERSONS WITHOUT DOMICILE?

§ 46. The law of Rome unquestionably recognised, after some hesitation, that a person could have more domiciles than one, if he indifferently selected several places as centres of his activity,³⁷ just as, conversely, one might be entirely without a domicile. Savigny (p. 64, § 354; Guthrie, p. 107) puts the following cases in illustration of the latter predicament:—

³⁰ According to § 108 of the *Code Civil*, the ward takes at once the domicile of his guardian; but by that *code* the personal law will not be modified at all by a change of domicile.

³¹ So Mornacius, *Observ. in Cod.* 3, 20 (Opp. iii. p. 328); Bouhier, cap. 21, No. 3, ch. 23, No. 164; Boullenois, ii. p. 69; Story, § 46; Fœlix, i. No. 28.

³² J. Voet, *Comm.* No. 4, § 10 *ad fin.*

³³ So, after many doubts, Corn. v. Bynkershoeck, *Quæst. jur. priv.* 1, c. 16; Rodenburg, ii. tit. 2, c. 1, § 6.

³⁴ If one under curatory takes up his residence in another country or another kingdom, that will not interfere with the continuance of the curatory under the court which has hitherto conducted it. Cf. Supreme Court of App. Munich, 11th October 1852; Supreme Court of App. Bostock, 28th September 1866; Supreme Court, Berlin, 2nd May 1867 (Seuffert, 6, No. 49; 19, No. 240; 23, No. 3).

³⁵ The theory of England and the United States is also to the effect that the curator can change his ward's domicile, but only with the approval of the court which has supreme curatorial jurisdiction. Cf. Story, § 506; Wharton, § 42; Westlake, § 250.

³⁶ On the legal domicile which freedmen by the law of Rome had at their patron's residence, see Savigny, § 353.

³⁷ L. 5, D. 50, 1. *Labeo indicat eum qui pluribus locis ex æquo negotietur, nusquam domicilium habere; quosdam autem dicere refert, pluribus locis eum incolam esse aut domicilium habere.* L. 6, § 2, L. 27, § 2, D. *eod.*

1. When a previous domicile is renounced, in order to go in quest of a new one, until this is chosen and actually constituted.³⁸

2. When a person has for a long time made travelling his occupation, without having at the same time any home, to which he is in use to return.

3. When a person, without any settled way of life, seeks his subsistence as a tramp or vagabond, by means that are uncertain and dangerous to public safety.³⁹

In Roman law both cases, that of several domiciles, and that of no domicile, were, however, without any considerable importance: for it was merely a general jurisdiction of courts, and not personal right, that was determined according to a man's domicile. In the former case, then, the person in question could be sued in several places as the seats of a general jurisdiction over him. In the latter case, recourse could be had either to a special jurisdiction, or to the general jurisdiction conferred by *origo* in the Roman sense, *i.e.* the general jurisdiction of the court of the place where the person enjoyed the right of citizenship.

If, however, the so-called personal law, or law of *status*, is to be made dependent on the domicile, the possibility of a plurality of domiciles to that effect must be negatived; and, on the other hand, we must hold that a domicile once acquired subsists till a new one is acquired. A plurality of personal laws for one and the same person is just as much a legal impossibility as an absolute lack of domicile.

The jurisprudence of England and the United States has drawn both of these inferences⁴⁰ as a matter of settled law, and by so doing has plainly and consciously withdrawn from the ground of the law of Rome.^{41 42 43}

³⁸ L. 27, § 2, D. 50, 1.

³⁹ [Held that the *forum* of a travelling merchant, who had no fixed place of residence, was the place in which he chanced to be for the time. *Linn v. Cassadinos*, 1881, Ct. of Sess. Reps. 4th series, viii. p. 849.]

⁴⁰ Cf. Phillimore, §§ 51 *et seq.*; Foote, p. 11; Dicey, pp. 61 *et seq.*; Wharton, §§ 72, 73. But it must be noted that English jurists assume the possibility of a plurality of domiciles, in so far as there may be a question as to distinct legal relations of the same person. *E.g.* it is assumed that a person may have his commercial domicile in A, but his domicile of succession in B. (The so-called commercial domicile comes into play in questions arising during a war, as to whether the ship or the wares of a person are to be regarded as belonging to the enemy. But what is in truth the object of this enquiry in those cases is whether in fact or by presumption of fact the goods come from the enemy's country, or are intended for his behoof. Under certain circumstances, then, the property of a British subject may be held to belong to the enemy [and one man may have two commercial domiciles ("Jonge Classina," 1804. 5 C. Rob. 297).]

⁴¹ On the inadequacy of the Roman law, see specially Westlake, p. 284 *et seq.* § 227. Foote, p. 11, cites English decisions in accordance with which the domicile of birth revives, if a domicile subsequently acquired is given up, and a new domicile is not yet acquired. [The familiar doctrine that the domicile of origin reverts *in transitu*, see *Udny v. Udny*, 1869, H. of L. Ct. of Sess. Reps. 3rd ser. vii. p. 89, Lord Westbury, p. 100: as to the persistence of the domicile of origin, see *Steel v. Steel*, 1888, Ct. of Sess. Reps. 4th ser. xv. p. 896; also *Vincent v. Earl of Buchan*, 1889, do. do. xvi. p. 637.]

⁴² The possibility of a plurality of domiciles is also negatived by many French authors. Cf. Brocher, i. No. 77 (p. 250). In Swiss jurisprudence there is no lack of representatives of this view, to which, for example, Muheim, p. 78, attaches himself.

⁴³ But see Savigny, pp. 101 *et seq.* § 359; Guthrie, pp. 125 *et seq.*; Stobbe, § 30, note 7; Dernburg, *Pandekts*, § 46, Notes 6-8. The provision of the general Prussian Land Code,

The German theory, which, as a general rule, in the same way declares itself for the dependence of the personal law upon the domicile, is less clear and less settled.⁴⁴

APPENDIX.

DOMICILE OF JURISTIC PERSONS: DOMICILE OF INCORPORATED COMPANIES IN PARTICULAR.

§ 47. Domicile is also an attribute of juristic persons. In their case, too, we can conceive of a centre of their activity, that is, of the activity that belongs to them as juristic persons. Many such juristic persons are by their very nature tied down to a particular locality as the centre of their activity, *e.g.* burghs, village communities, churches, schools, hospitals, etc. In other cases, the domicile is, as a rule, determined by the Statute of Incorporation, or by special legislative enactment.⁴⁵ But such special provisions,⁴⁶ except in so far as they are guaranteed by treaty, have no absolute international validity. They can only be regarded as *prima facie* proof of the domicile that is alleged. If, for instance, an industrial company which has been in form constituted in State A, has in truth the centre of its business in State B, it is a company belonging to State B,⁴⁷ and subject, therefore, to all the laws of State B, which have an application to the constitution of companies of the kind, and possibly by these laws the constitution or sequestration in bankruptcy of the company may be invalid.⁴⁸ Otherwise the laws of any State, which had been

Introd. § 27, is capricious and also inadequate: "If a man has two domiciles, his capacity is to be dealt with and to be determined by the laws of that one of the two jurisdictions which most favours the validity of the transaction." What is the law in the case of intestate succession, according to this statute?

⁴⁴ English jurisprudence regards domicile as so pre-eminently a matter of fact that the limitations imposed by foreign systems of law on the acquisition of a domicile in their dominions are simply disregarded, in so far as legal relations which depend on the acquisition of a foreign domicile, but come up for decision in an English Court, are concerned (Foote, p. 23).

⁴⁵ Cf. Savigny, § 354 *ad fin.*; Guthrie, p. 108; Dicey, pp. 110 *et seq.*

⁴⁶ Cf. German Code of Civil Procedure, § 19: "The court of general jurisdiction for communities, corporations, and all companies, associations, or other combinations of persons, and all foundations, establishments, and collections of assets or property, which can be sued as such, is determined by their seat. Unless some other seat is plainly discoverable, the place where the management of the concern is carried on is held to be the seat."

⁴⁷ Cf. Belgian statute of 18th May 1873, art. 129: "*Toute société dont le principal établissement est en Belgique, est soumise à la loi belge, bien que l'acte constitutif ait été passé en pays étranger.*"

⁴⁸ So Vavasseur, *Jour.* ii. pp. 345 *et seq.* (Trib. de comm. de la Seine, 15th March 1874, and 11th March 1880; *Jour.* i. pp. 96 *et seq.* and vii. p. 195), and decree of the Swiss Bundesrath to the same effect on 21st January 1875, which recognised in a case of the kind, in the bankruptcy of the *Credit Foncier Suisse*, the exclusive jurisdiction of the French courts. *Jour.* ii. pp. 80 *et seq.* (By that decree, the judgment of the courts of Geneva, which had held the provisions of the statute as to form to be absolutely binding, was set aside. *Jour.*

enacted in the public interest for the formation of companies,⁴⁹ might in the simplest possible way be evaded. The establishment of a branch is not a change of the domicile, and by no means subjects the company in all respects to the laws of the place where the branch is set up (Judgment of the Trib. Corr. Seine of 10th February 1881. *Jour.* viii. p. 158). But a real change of domicile can only be carried out,⁵⁰ if the company or corporation, besides actually transporting the seat of its administration, observes also those legislative provisions which are required at its new domicile for the establishment for the first time of a juristic person or company of the kind. To attempt to place the company under a law different from that of its real domicile, by merely going through the statutory forms, would in law have no effect; and, on the other hand, an actual change of domicile by itself would simply withdraw from the juristic person or company its legal foundation. From that time onwards, it could only be considered as a *de facto* partnership,⁵¹ unless, of course, there was some special statutory provision for this case.

[The law of England as to foreign trading companies and incorporations is stated in Lindley on Company Law, p. 909, and is in substantial conformity with the doctrines of the text. He quotes a convention concluded between England and France, the first article of which provides: "The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions." Similar conventions are concluded with Belgium, Italy, Germany, Spain, and Greece. For further discussion of the subject, see below, §§ 104-108, and relative note.]

i. pp. 154 *et seq.*) Clunet (*Jour.* v. pp. 525, 526). A different result is obtained from a judgment of the Court of Cassation for Belgium, *C. de Bruxelles*, 12 Ap. 1877. On that, see the excellent notes of Clunet, as cited.

⁴⁹ Cf. *C. de Bruxelles*, 14th October 1870 (*Rev.* iv. p. 154).

⁵⁰ So Vavasseur, *Jour.* ii. pp. 350, 351. Judgment of Court of Brussels, 14th October 1870, reported by Dubois, *Rev.* iv. p. 154.

⁵¹ A change of the seat of an incorporated company, is plainly not the same thing as an alteration of the objects of the undertaking; on this account (cf. Art. 215, *subsec.* i. of the German Code of Commerce) it may be resolved on by a majority of the company (cf. Renaud, *Rechtliche Gutachten*, pub. by Hergenhausen, 1886, i. p. 214). This conclusion must, however, be confined to the case of a change of domicile within the territory. In any case, this raises no proper question of private international law; but is simply dependent on the legal system of the country which has for the first time settled the rights of the company as against its individual members. Against the possibility of transferring the seat of the company into another State by the resolution of a majority, see Vavasseur *ut cit.* and a judgment of the French Court of Cassation, 7th June 1880 (*Jour.* viii. pp. 263 *et seq.*) In agreement with the text, see judgment of Imperial Court, i. on 5th January 1862 (*Dec.* vii. p. 69, Seuffert, 38, No. 243).

II. NATIONALITY.¹

A. HISTORICAL DEVELOPMENT.

§ 48. The ancients made the so-called law of the person depend on descent and not on domicile. Law, religion, and civilisation were closely connected:² they were matters of race and of family, a natural position, since law and the State are developed out of the family. The *Metoeci* in Greece, the *Peregrini*, who lived in Rome, did not enjoy the personal law of the State although resident in its territory. (So long as distinctions were still recognised within the Roman Empire, personal rights were determined by *origo*,³ in the Roman sense, *i.e.* the citizenship of any

¹ German literature on the subject of nationality is inadequate, and, in scientific and practical value, falls short of the French, in which Cogordan's work no doubt is, as yet, entitled to the first place. Even Martitz's meritorious treatise, which is so often cited, by no means exhausts the subject, even from the point of view of the German law. The predominant point with him is military duty, and his principal result is a criticism, no doubt a very valuable criticism, of the so-called Bancroft treaties. The former edition of this book was, it must be conceded, very deficient on this subject. At that time, however, there was as yet no literature worth the name on this subject. Even the materials for discussion were wanting, or were only made available at a later date, and the aims which were described in that edition as the proper aims of the theory—although the distinction between what was actually in existence and what was desirable was, owing to the brevity of the exposition, not always kept clearly in view—have obtained more and more recognition as practically and scientifically sound.

² Cf. Cogordan, *La Nationalité*, Paris 1879, p. 20. On the law of citizenship and the law of foreigners in the States of antiquity, see A. Pierantoni, *Trattato di diritto internazionale*, vol. i. Rome 1881. (*Prolegomena . . . Storia dall'antichità al 1400.*)

³ See in general on this subject Savigny, §§ 351 *et seq.*; Guthrie, pp. 88 *et seq.* Apparently the state of things in Rome, according to which the whole dominions of the State fell into certain burghal divisions (*Stadt-bezirke*), had its origin in the fact that the land and soil and their inhabitants had belonged to particular States or towns which at one time had sovereign power. The natural result was that citizenship and not domicile determined the so-called law of the person. We cannot assent to Savigny's assumption that there were subjects of the Roman Empire, who were not—at least passively—citizens of some particular city, and that personal law could, in any part of the Roman Empire, have been dependent on domicile. Savigny thinks that a right of citizenship in a particular city was not enjoyed by the following persons:—

(1) Foreigners who happened to be admitted to the Roman Empire as inhabitants, but had never been admitted as citizens of any particular city.

(2) Citizens of any city who had been loosed from its municipal society without having been admitted to any other municipal community.

(3) Lastly, the freedmen of the lowest class, who were *dediticiorum numero*, and belonged to no particular community.

But it is very improbable, and no proof of the theory is adduced, that any one could have been received into the Roman Empire without acquiring the citizenship of a particular city, especially as thereby he might have withdrawn himself from the burdens and taxes of the cities, which are known to have been so heavy, and for the sure payment of which all kinds of precautions were taken. The same reason argues against the possibility of the second class of exceptions, and a favourable position of that kind is certainly not to be assumed to have existed in the case of the *Dediticii*. It is true that they had no active rights as citizens, but we certainly cannot exempt this class of person, who were generally at a disadvantage, from the burdens of citizenship. If, however, all persons in all places were at least in a passive sense citizens, there is no

particular town.) It was but seldom that foreigners were received into the national community with full rights of citizenship, and, as a rule, an act of the legislative authority was required to effect it. It was only in the later days of the Roman Empire, when it set out to develop a world-wide empire, that the *Civitas Romana* was frequently given. In accordance with the theocracy of the Jewish State, the true question with them was whether the stranger adopted the faith and the ritual of the Jewish people.⁴

Originally it was just the same among the Germani. But, as we have noted, this race was less exclusive, and the same striving after freedom to choose, each for himself, a fellowship or community, with which is associated the development of the unions of retainers or followers of a chief, seems at an early date to have made it possible to receive strangers into the full community of the place or of the clan. No doubt, says the *Lex Salica* (45), the foreigner must retire, if only one of the existing community raises an objection to him; but if any one has remained unchallenged for a year and a day, he can no longer be expelled, and he has become a comrade (*Genosse*) in the full sense.⁵ This is the origin from which gradually sprang the rule that domicile, at first only a domicile that had lasted for a year and a day, is the determinant of personal law.

In truth, domicile and the acquisition of a right of citizenship—if the latter is not confined to members of the same race—are distinguished only by this fact, that in the case of domicile the stranger is tacitly admitted into the community of law, while in acquiring citizenship he is expressly so admitted. No importance will, however, attach to the necessity of an express admission to citizenship which may, from motives of expediency or of caprice, be refused by the commonwealth that is concerned, unless special political rights or duties, as the case may be, are associated with this admission. From the end of the Middle Ages onwards, after the great mass of the people had lost all political rights, that was no longer the case; and thus, to take an example, the question whether a man, who had settled in France, was a Frenchman or not, had no further meaning than that in the former case the *droit d'aubaine* could not be exercised. Naturalisation,

reason left for regarding domicile even in a subsidiary sense as regulative of personal rights. Personal rights were a privilege of rank or class—*favorabile* or *odiosum*—and it is at variance with the nature of such a privilege to suppose it to be dependent on the capricious choice of domicile by an individual. In favour of this view and against Savigny, see Nüscheler, *Beiträge zur Geschichte des Heimathlichen Gerichtstandes*, Zürich 1880, pp. 5 *et seq.*, especially pp. 10 and 11. (Those who, as persons without citizenship, are called *ἀπολίδες*—see L. 17, § 1; D. *de poenis*, 48, 19—are persons, in the law of Rome, who are incapable of all those legal relations which belonged to the *jus civile*, persons who, as a punishment, are afflicted with a kind of civil death.) (*Forum originis*, in the modern sense, is the jurisdiction of the domicile of the father or mother as the case may be, which, no doubt, used in older practice to be assumed as a subsidiary jurisdiction in general in the case of persons who had no domicile at all.

⁴ Pierantoni, *ut cit.* p. 147.

⁵ Folleville, p. 29. This proposition returns again in later times. Folleville, p. 35, *Rechtssbuch nach distinctionen*, v. 2, 2.

which, as a name merely, was known before the first revolution, was simply a renunciation of this right made in advance. It was only in cities, where there was still some meaning attached to the political rights of individuals, although that meaning was often a very narrow one, that in certain relations importance was still given to a special acquisition of the rights of citizenship.⁶ The reverse, however, was the general rule.⁷ For the rest, domicile and nationality were generally identified with each other, a thing which it was all the easier to do, as no distinction was made between foreigners and strangers, even as regarded exile or expatriation. There is no doubt that persons born in France or in England were at once regarded as French⁸ or Englishmen, as the case might be. According to feudal theories, they might in a certain sense be looked upon as products of the soil, while in France the children of French parents who had been born abroad were also counted as French.⁹ Upon the whole, however, this nationality had no further meaning than as a certain favourable position for the individuals concerned. It excluded the application of the *jus albinagii* from those persons who enjoyed it, and made them to the fullest extent of legal capacity. At the same time, too, nationality of this kind was capable of being employed in a more capricious way in international concerns. The interests of citizens of this kind served as an occasion for interventions in matters of public law, and such citizens could be more justly than foreigners enlisted as soldiers or pressed as sailors, although in earlier periods the question of citizenship was not much stirred in such matters. Nationality might seem to be a matter of indifference in determining the law of the person. Within the same State, as a general rule, a maze of the most various rules of private law was recognised, and across the frontier of the State the same variety often prevailed as was found in the different quarters of the State itself. How could the idea that the fact of belonging to a State (a fact which seemed, in so far as questions of private law were concerned, to be quite irrelevant) should be the determinant of personal law ever arise? This is the explanation of the circumstance that the question of nationality was most superficially considered.

⁶ In the period between the sixteenth and eighteenth centuries, the principle that, for the law of the person, the law of membership of the canton, and not the domicile, was regulative, was recognised in many of the Swiss cantons, especially in those which, on the one hand, enjoyed a complete freedom, or at least a ruling position, and, on the other hand, had not been affected by the levelling influences of the jurisprudence of the common law. It was even in earlier times recognised in these cantons, that the canton in which any one enjoyed the rights of citizenship was obliged to receive him if he should fall into poverty. Cf. Wyss, *at cit. sup.* pp. 54 *et seq.*, and in more detail the paper by Nussleier, pp. 51 *et seq.*, cited above.

⁷ Cf. Pufendorf, *Observationes juris*, l. ult. § 2: "*Insulis quædam non cunctis domicilium in civitate (Stadt) habitantibus ex jure civitatis succedunt, sed jus civitatis non habent. Et ita Senatus Cellensis judicavit, anno 1719.*"

⁸ This rule is found in France from the days of Charles the Great. Cf. Fellerille, p. 23.

⁹ We also meet here and there with the theory, that the place of birth involves an attachment as citizen to that territory, only if the parents have their domicile there.

B. GENERAL IMPORT OF NATIONALITY IN INTERNATIONAL INTERCOURSE.

§ 49. But things necessarily changed when the subjects of different States began to have important political rights conceded to them, and when comprehensive systems of private law were devised for the whole State, and they changed still more when the banishment of natives of the State began gradually more and more to be looked upon as an inadmissible measure. The gift of political rights was necessarily associated with a special declaration of adoption on the part of the State, or with some protracted stay in the territory, or with some other conditions precedent.

To the legislation of the first French revolution belongs the merit of having first distinctly grappled with the question of nationality, although at the outset with much hesitation and many mistakes in detail, and of having more correctly estimated its meaning. This legal system, too, was the first that logically made the so-called law of the person dependent on nationality and not on domicile.

Nationality,¹ as we have already remarked, is one of the axioms of international law, and unquestionably it is primarily dependent on the legal enactments of each individual State; each individual State will always, in the first place, have to decide whether, in accordance with its own legal system, any particular person is to be recognised as belonging to it or not.² But apart from the question, which we shall afterwards discuss, whether the law of the person is to be determined by the law of his domicile or by that of his nationality, there is no doubt that to private international law belongs the discussion of the problem, as to what principles are the most practical for settling the acquisition and the loss of nationality, as also the discussion of possible cases of conflict, of cases in which two or more States at the same time each and all claim some individual as belonging to them, or seem to do so; and, on the other hand, of the converse cases that all the States that can possibly come into consideration, refuse an individual nationality in any of them.³

C. VARIOUS PRINCIPLES. THE PLACE OF BIRTH (*JUS SOLI*). DESCENT (*JUS SANGUINIS*). MIXED PRINCIPLE (THE PRINCIPLE OF ASSIMILATION).

§ 50. It is now more and more widely recognised, that the place of birth, which is determined by pure accident, should have nothing to say in determining nationality, but that the question must be made to depend on

¹ The statutes of a great number of nations as to nationality are, at least in their main provisions, to be found in Beach-Lawrence, iii. pp. 194 *et seq.*; in Cogordan (cf. especially p. 429) and Weiss, pp. 255 *et seq.* Cogordan besides gives a literal translation of the enactments.

² Blütschli, *Völkerrecht*, § 374; Fiore, § 53: cf. too, the judgments of the Swiss Bundesgericht, 21st April 1882, Martin, Rev. xvi. p. 489; Cogordan, p. 278. We must not, however, infer, as the last-named writer does, that it is only the courts of the State concerned that have jurisdiction to decide when a dispute arises as to the acquisition or the loss of citizenship.

³ "Questions as to citizenship are determined by municipal law in subordination to the law of nations" (Wharton, Dig. ii. p. 234).

descent.⁴ But still we cannot look on the principle of the place of birth, the *jus soli*, as completely set aside.⁵ It is still held by England and the United States along with⁶ the principle of descent; in the Republics of South America and in Venezuela it is still recognised to the full, and here and there it is argued in support of this view, that an exclusive recognition of the principle of descent would lead to this, that there might easily be a number of families who should for generations keep themselves from becoming naturalised, while they in fact enjoy all the advantages of nationality—for in matters of private law the foreigner and the native enjoy exactly the same legal capacity—but escape from the special burdens of citizens, such as military service. They may also, it is said, by invoking the protection of foreign powers, in certain circumstances become a danger to the very State which has hospitably received them.

As a matter of fact, the system of descent carried out in its fulness,⁷ results in an unreality, so soon as the stranger, as is substantially the case nowadays, enjoys the like rights as the native, while religion and customs

⁴ The principle of *jus sanguinis*. The Institute for International Law (Annuaire, v. pp. 43 *et seq.*) has declared for the principle of descent. Fiore, *Diritto pubblico internazionale*, 3rd edition, p. 253, describes the *jus soli* as at variance with the international rights of the individual (*contro il diritto internazionale dell'uomo*).

⁵ See the more exact declarations in Weiss, p. 73, and the note of the government of Venezuela to the Italian ambassador in 1874, given by Cogordan, p. 40: "*Que la constitution du Vénézuéla ayant posé en principe que tout individu né sur le territoire de la République est Vénézuélien quelle que soit la nationalité de ses parents, les fils d'Italiens nés au Vénézuéla sont Vénézuéliens quelles que soient les dispositions du Code Italien.*" An exception is made by the law of the Argentine Republic, of 1st October 1869, in the case only of children of a foreign ambassador born in the Republic. The English statute of 1870 (33 & 34 Vict. c. 14, § 4) provides that, in the event of a conflict arising out of the application of the *jus soli*, there shall be an unlimited right of option, which may be exercised at any time after majority.

⁶ Cf. Wharton, Dig. 2, § 183. It is, however, laid down that if a father, himself a foreigner, takes a child born in the United States out of the country with him, that child ceases to be an American citizen. A man born in the United States is, on the other hand, allowed the right, after attaining majority (with this limitation, no doubt, that it must be soon after attaining it), of unequivocally declaring his intention of becoming a citizen of the United States, and of thereby acquiring that right of citizenship. The retention or abandonment of the domicile is regarded as decisive, and therefore it is at least doubtful whether a widow, who is a foreigner, by transferring her domicile again to a foreign country and taking her children with her, without the leave of the supreme curatorial authority, will expatriate the children. (Cf. Wharton, Dig. 2, p. 401.) Decision of the Circuit Court of California, 29th September 1883, reported by Lebreton (*Jour.* xiv. pp. 230 *et seq.*). The son, too, of a Chinaman born in the United States becomes an American citizen, and, consequently, if he travels to China and returns again, he is not affected by the prohibition against the landing of Chinese labourers.

[In Great Britain the character of citizen is acquired (1) by birth in Great Britain or the dominions of the Queen; (2) by descent (4 Geo. II. c. 21, § 1); (3) by naturalisation, denization, and resumption of British nationality. Denization is granted by the Crown; naturalisation by the Secretary of State on application made to him by persons who have resided for five years in the United Kingdom, or served under the Crown for that period, and intend to continue so residing or serving; resumption of nationality is effected on the same conditions by British subjects who have become aliens, and, therefore, by a widow who has been married to an alien. Naturalisation and resumption of nationality carry the rights of citizenship to infant children residing with their father or mother (33 & 34 Vict. c. 14, §§ 7 & 8).]

⁷ The law of the German Empire of 1st June 1870 is based purely on the principle of descent, but on that very account has already led to many inconveniences, and in particular to evasions of the obligation to military service. No doubt banishment may be used as a

have ceased to maintain any strict division between the members of different nations. At the same time, however, it would not be desirable to take a residence in any country for a considerable period as a ground on which by itself to set up a claim to nationality. The necessary duration of any such residence cannot be fixed with any certainty, and the individual concerned is in the same way quite unconscious of any such definite period. The question whether a domicile has been established at all at a particular place is frequently matter of doubt: it would be much more difficult to say at what point of time a domicile began to exist. For a residence, which at first was thought to be merely temporary, may imperceptibly turn into a true domicile. On this account, the course which French jurisprudence of more modern date has opened out, seems to have much more to recommend it. It holds⁸ a residence, which may be presumed to have lasted through two generations, to found nationality to this effect, that, if a father was born in France, his son, being also born in France, becomes at once a Frenchman. Birth is a circumstance the date of which can be fixed with sufficient precision, and it will only be in very rare cases that the births in one family will take place for two generations in a country in which that family is not, as a matter of fact, firmly established. But all objections will lose their point, if the child is allowed by some formal act, which is to be gone through before an official within a fixed period, to preserve its right to the nationality to which it belongs by descent. We may, perhaps, fitly call this system the principle of pre-

compulsitor against foreigners, who in fact, if not in law, have become citizens, but at the same time neglect to obtain naturalisation. Such a measure, however, is very severe, and is easily represented as odious, while it by no means removes all the evils that are attendant upon the position. See Martitz, *ut cit.* [By the German statute the quality of citizenship is acquired either (1) by descent; (2) by legitimation; (3) by marriage; (4) by reception (*Annahme*), in the case of a citizen passing from one State of the empire to another; (5) by naturalisation in the case of foreigners. Neither adoption nor domicile will give the quality of citizen. Foreigners are admitted to be naturalised on proof that they are *sui juris* by their own law, and of good character; that they have a residence or trading establishment in Germany; and that they have the means of providing for themselves and their families. Naturalisation and reception are both acts of the Government.] In the debates of the Institutes, the evils of this position seem not to have been kept in view: there the pure principle of descent was adopted, and a necessary exception was made solely in the case of foundlings.

⁸ Cf. statute of [6th June 1889, art. 1. "*Sont Français . . . 3° tout individu né en France d'étranger qui lui même y est né; . . . Tout individu né en France d'un étranger et qui, à l'époque de sa majorité, est domicilié en France, à moins que, dans l'année qui suit sa majorité, telle qu'elle est réglée par la loi française, il n'ait décliné la qualité de Français et prouvé qu'il a conservé la nationalité de ses parents, par une attestation en due forme de son gouvernement, laquelle demeurera annexée à la déclaration, et qu'il n'ait en outre produit, s'il y a lieu, un certificat constatant qu'il a répondu à l'appel sous les drapeaux, conformément à la loi militaire de son pays, sauf les exceptions prévues aux traités.*"] The Italian statute book, art. 8, takes an uninterrupted domicile of the father for ten years in Italian territory in place of the birth of the father there: "*E' riputato cittadino (a native) il figlio nato nel regno da straniero che vi abbia fissato il suo domicilio da dieci anni non interrotti: la residenza per causa di commercio non basta a determinare il domicilio. Egli può tuttavia eleggere la qualità di straniero, purchè ne faccia dichiarazione nel tempo e modo stabilito dall' articolo 5. . . .*" The proviso with reference to a settlement for trade purposes shows that this article must in practice often give rise to doubts.

sumptive assimilation. More modern French legislation is [to some extent] in accord with this principle. It allows a child [domiciled in France at the date of his majority], and born in France of a father who is a foreigner,⁹ the liberty, within a year after attaining majority, to decide by a formal declaration for the nationality which depends on his descent.¹⁰ The proposal we make could not be adopted in France exactly as we have made it, without surrendering a principle to which French legislation and French jurisprudence obstinately believe themselves bound to adhere. That is the principle that, in all cases in which the choice or the determination of nationality is referred to the will of the individual, the declaration is pre-eminently a personal matter, which cannot be satisfied by any declaration or any act of the father or of the guardian. Thus French legislation is forced to defer the necessary declaration till the majority of the child born in France.¹¹ But that involves the evil that, till majority is attained, we remain uncertain as to the eventual nationality of the person concerned, although for the time, in matters of private law, he is treated as French. For instance, we do not know whether he can be admitted to the military schools;¹² and again, the choice comes into play at the very moment at which there is most probability of an attempt by the young man to withdraw himself from the claims of his country from selfish motives.¹³ The additional limitation

⁹ In the United States, the proposition in a negative direction has at least been so far recognised, that the right of citizenship does not pass to the sons whose fathers never resided in the United States. Cf. Wharton, Dig. 2, § 176, p. 363. In like manner English citizenship does not pass to the third generation born abroad (Foote, p. 3).

¹⁰ Besides, French jurisprudence is defective in so far as it holds to the absolute operation of the *jus sanguinis* in the case of foreign countries. It ought to recognise that, in the same cases in which a child born in France becomes French, a child born abroad of French parents comes into the world as a foreigner, provided always that the foreign State concerned concedes its nationality to a child born within its bounds. See, as to conflicts of the kind in relation to the descendants of French parents, Daireaux, *Jour.* xiii. pp. 422 *et seq.* I cannot, however, assent to the suggestion there made as to the proper principle, which is really the same as that of Martitz, to be noticed below.

¹¹ According to the legislation of 1889, this declaration is to take place within a year after majority. Cf. Weiss, p. 300.

¹² The provisions of French law, which stand in connection with the 9th article of the *Code Civil* [as amended in 1889, viz.: "*Tout individu né en France d'un étranger et qui n'y est pas domicilié à l'époque de sa majorité pourra, jusqu'à l'âge de vingt-deux ans accomplis, faire sa soumission de fixer en France son domicile, et s'il l'y établit dans l'année à compter de l'acte de soumission, réclamer la qualité de Français, par une déclaration qui sera enregistrée au ministère de la justice*"], in their historical origin may be traced back to a remnant of the so-called *jus soli*, and therefore many authorities (among others Weiss, p. 54) assert the retrospective action of the claim for which provision is made in that article. But we can logically and rationally arrive at similar provisions by the path indicated in the text, and Cogordan (p. 92), for instance, is of the opinion that a retrospective effect, which he recognises no doubt *de lege lata*, must from the legislative point of view be esteemed a serious error. See, too, against such an effect, Fiore, No. 54 (pp. 98 *et seq.*), the Belgian practice cited by Dubois, *Rev.* xiii. p. 54, *Rev.* viii. p. 486, and in recent times the judgment of the C. de Paris of 6th March 1884, affirming the judgment of the court of first instance the tribunal of the Seine. [The latest law as to French nationality rejects the retrospective operation of some of the rights which it confers, art. 1 (20).]

¹³ Accordingly, art. 1 of the law of 1889 has expressly given up to a certain extent the principle of an entirely independent choice of nationality. In speaking of the power given

imposed by the law of 1889, according to which it is only permissible, in cases such as those described in *note* 12, to claim a foreign nationality if the claimant can prove its continued subsistence, is very proper in itself, but is scarcely sufficient to prevent undesirable abuses of the laws of hospitality such as have been indicated.¹⁴

We may recommend the following provisions for international treaties, and generally for legislation,¹⁵ viz.:—

“Nationality is founded on descent: provided that birth in the territory of a State founds nationality there, if the father, or, in the case of bastards, the mother, was born in that territory, unless within a period of six months, reckoning from the child's birth, the father, or mother, or guardian, as the case may be, makes a formal declaration before the proper official of the place of birth, that the child shall retain the nationality of the father, or of the mother, as the case may be.¹⁶ This declaration must be

to sons of foreigners, born in France, of claiming French nationality, as described in the last note, it further provides: “*S'il est âgé de moins de vingt et un ans accomplis la déclaration sera faite en son nom par son père; en cas de décès par sa mère; en cas de décès du père et de la mère, ou de leur exclusion de la tutelle . . . par le tuteur autorisé par délibération du conseil de famille.*”

¹⁴ The territory of a State in this connection is to be taken in the sense of public law. Birth on board ships of war belonging to the State, or on merchant ships on the high seas, is birth in the territory of the State; not so birth in the hotel of an ambassador. Cf. Cogordan, p. 78. On the other hand, the whole rule that the family is firmly settled in the country, if a birth in the second generation takes place there, is necessarily inapplicable, in dealing with extra-territorial persons: for extra-territoriality is just the reverse of a settled and firm subjection to the law of that country. Thus, even the legal system of the Argentine Republic, which holds fast to the strict *jus soli*, makes an exception in the case of the children of extra-territorial persons born there. See Weiss, pp. 73, 74.

¹⁵ The provisions of the French law have obtained a very general assent. In Luxemburg (cf. Cogordan, pp. 54 *et seq.*), however, a further condition is required for the acquisition of nationality by the child of the second generation, being born in Luxemburg, viz. that the father should, up to the date of the child's birth, have had his domicile in Luxemburg. The government had proposed simply to adopt the French principle. The council of Luxemburg, on the other hand, maintained that nationality should not be allowed to be acquired simply by omission, and possibly by positive neglect, and desired in every case an “*acte authentique*” to establish a change of nationality. But it is just such things as the acquisition and retention of a domicile that are least susceptible of being established by an authentic act. If, as the council desired, it is proposed to protect the State against a tacit acquisition of nationality by undeserving persons, that would be better ensured by a provision by which State officials should be allowed, within a certain period, reckoned from the birth of the child (or from the intimation of the birth at the proper office), to lodge objections to the acquisition of nationality, and that this should prevent its being acquired. This is the only possible method of really referring the acquisition or non-acquisition of nationality, as the case might be, to an authentic act. If a principle such as that recommended in the text were adopted, there would be no need of the principle of law of the United States (cf. Beach-Lawrence on the Acts of 10th Feb. 1855), by which citizenship no doubt passes from father to children, but not to the descendants of persons who have never stayed in the United States, so that the right of citizenship is extinguished in the second generation born abroad. A negative rule of that kind, although it proceeds from the correct principle, that the rule of descent, if recognised *in infinitum*, leads at last to an unreality, seems suspicious, because its tendency is to increase the number of “the homeless.”

¹⁶ Martitz, *ut cit.* 1146, recommends the following amendment for the German statute, viz.: “But every person shall be treated as a citizen, who is born within the German Empire, of parents who have settled here with the intention of not returning to their homes: it may be

accompanied by evidence of the nationality of the father, or of the mother, as the case may be. In the case of an attestation by the authorities of the foreign State being wanting, the court of the place of birth decides as to the import of the evidence."

As a necessary consequence, powers of guardianship, as the analogous French law would require, must be vested in the State where the birth takes place, but, of course, at the same time must protect the interests of the ward, with reference *e.g.* to his family circumstances.

CHILDREN WHOSE PARENTS ARE UNKNOWN (FOUNDLINGS). ILLEGITIMATE DESCENT.

§ 51. In the case of children whose parents are unknown, necessity requires that the place of birth, or the place where they are found, should determine their nationality.^{17 18}

In determining nationality, it should in all reason be matter of indifference that the mother has not recognised the child, if, on the other hand, it

that such a person may be allowed to certify that he has continued to be a citizen of another country by means of a declaration by its authorities."

But, in the first place, the intention of the parents in such a matter may in many cases be very doubtful. Again, the rule proposed will in this guise very nearly throw over the principle of nationality, and substitute for it that of domicile. It is well adapted for the regulation of the duty of military service, but not for the determination of relations of civil law. Laurent, iii. §§ 109 *et seq.*, cf. *Avant projet*, art. 40, proposes that a child of a foreigner born in Belgium should at once be claimed for Belgium, reserving a power of option to be exercised at a later date. The foundation of this claim is not very plausible. A child born in Belgium is not on that account brought up there (two things which Laurent, in giving an illustration, at once identifies with each other), and has not necessarily any special "attachment" to the State where it is born. More tolerable and better is the 8th article of the Italian statute book, which introduces a provision of the same kind, in the event of the father having had a residence for ten years in Italy. "Homelessness" is no doubt in the actual sense of the term an evil, but legal systems are not intended to capture souls.

¹⁷ Cf. *Vesque v. Püttlingen*, pp. 89, 90. *Karminski*, p. 46, as to the difficulties and artificialities of French jurisprudence on this point. *Weiss*, pp. 27, 28. Cf., too, *Bluntschli, Völkerr.* § 366a.

¹⁸ Neither French nor German law has any special provision as to foundlings. But *Cogordan*, p. 102, *Folleville*, p. 113, and *Weiss*, p. 68, are justified in inferring that a child found in France must be treated as a French subject, as a decree of the convention in 1793 declared *enfants trouvés* to be "*enfants naturels de la patrie*," and a decree of 19th Jan. 1811 laid on them the obligation of military service. Some French authors propose to give the founding the option contained in Article 9 of the Code Civil. In Belgium, the practice of the Court of Cassation (differing from that of the Courts of Appeal) had decided that a child of unknown parents born on Belgian soil did not at once acquire Belgian nationality (cf. *Dubois, Rev.* 13, pp. 58 *et seq.*), because the *Code Civil* had given up the principle of *jus soli*. But the rule adopted in the text justifies itself upon other considerations. Probability pronounces that the child was probably born of native parents. A statutory interpretation (15th Aug. 1881) has put an end to the practice of the Belgian Court of Cassation on this point. Many difficulties arise from the rule of the Franco-Belgian law, which in a legal sense sets children born of parents "*légalement inconnus*" on the same footing as foundlings. Cf. *Van der Rest, Rev.* xvi. p. 139. But conception within a State is by no means the same thing as birth there. Judgment of the Belgian Court of Cassation 8th March 1881, *Rev.* xvi. p. 139.

is certain that she gave birth to it; it should also be unimportant that in other matters the law denies all legal effects, even to the child's relationship with its mother, on the ground that the procreation of the child was a criminal act. A child should not for these reasons be placed on a footing with a foundling, whose parents really are unknown. In determining nationality, actual facts in nature must, as far as possible, be taken as the foundation, and not artificial and more or less capricious fictions, although they be based upon pretended considerations of morality.¹⁹ Again, how can we compel a foreign State to take such a child as a citizen, if by accident, for instance, it has been born just across the frontier of its mother's native State, while the mother, as happens in most cases, has taken the child back with her to her own home. The German statute, § 3, provides very rightly in this simple and comprehensive way, without making distinctions, viz. :—"Illegitimate children acquire the nationality of their mother."

Again, it is no good reason for making bastards follow the nationality of their father, that he has to some extent, short of legitimation, recognised them.²⁰ The foundation of the whole system of a child's personal rights should not be allowed to depend on acts²¹ like these, informal and often more or less doubtful.

DATE OF BIRTH DECISIVE.

§ 52. According to the strict principle of descent, the logical result would be that the nationality of a child should be determined, not by the time of its birth, but by that of its conception. The child would acquire the nationality which the father or the mother, as the case might be, had at the date of conception. But, nevertheless, we shall find it sounder to adhere to the date of the birth, as the date of the conception is uncertain.²² In French jurisprudence, too, the weight of authority is to this

¹⁹ We say "pretended considerations" on purpose, for laws which trample under foot a fact which is notorious, and not to be denied, are never truly moral. For instance, would not a child procreated in adultery still treat its mother as a mother, and be regarded by her as her child?

²⁰ This is the rule of French jurisprudence. But Cogordan rightly declares for the other view, pp. 27 *et seq.* He gives most weight to the doubt whether the child will give his assent to the opposite rule; for no one can acquire the rights of a father over a stranger child by any procedure he pleases: what is, too, to be the result, if several persons of different nationalities thus recognise the child?

²¹ Strictly speaking, French law requires recognition of the child by the mother.

²² The Roman law, no doubt, in questions of *status* had regard in case of legitimate birth to the date of the conception. Gai. i. §§ 89-91 (cf. L. 11, D. *de statu hom.* 4, 5). But in such cases regard was always had in truth to that moment, within the possible period of conception, which was most favourable to the child's legal capacity. It is this *favour* to the child, which makes him a *civis Romanus* if the father, at any moment within the period of possible conception, was himself a *civis Romanus*. But nowadays one cannot say that a child will certainly be in a better position according as he takes up this or that nationality.

effect, in correspondence with the words of the French law.²³ But it is plain that, from the point of view of the French law, there is an illogicality in this position. For it will not under any circumstances allow parents any influence at all upon the nationality of their children, and yet they are allowed such an influence if the naturalisation of the parents in the interval between conception and the birth is to alter the nationality of the child.

LEGITIMATION.

§ 53. The legitimation of a child has the effect of elevating a natural relationship into one that the law will recognise, and it operates therefore to make the nationality of the child follow that of the father.²⁴ It is therefore, as French jurisprudence in regard to the recognition of a child also admits, to be regarded more correctly not as a privileged form of naturalisation, but as a legal declaration of a natural fact already in existence, and therefore has *ipso jure*^{25 26} an operative and retrospective effect.²⁷ It stands, therefore, in the same position as the subsequent discovery of the parentage of a foundling would stand.²⁸

²³ Cf. specially Cogordan, pp. 25, 26, Weiss, p. 25 (Judgment of the Belgian Court of Cassation of 17th February 1873, Dubois, Revue, vi. p. 277). On the other side, Aubry and Rau, *Droit civil*, i. § 69; Laurent, iii. § 106. The exaggeration of the principle of descent in the 5th article of the *Codice Italiano* is peculiar, but it is not to be recommended, because it gives rise to conflicts of different systems of law and to divisions in the family. The provision is that, if the father has lost his Italian nationality before the birth of the child, the child is still an Italian, if it is born in Italy and has its residence there. After attaining majority, no doubt, such a child may declare for a foreign nationality.

²⁴ This is the general opinion, for which Fiore, especially § 58, adduces very weighty grounds. Laurent, iii. § 101, proposes to give the child a right of option, but can hardly have found much approval for this view; such rights of option are unadvisable, on account of the long period of uncertainty which they involve. See, on the other side, Durand, pp. 256 *et seq.* In Laurent's proposal for amendment of the Belgian law, art. 40, it is provided that a legitimated child shall always follow Belgian nationality, if either father or mother belongs to that State. A general acceptance of the principle must necessarily lead to conflicts.

²⁵ Some Austrian authors, and among them Unger (p. 294), deny that the legitimated children of an Austrian are by Austrian law citizens of that country. But we are not driven to that conclusion by the use of the word "*Geburt*" in the Austrian statute book, corresponding to the word "*né*" in the French code. See, on the other side, in particular Vesque v. Püttlingen, p. 85, who seems, however, illogically to deny a retrospective operation to legitimation, or who has not clear ideas as to the benefit of such a retrospective operation.

²⁶ For the *ipso jure* effect, see the French practice cited in the Journal, vi. 393. But, of course, the child is not bound to accept legitimation or recognition from any one that chooses to offer it. If the child, or the guardian, does not assent, the alleged father must prove his paternity. As a rule, the consent will not be refused.

²⁷ Cogordan, p. 32, Folleville, p. 115, Weiss, p. 31. On the other hand, the latest French legislation on nationality rejects, to some extent, a retrospective effect. Logically, in such questions, the nationality of the father at the date of the birth must rule. But it is equally true that, if the father has subsequently acquired a different nationality, then, according to the rule of the unity of that family, which lies at the root of the German system, the child follows this latter nationality, and it certainly in that event has no retrospective effect. French law is different from this.

²⁸ The words of the German statute are, § 4: "If the father of a bastard is a German, while the mother has not the father's nationality, the child acquires the father's nationality by

With adoption, however, the result is otherwise.²⁹ It is a purely capricious act, and one entirely apart from the natural relation of descent. French jurisprudence refuses to allow adoption to have any effect on nationality. This can also be expressly provided, as in the last paragraph of § 2 of the German statute.

D. IMPORT OF THE LAW OF NATIONALITY.

(RIGHTS AND DUTIES.)

§ 54. Up to this time, we have not touched the question as to what the idea of nationality imports, what the rights and duties on the part of the individual and of the State which it involves are. This discussion, as a matter of fact, has been left untouched by very many authors, and in international law it might be possible to evade it, and commit it to the law of the individual State, were it not that the question, whether an individual's nationality in regard to a particular State has ceased, is very closely dependent on the solution of this other question, viz. whether the individual has established a nationality for himself in some other State. If, then, by the term nationality different things are understood in different States, this would give rise to general confusion, and far-reaching collisions between States.

We have already said above that the acquisition of a domicile in itself,¹ so far as this depends simply on the free will of the individual, cannot constitute the idea of nationality. But just as little can the acquisition of political rights be a condition precedent of nationality. For there have

legitimation carried out in conformity with legal requirements." From the use of the word "acquires" one might suppose, and this is in fact Cogordan's view *ut sup. cit.* that German law regards legitimation as a kind of naturalisation, which would bear some analogy to the naturalisation of a wife by her marriage, and would therefore give ground for holding that § 3 adduces legitimation as a special ground for acquiring a nationality, along with descent, marriage, and naturalisation. But the expression of the German statute is upon the whole not very exact. The enumeration in § 2 shows this: for either the acquisition of nationality by legitimation belongs to the head of naturalisation, or else it is an acquisition by descent, but in a juristic sense it is impossible that it should be a third means of acquiring nationality of an entirely different character. Again, it is not strictly correct to say "by birth . . . legitimated children of a German acquire his nationality. . . ." It should run, "Legitimate children of a German, who at the time of their birth was a German, are German, even although their birth takes place abroad." There is, however, no idea here of a special act of acquisition. In these circumstances, we do not feel ourselves compelled to determine questions by the words of the statute, if these are at variance with the nature of the subject.

²⁹ Cf. Cogordan, p. 33, *Vesque v. Püttlingen*, p. 84, who obtains the same result for Austrian law from general principles. See, too, on p. 86, the practice of the Hungarian ministry of the interior.

¹ On this, says Martitz, p. 1118, all European powers are at one. Cf. statute of the German Empire, § 12: "Domicile within one of the States of the Empire does not in itself give rise to nationality." On the other hand, a domicile continued for a certain protracted time may very well turn into nationality. Thus in Norway and Denmark a foreigner, who has had his domicile there continually for two years, cannot be expelled. Cf. Cogordan (pp. 196 *et seq.*). The foreigner has then acquired a nationality; he has not as yet got political rights.

been, and still are, in many States, classes of persons who are without political rights, and yet no one on that account thinks of doubting their nationality.² We must, however, recognise the exercise of political rights in the proper sense,—and, as Karminski (p. 17) very properly remarks, we mean by that not all public rights, but only those that have in view some participation in the control of the State, either directly or through the different communities found within the State,—as an important indication that a person or a family is counted to have any particular nationality. The exercise of political rights by foreigners is always an exception. On the other hand, there are cases, although at the present day they are exceptional, in which, either from force of custom, or it may be by virtue of some special enactment, foreigners, *e.g.* persons who are owners of particular estates in the country, exercise political rights, *e.g.* are members of a chamber of peers.³

On the other hand, it is no sign of nationality to be subject to the system of private law in any particular State, and in the same way it is possible for a State to go so far as to extend diplomatic protection to persons who are not in truth its permanent subjects.^{4 5} Conversely, it may refuse that protection to certain persons, although they do belong to it, for the reason *e.g.* that they have shown themselves unworthy of this protection, or by some breach of the law have forfeited⁶ their claims to such protection.⁷ There is then hardly anything left except the indefeas-

² Cf., in recent times, Wharton (*Jour.* xiii. p. 541) on the instructions of the diplomatic representatives of the United States.

³ See Karminski's (pp. 13 *et seq.*) careful enquiry as to the state of things in Austria. The prince-bishop of Breslau and the prince of Leichtenstein are, for example, members of the Austrian Upper House. In the same way, in some provinces of Germany, the so-called "*Standesherrn*" (*i.e.* the representatives of the prince of a mediatised State) may belong to the so-called first chambers, as not being in the rank of subjects.

⁴ The United States extend diplomatic protection to persons who have not as yet become citizens, if they are domiciled in the United States, and have made a declaration of their intention of becoming citizens: except in questions with the country from which they came, if by its laws the existing bond of allegiance is not dissolved, and if the persons in question have voluntarily betaken themselves to her territory. See, on that subject, Wharton, *Jour.* xiii. pp. 537 *et seq.* See Woolsey, *Int. Law*, § 81, on the case of Koszta, which partly belongs to this subject.

⁵ For instance, persons who are under the protection of European powers in the East, belong in no sense to that nation whose protection they enjoy. See *Vesque v. Püttlingen*, pp. 47 *et seq.*, on persons styled *de facto* Austrian subjects.

⁶ It is notorious that to levy direct taxes from any person does not imply a recognition of his nationality. See below, § 107.

⁷ Stoerk, in v. Holtzendorff's *Völkerr.* 2, § 115 (pp. 594 and 596), proposes to find in the idea of nationality a complete legal subjection to the personal majesty (what is the meaning of that ?) of the State, and an entering into the unity (?) of the national law of *status*. That is to say, he thinks that with nationality the so-called personal statutes are at once conferred. He regards the connection, which is recognised "in some territories," of the so-called personal law with domicile as only "of local effect." I must say, however, that although I have declared myself in favour of determining personal law in future legislation in Germany according to the principle of nationality, I must at the same time refuse to hold the principle of domicile which is still recognised in the most extensive empires, to be a purely particular institute, or an arrangement with nothing but local effects.

ible right of residence⁸ in the State, the right to live there.⁹ For, however far a State may go in hospitably receiving foreigners, still foreigners who are dangerous to the community, or in need of relief from the poor law, may be refused a right of residence, and in extraordinary cases at least that right may be limited by special legislation to some other effect.¹⁰ On the other hand, no State can in these days effectively refuse to receive back into its own territory subjects of its own, who have been rejected by a foreign country. The banishment of a State's own subjects, a power which is still sometimes exercised as an exceptional political measure, in truth can only be exercised with the knowledge that it is contrary to the rules of

⁸ The authorised domicile of the French law does not give rise to nationality, because, in spite of the authority obtained from government, the foreigner can be expelled.

⁹ For this theory, elaborated by me in my former edition, see in particular Laband, *Das Staatsrecht des deutschen Reichs*, i. 2nd ed. p. 144, note 1, and Herm. Schulze, *Lehrbuch d. deutschen Staatsrechts*, i. (1880), § 136; Cogordan, p. 17; Laurent, iii. § 144; and Martitz, pp. 794 *et seq.* Laband and many others agree with me, but at the same time propose to include in the definition an obligation to special loyalty and obedience on the part of the individual. This obligation is certainly not to be denied, and I myself, in my first edition, tried to draw several important conclusions from it. At the same time, it seems to be a mistake to make this, which is only a deduction from the fact that an individual, with his right to live somewhere on the world's surface, is in the last resort driven back upon the State where his home is, into an integral part of the definition. Besides, the obligation of the individual to loyalty, in so far as that term is not limited to the sentiment, which has no juristic importance, is by no means absolute. The State B, for instance, in which a subject of State A lives, may make it impossible for this foreigner to fulfil his obligation to military service by measures of coercion and criminal regulations passed just as war breaks out. It could compel him, although that would, of course, be an infraction of public law, to carry arms against his own country. It is, then, more correct, instead of speaking directly of an obligation of loyalty binding on the individual, to say: Every State has a right to claim that its citizens should not be prevented by another State from fulfilling in a certain measure their obligations of loyalty, or at least that no other State by its legislation (*e.g.* by forcing them to military service under itself) turn these obligations into their reverse. The obligation of the individual to be loyal is in itself domestic law in each State: the other right of the State, which we have just expressed, is international law. While, however, Laband (*Staatsr.* 2nd ed. i. § 15), and with him most others (*e.g.* H. Schulze, *Deutsches Staatsr.* i. §§ 141, 142), assign to the citizen a certain duty of loyalty and obedience, Stoerk, § 119a, in agreement with G. Meyer and Ehrenberg (*Deutsche Rundschau*, 10, Heft. 7), recognises merely the duty of obedience. In my opinion it is true that for the judge, in a question *de lege lata*, there is no need that he should concern himself with the obligation of loyalty: in questions *de lege lata*, the point never involves anything except obedience to a particular law. But in questions *de lege ferenda*, the obligation to obedience is seen to arise out of the obligation of loyalty, and the obligation of the citizen who is abroad, to be obedient, ought not to extend further than loyalty can be required of him. On the other hand, the *subditus temporarius* owes obedience. Vattel, i. ch. 19, §§ 212, 213, was on the way to define nationality as the right to a permanent residence in any territory, when he said: "*Les habitants perpétuels sont ceux qui ont reçu le droit d'habitation perpétuelle. C'est une espèce de citoyens d'un ordre inférieure.*" Vattel is no doubt very confused on this subject, for he declares that even "*habitans*," who have not that right, are bound to defend the country in which they reside, because they have enjoyed the protection of that country.

¹⁰ On the expulsion of foreigners, see below, § 98. As, however, Laband very properly suggests, it is perfectly reconcilable with this rule that foreigners should, by virtue of treaties, gain an unconditional right to a residence in the country. Thus, in the Middle Ages, the Jews often had a right of residence secured to them by treaty (Stobbe, *The Jews in the Middle Ages*, pp. 23 *et seq.*).

public law, and that it is impossible to carry it out in so far as other States refuse to receive the exiles.¹¹

E. LOSS OF ONE NATIONALITY WITHOUT A CONTEMPORANEOUS
ACQUISITION OF ANOTHER?

RELEASE FROM THE STATE TIES.

§ 55. As the State cannot with full effect declare that persons who have once belonged to it have lost their right of residence on its territories,¹ so we must also deny its power to do so, on the ground that any person has spent a long time abroad, without having fulfilled certain duties which he owed to it, the State where he had his home.² Indeed, considering that in this question we are dealing not only with the interests of the individual,

¹¹ Muheim, pp. 38, 39, combats both the conception of nationality as a right of residence in the State, and the obligation to loyalty which arises from that right. The latter belongs, he thinks, to feudal law, is not in accord with democracy, and is in contradiction to the fact that in Switzerland, for example, an individual can have rights of citizenship in several cantons (Indigénate). The right of citizenship in the commune may, he thinks, supply a foundation for a right of citizenship in the State. But it is not easy to see why one should not be under an obligation of loyalty to a State with a democratic constitution. Again, the combination of several cantonal citizenships, if the cantonal communities are closely united, so that a conflict of duties seems hardly conceivable, may very well co-exist with the obligation to loyalty. The possibility, therefore, of a plurality of cantonal citizenships proves nothing. Finally, it is no doubt quite possible that one, by simply being received into a local community, may become a citizen of the State to which that community belongs. It is simply a domestic detail of the constitution, whether each local community has the privilege of turning foreigners into subjects indirectly, by receiving them into its own body; then if the persons, who are thus received by a community, cannot be afterwards expelled by the State, they have acquired its nationality, although they may lack many political rights. On the other hand, the State authority may make the acquisition of nationality dependent on a prior acquisition of a right of residence in some local community. In that case, the final right of residence in the State, and as a consequence the right of residence in the particular community, is conditioned by the acquisition of nationality, although the community can raise no objection to the acquisition of the local citizenship.

In pages 56 and 57, Muheim argues against the obligation of loyalty being incumbent on subjects, on the ground that it is inconsistent with the freedom of emigration, which would then become a breach of faith, while on the other hand the State would have the right of cutting any one free from its ties, who had in any way broken his obligation of loyalty. But such a relation of loyalty need not be eternal; it is quite reconcilable with the idea of it, that it should be capable of being dissolved. Although the servant owes his master fidelity, and the vassal his lord, it is not meant that both of these obligations are to last for life.

¹ See especially Laband, *ut cit.* p. 144, note 2.

² In more modern times a number of treaties have been concluded, in which the contracting States have bound themselves to receive back again their subjects in such cases as, for example, their being paupers. In many of these treaties this provision is quite properly expressly extended to cases, where the person in question has lost his nationality in the State so bound according to its own laws, but has not yet acquired any other nationality. See, on that subject, Bulmerincq in v. Holtzendorff's *Rechtslexicon*, Art. *Asylrecht. ad fix.*, and Stoerk in v. Holtzendorff's *Volkerr.* 2, § 116, note 4. To take such a person back is held to be taking back one who belongs to the State, and on principle, therefore, the children of such persons must be taken back with him. See in this sense, and on the divergent view of the Prussian officials, Karminski, p. 45.

but that we must also take into account the rights of the other States, even an express renunciation by the individual of his rights of nationality, or a release of him by the State with his own consent from the ties that bind a subject, can in this matter make no difference.³ Still less, of course, can it be decisive of the question that the person has left his fatherland without any intention of returning to it.⁴ The general interests of international legal order imperatively demand that every one should belong to some particular State,⁵ and that no one should be without a home.⁶ Would it, on the other hand, be possible to suppose that an indigent person should be tossed like a football from one State to another, or should be exposed somewhere on a desert island, or that—supposing personal law to be dependent on nationality—he should have no personal law at all? We come, then, to the conclusion that any provisions, which on any grounds you please declare that a man has lost his rights of citizenship,⁷ and even a sentence of dismissal from all the ties that bind a subject, mean primarily no more than this, that the State shall no longer be bound to afford diplomatic protection abroad to persons who have been so declared to have lost their rights, or to have been dismissed, and that the exercise of political rights shall cease at the

³ On this account the French rule, which no doubt had for its first object the freedom of emigration, was faulty as a piece of legislation. It ran thus, viz.: "*La qualité de Français se perdra . . . 3^o enfin par tout établissement fait en pays étranger, sans esprit de retour.*" It is faulty in so far as, by the term *établissement fait en pays étranger*, we understand the acquisition of a domicile, or even a prolonged *de facto* residence. [This provision is repealed by the statute of 1889.] The Italian Code requires, art. 11, at least an express renunciation of Italian nationality. Laurent, however, in his sketch of Belgian legislation, adheres to this erroneous conception of the French law (cf. art. 45).

⁴ If we do not require, to constitute expatriation, *i.e.* to give rise to the loss of nationality, the acquisition of another nationality, it is correct not to require from the emigrant the positive determination never to return, all we require in that case is the want of a distinct intention to return. (Cf. v. Martitz, pp. 1148, 1149.) But in that case expatriation is hardly distinguishable from a change or abandonment of domicile; and as it is desired to distinguish between domicile and nationality, the existence of an *animus non revertendi* has been postulated as a condition of emigration that is to imply a loss of nationality. Such an *animus* can only be demonstrated to exist in the most exceptional cases, as Martitz rightly notes. As a general rule, the individual will regard his return or non-return as dependent on uncertain events, *e.g.* upon whether he succeeds or not.

⁵ Cogordan, p. 17, places at the head of the three fundamental rules which he regards as necessary this rule, viz.: "Every man must belong to a particular State." ("*Que tout homme doit posséder une nationalité.*") So, too, Folleville, pp. xiv. *et seq.* That agrees, as we see, with the rule which the jurisprudence of England and the United States has set up with regard to national domicile. This, too, cannot be lost until a new one is acquired.

⁶ The word "*heimathlos*" (homeless) has passed over from German into international literature, especially in France. We find there the expression "*le heimathlosat.*" Besides, this word is used to describe the condition of persons who desire, as far as it is feasible, to have no home, and so withdraw themselves from the burdens which any nationality would lay upon them, and particularly from military service (cf. Cogordan, p. 10).

⁷ Experience shows that every State, in spite of expatriation having taken place, will in the end find itself forced, in spite of all the protestations and appeals to its own legislative enactments which it may make, to receive back into its dominions, persons who have left it, if they have not acquired a new nationality elsewhere, and are indigent. Thus Russia, in 1878, had to take back the so-called Saratow colonists who had emigrated to Brazil, and subsequently, in 1883, the Jews who had emigrated to Austria and the United States.

moment at which the dismissal takes effect.⁸ On the other hand, these declarations leave the person so dismissed full freedom of movement, and the State neither can nor will claim from him the performance of any special duties founded on his allegiance; and further, the principles of criminal law which postulate the character of citizen have no application to his case. In so far, however, as the personal law of the individual depends on his nationality, that nationality must of necessity remain in existence until a new one is acquired, and in like manner the obligation of the State to receive him again, if need be, must also continue to subsist.⁹

§ 56. Inasmuch, then, as there is a complete freedom of emigration, an emigrant should be given, not a release from the ties of allegiance, but rather a certificate of intimation of the intention to emigrate, and that no obstacle stands in the way of the persons concerned giving up their allegiance to the State. This is the present rule of practice in Austria (cf. *Vesque v. Püttlingen*, p. 110).

On the other hand, the release is in Austria treated as ineffectual, if the person concerned does not actually leave Austrian territory, and this is quite sound (cf. *v. Püttlingen*, p. 112). Men who are under military obligations require in Austria special permission, which, in a legal sense, simply implies a waiver by the State of these obligations; or they may obtain a certificate from the State, that no military duties are exigible from them, it may be on account of bodily infirmity.

The idea of the German law on this point is incorrect, in respect that, although emigration is free to all, it only speaks of the cases in which emigration will not be allowed, without saying that in other cases it cannot be denied, and also in respect that it speaks of release from State obligations. Can a man who is free be said to need a release?

But the provision of § 18, subsec. 1, is absolutely wrong, and leads to peculiar results. "The certificate of release operates a loss of nationality the moment it is delivered."

⁸ For the exercise of political rights in its nature presupposes a permanent relation of dependence on the State, and when a man has brought about his dismissal from the State, he has made a declaration that is inconsistent with this relation. Strictly speaking, one who has been thus dismissed, even although he continues to reside in the country, must, in order to exercise political rights, have this declaration formally recalled. The obligation of the State, then, in some aspects lasts longer than its right; the complete freedom of the individual begins before his right (*e.g.* the right to be eventually taken back by the State) ends. There is, therefore, a sort of incongruity between right and obligation, and we may say that the obligation of special loyalty ceases sooner than the true kernel of nationality, *viz.* the right to live in the country. This incongruity, however, is inevitable, for an emigrant must begin by seeking an enduring connection with another State, and in this he might find it an obstacle to be obliged still to retain his loyalty to the State of his birth.

⁹ At the same time, a certain care for its emigrants is quite consistent with this, the true position of a State, and must be recognised as a moral duty, as *v. Martens* rightly insists (*ii.* p. 185). The modern practice of most civilised nations is in accordance with this rule. Other States cannot well resist the exercise of this duty: in spite of it, the home State must still eventually take back its emigrants if need be.

This rule applies only to the case of being released from one of the States of the empire to pass into another, a case in which, by § 16, subsec. 1, the acquisition of nationality in the new State is a condition precedent. Besides, within the empire there is a right of migration without payment of any duty. But the rule does not apply to international relations. Can it be asserted that a man who has got his papers of release can be turned out of the territory of the empire, although, as a matter of fact, he has never left his home, and has not been adopted by any other State?

And what is to be the result if, as is the case according to § 7 of the Royal Saxon municipal statute book, the so-called personal statute is determined by nationality? What personal statute has the person so released in the interim?

The rule, however, has this result, which is quite sound, viz. that, when a man's papers are delivered to him, all special obligations of allegiance which are incumbent only on German subjects are extinguished. The person so released cannot, for instance, if he returns to Germany, be punished there for any crime committed by him abroad, except on a special application for that end made by the foreign authorities, and except in the extraordinary cases mentioned in § 4, No. 1, of the Criminal Code. This was recognised, in reference to the corresponding provisions which used to be law in Prussia, in a judgment of the Supreme Court of 26th March 1865, and in a dissertation of an eminent Prussian jurist approving of this decision (cf. Goltdammer in his *Archiv. für Preussisches Staatsrecht*, pp. 340 *et seq.*). He can no more be extradited than he can be banished (Judgment of the Prussian Supreme Court, 3rd February 1854. Goltdammer, *Archiv.* ii. pp. 252 *et seq.*), while the last paragraph of § 4 of the Criminal Code may be applied.

There is, however, in the last paragraph of § 18 of the German statute, a certain implied recognition of the principle taken up in the text, that all releases are only operative under certain conditions:—

“The release is inoperative, if the person released does not, within six months from the day on which his papers are delivered, shift his abode out of the empire, or acquire nationality in another State of the empire.”

§ 57. In these questions French legislation is sounder than German. The leading grounds on which the character of a French citizen can be lost, set out in the 17th and following articles of the Code Civil [as amended by the statute of 1889], except the special case of a French woman marrying a foreigner, presuppose that a new nationality has been acquired, or at least that French territory has been quitted.

It may, however, be taken as certain according to German law also, that release from allegiance, as distinguished from a loss of nationality under § 21, by reason of long-continued residence in a foreign country, is looked upon as an act that rests upon the assent of the person who is to be released. Accordingly, the decisive point of time is the delivery of the

certificate of release, not the date of its publication; and we might put it even more correctly thus, that it is the date at which that certificate is received. Because the person who has applied for it may always refuse to receive it, and thus for a time, or permanently, make the certificate of no effect.¹⁰

A provision to the following effect would be practically useful, viz. :—

“Every one who wishes to emigrate shall receive, on application, an official attestation to show that there are no obstacles in the way of his being released from his allegiance to the State. Those who are subject to military service, soldiers, etc., can only obtain this attestation provided that, etc.”

Delivery of this attestation has these effects, viz. :—

“(1.) The person named therein shall not exercise any special rights which postulate nationality, until he gives back the attestation, but at the same time

“(2.) He is not to be called upon to perform any duties which postulate his nationality or his residence in the State, or in any community belonging to it.

“The attestation shall fall after the expiration of six months, if the person who has received it has not left the territory with the intention of being permanently absent, or of acquiring a foreign residence.”¹¹

LOSS OF NATIONALITY AS A PENALTY, AS A CONSEQUENCE OF PARTICULAR ACTS.

§ 58. It follows, from the principle that every one must belong to some particular State, that in particular we may cast aside any statutory

¹⁰ Cf. Laband, *Staatsr.* i. p. 158, note 1, p. 164: “Release, too, is a bilateral contract, which requires the concurrent will of the two parties, and for the completion of which we must have writing, and the preparation and delivery of a formal document.”

¹¹ The German law no doubt also recognises a loss of nationality without the consent of the subject (§§ 20, 21). “Germans, who are resident abroad, may be declared to have lost their nationality by a resolution of the central authority of their native State, if in case of a war, or a threatening of war, they fail to obey an express summons for the whole empire issued by the *Bundespraesidium* (i.e. at present the Emperor) within the specified period.

“§ 21. Germans, who have left the empire and resided ten years uninterruptedly abroad, lose their nationality thereby. That period will be interrupted by being entered in the register of an Imperial Consulate.” (According, also, to the Imperial German Statute of 4th May 1874, regulating the unauthorised exercise of ecclesiastical offices, clergymen or other servants of religion, who by a judicial sentence have been dismissed from their offices, but who nevertheless assert their right to the same or exercise them, or resist any regulations of the police made to prevent them, may be declared to have forfeited their nationality, and may be expelled from the empire.)

At the end of § 21 it is besides provided: “Germans who have lost their nationality by a ten years’ residence abroad, and forthwith return into the territory of the empire, acquire nationality in that State of the empire in which they settle, by means of a certificate of reception under the hand of the supreme administrative authority, which must be given to them on demand.”

As the reception of the applicant is in this case imperative, if the person concerned desires

provision which assigns the loss of citizenship as a punishment, or as a consequence of certain acts which may be described as breaches of loyalty, or felony against one's native country. The French statute book contains provisions of this latter kind, and a peculiar French statute of 1848 punishes slave-dealing with the loss of French nationality.¹² But Cogordan properly (pp. 264 *et seq.*) declares himself opposed to this principle. The only true course, as Cogordan remarks, is that followed by the law of Russia. The Russian does not lose his nationality, but forfeits all privileges, which the law reserves exclusively for Russians. If the entry into the civil and military service of a foreign State, without special leave obtained, or emigration without leave, is to operate loss of citizenship, while the foreign State does not recognise the act in question as having that effect, the only meaning to be attached to the loss of nationality must be one of the following: *First*, the individual may be free from all criminal responsibility, for crimes in which nationality is recognised as a condition of the possibility of guilt; *second*, the individual may lose all the privileges of a citizen, particularly diplomatic protection; *third*, the individual may, in matters of private law, lose all his so-called personal rights; *fourth*, the individual may have no right to be taken back into the State, and, in the event of his poverty, to be attended to there. The third result, if personal law is to depend on nationality, is a legal impossibility. The fourth result will, as a matter of fact, generally be an impossibility. The first infers no punishment and no disadvantage, but rather in the long run an advantage for the individual. The second result is thus left as the only true solution which is at the same time capable of securing effect in practice.

it, there is an indirect recognition of the position, that the loss of nationality by this means is not definite.

The principle adopted in the text is the foundation of an agreement concluded at Gotha on 15th July 1851, by a large number of German governments, which, however, except in so far as the kingdom of Bavaria is concerned, has lost its practical significance in consequence of the Imperial statute of 6th June 1870 as to domicile, for the purposes of poor law relief. § 1 provided:

"Each of the contracting governments binds itself to receive back persons (*a*) who have continued to be its citizens or subjects, and (*b*) their former citizens or subjects, even although by their own law they have already lost their citizenship, so long as they have not come to belong to any other State by its law."

By an exchange of declarations in similar terms, in 1875, between the governments of the German and the Austrian Empires, the same principles are declared to govern their relations (see Vesque von Püttingen, pp. 122, 123; on agreements by Austria with other States to the same effect, see p. 122). As a matter of fact the German Empire, in spite of the formal provisions of the statute as to nationality, seems to be unable to refuse to receive again persons who have lost their German nationality, but have not as yet acquired any other. See the case reported by Wohlers (*Entsch. des Deutschen Heimathsamtes*, 17, p. 185). Von Martitz, too (p. 1149; see also p. 792), repeats the rule already laid down by me in my first edition, that all grounds for expatriation have merely a relative effect—*i.e.* no State can in the long run refuse to receive back citizens who have not at the same time acquired another nationality. See, on this, Bluntschli, *Völkerr.* § 371 and in the Review, ii. p. 117.

¹² Cogordan very properly enquires, Why should not French nationality be withdrawn from other notorious criminals?

ENTRY INTO THE CIVIL AND PARTICULARLY THE MILITARY SERVICE
OF A FOREIGN STATE. ABANDONMENT OF NATIVE COUNTRY.

§ 59. All that has been said about the loss of nationality which takes place by direct operation of law, will of course apply to any special sentence of loss of citizenship that may be pronounced according to § 22 of the German statute, in the case of a German who enters foreign public service without the leave of his government. But, on the other hand, § 23 of the German statute promises too much, when it provides: "If a German serves with a foreign government, with the leave of his own government, his nationality remains German." If the entry into the service of a foreign State has, by the laws of that State, the absolute effect of naturalisation, the German Government will scarcely be able to make good its claim, that the official still remains German. It must, at least, abandon all claims that are inconsistent with the requirements of his duty. To be accurate, therefore, the 23rd paragraph must have this addition made to it, "in so far as the conditions of the appointment, and the law of the foreign State allow." If the entry on the service of a foreign power without special leave were not regarded as a kind of insubordination, which deserves to be threatened with the irrational punishment of the loss of nationality, it would be much more correct to provide to this effect, viz.: "Entry on service with a foreign power suspends the duties of nationality, only if it is made with leave of one's own government. But, in conferring such leave, the rights of nationality may be reserved in so far as this is consistent with the office, and with the laws of the foreign State. With such a reservation is always associated the right of re-demanding nationality, by an express declaration to be made in the event of return."¹³

But if we put aside the absurd rule that, by entering a foreign service, a man loses his nationality, and if we hold that it is only lost in so far as a foreign nationality is acquired, we escape from all the difficult questions that are involved in determining what the nature of the foreign official position must be, to infer loss of citizenship.¹⁴ No one would lose his nationality, unless by accepting his office he acquired another.

Again, it is inconsistent with the formal character of nationality, to attach the loss of it to the case where a man simply leaves the country without intending to return,¹⁵ or, it may be, with a positive intention of

¹³ In practice, the continued subsistence of nationality often finds expression in the necessity for the officials obtaining leave from their original government to accept orders and promotions in rank.

¹⁴ See Cogordan (pp. 276 *et seq.*) on the doubtful interpretation of French regulations on these subjects. Is an officer at the court of a foreign sovereign within the category? or an ecclesiastical office, the situation of architect, the profession of an advocate, and other such offices under a public license?

¹⁵ Code Civil, art. 17, *La qualité de Français se perdra . . . 3º par toute établissement fait en pays étranger, sans esprit de retour.* [Repealed by statute in 1889.]

not returning. A principle of that kind leads back again to all the doubts and vagueness of domicile.¹⁶ One is most inclined to associate loss of citizenship with entry into foreign military service without leave obtained. It is here that the sharpest conflicts may take place, and it seems almost a kindness to the individual, that he should be released in such a case from the burden of his original nationality. French jurisprudence, however, which has at command in this matter a rich store of experience, has recognised that it is not every kind of enlistment in foreign military service that will infer the loss of French nationality, in spite of the very categorical provisions of the 17th article of the statute of 1889, viz.: "*Perdent la qualité de Français. . . . Le Français qui sans autorisation du gouvernement . . . prend du service militaire à l'étranger.*" The performance of military duty in another State is very properly not regarded as involving the loss of French nationality, if the Frenchman has been claimed by that State as liable to serve.¹⁷ It is very easy for officials, or even for the man himself, to make a mistake in such matters; and should we threaten loss of nationality as a penalty for some one else's mistake, or for reluctance to encounter the difficulties of an appeal against it? What is required, then, in France, if French nationality is to be lost, is, *first*, enlistment in a foreign service for a fixed period (*durée déterminée*), and, *secondly*, unequivocal consent to surrender French nationality.¹⁸ Thus in the end the will of the individual comes to be the true determinant, and that is a thing that may very well be open to doubt.

By losing his nationality, the individual no doubt acquires this advantage, that he cannot be punished for treason, if he bears arms against his

¹⁶ In art. 11 of the Italian statute book, and in the new law of 1889 as to French nationality, this ground for the loss of nationality has disappeared (cf. Weiss, pp. 300 *et seq.*). It has also disappeared from other systems, which in other respects are very much under the influence of French jurisprudence. No doubt in Austria, § 1 of the charter of emigration, of 24th March 1832, regulates the law by which emigration, with the intention of not returning, destroys Austrian citizenship. Cf. Vesque v. Püttlingen, p. 112.

¹⁷ Cf. judgment of the Trib. at Evreux of 17th August 1881 (Jour. ix. p. 196; Trib. civ. Charleville, Jour. iv. p. 427), and other judgments cited there; Trib. of the Seine, 19th July 1884, Jour. xii. pp. 92 *et seq.* (Clunet is in agreement with this). See Folleville, pp. 390 *et seq.*, on enlistment in the army of a pretender, or a foreign free corps: he is not inclined to think that this involves loss of French nationality. Cf. p. 395 on the question of the Frenchman who enlisted in the Zouaves under Pope Pius IX., a question much discussed at the time. Clunet (Jour. vi. p. 540) has collected the rules that are in force in France with reference to permission to enlist in foreign service. [These decisions and rules would seem to be still applicable, although the ruling statute is now that which is quoted *supra* in the text.] A Franco-Spanish treaty of 7th January 1862, art. 5, has gone the length of providing that Spanish subjects, who are born in France, are to be liable to serve as substitutes in France, if they cannot show that they have satisfied the Spanish recruiting law. Generally speaking, several States, in order to lay a burden on evasions of military service, have adopted thorough-going measures of this kind, which must be said to be utterly inadmissible, if the fact of enlistment in a foreign military service must necessarily *per se* involve the loss of nationality.

¹⁸ See, as to the rules of jurisprudence established in this sense, Jour. v. p. 505.

original country, that all obligations to military service, which have not yet emerged, come to an end, and that the prescription of those delicts, which are committed anew every moment in respect of failure to fulfil duties to his country, begins to run. Prescription of those delicts, it is plain, cannot begin so long as his nationality lasts. But no punishment for treason can be justified, if the person was in ignorance of his own national character, or if compulsion were put upon him by a foreign power, from which he could not well withdraw himself, and the matter of prescription which we have mentioned rests upon nothing better than a very debatable theory of criminal law. The *ipso jure* expatriation by entry into foreign military service is thus not well founded in the circumstances. It is frequently a not very intelligible favour shown to soldiers against their own country; frequently, in cases where a person who has thus left his own country is forbidden to return,¹⁹ it is a harsh regulation, which stands on no good ground. German jurisprudence knows nothing of this *ipso jure* expatriation either.

F. FREEDOM OF EXPATRIATION OR EMIGRATION.

I. HISTORICALLY CONSIDERED. THE PRINCIPLE.

§ 60. If, in accordance with what we have already said, it is an inevitable rule of international law that one nationality cannot be fully extinguished until another is acquired, on the other hand it has become more and more the principle of civilised States to hold that individuals are entitled to emigrate and to acquire another nationality.¹ Ancient Rome

¹⁹ Cf. Code Civil, art. 21 [as amended by the statute of 1889]. The 17th article (quoted on the last page) at its close says, "*sans préjudice des lois pénales contre le Français qui se soustrait aux obligations de la loi militaire.*" Codice civ. regno d'Italia, art. 12: "*La perdita della cittadinanza nei casi espressi nel articolo precedente non esime dagli obblighi del servizio militare né dalle pene inflitti a chi porti le armi contro la patria.*"

¹ V. Martitz proposes to distinguish strictly between emigration and expatriation in this sense, that emigration is to be taken to mean departure from one's country without a definite intention of returning, while expatriation describes the forfeiture of nationality. But such a distinction is not in accordance with the ordinary meaning of the words (*Auswanderung* and *Expatriation*). Emigration is the actual dissolution of nationality by giving up the existing domicile in the native country; whether the result of that is that the connection with the State which has hitherto subsisted is dissolved, remains undetermined. Stoerk, in v. Holtzendorff's *Völkerr.* ii. § 116, sides with Martitz, drawing a still more exact distinction between, on the one hand, actual emigration and legal expatriation or loss of citizenship, and, on the other, actual immigration and the reception as a citizen, or naturalisation, by a legal adoption into the other State. But this scheme cannot be maintained intact if, like Stoerk, we hold that expatriation occurs only in the case where at the same time there is a process of naturalisation elsewhere. For in that case expatriation, or loss of citizenship, and naturalisation are simply different sides of the same thing.

If Stoerk's division is to be taken as a fundamental doctrine, a more exact distinction must be drawn, thus:—*First*, Emigration=an actual permanent departure from the country, with the intention, either existing from the first or afterwards introduced, not to return again permanently=an actual departure from the country, coupled with an abandonment of residence

proceeded on a similar theory: *nemo in civitate maneat invitus*; ² indeed, in the later days of the Republic, it allowed criminal justice to be satisfied by a voluntary exile before sentence was pronounced. On the contrary, in the later Middle Ages, the great mass of the population almost everywhere consisted of persons who were not free, but *Glebae ascripti*, and such persons obviously could not emigrate without the permission of their overlord. This right of forbidding emigration, or of associating it with oppressive conditions, particularly with the exaction of a heavy tax (*Gabella emigrationis*), was afterwards transferred to the prince and sovereign of the country. To emigrate without leave seemed a determined act of disloyalty, and all the more so when politico-economical theories subsequently laid special weight upon the numbers of the population of any country. Men spoke of "the indissoluble ties of birth, which bound natural born subjects to their prince and their country;" in this fashion Lewis xiv., in an edict of 1669, threatened those who should emigrate without leave with confiscation of their property, and those who should enter foreign service as shipwrights with death.³ In 1784, the Austrian charter of emigration threatened confiscation of property, along with the loss of all rights of citizenship and a loss of freedom, to any persons who should assist another to emigrate without leave.⁴ English jurisprudence recognised the rule,

there. *Secondly*, Expatriation, or loss of citizenship=fulfilment of the conditions under which the State, on the one hand, will withdraw all claims competent to it on the ground of the connection that has hitherto subsisted, and, on the other hand, its protective supervision founded on that connection. *Thirdly*, Immigration=actual permanent settling in another country, with the intention of remaining there actually existing from the first, or afterwards introduced=actual transportation of domicile into another country. *Fourthly*, Reception as a citizen=a legal adoption into a new connection with another State.

Emigration and immigration will as a rule correspond to each other, but not absolutely necessarily so. A man may, just as he can be without a domicile, emigrate from one country without becoming an immigrant in any other. To make expatriation and naturalisation correspond must be an object for which legislation and treaties should labour as much as they can, but to which they can hardly fully attain for a long time, so various are men's conceptions of the minimum of individual freedom, and so various are the claims of States upon the individual. The mischievous influence of treating expatriation and naturalisation, and emigration and immigration as correlative, is seen in Stoerk's case, in the opposition which he urges now and again against the principle of freedom of emigration, and particularly in this, that in the case of the transgression of the rules of expatriation he does not distinguish properly between the position of the State that is left and that of the State to which the person resorts, and that of third States, as the case may be. It is not correct to say that, if one defends on principle the freedom of emigration, "that child of a literature that is ruled by legal ideas rested on the laws of nature and reason" (p. 619), one must logically measure the freedom of immigration by the same standard. For, as there are not merely two States in existence, but a large number with very various systems, so, to hold a man bound to any one country is a much more violent limitation of freedom than to refuse to admit him on his arriving at a new country. We shall discuss more than once again the distinction between the position of the State of the emigration and that of the State of the immigration, or of all other States, as the case may be.

² Cicero *pro Balbo*, c. 13 (§ 31): "*Ne quis invitum civitate mutetur, neve in civitate maneat invitus. Haec sunt enim fundamenta firmissima nostrae libertatis, sui quemque juris et retinendi et dimittendi esse dominum.*"

³ Cf. Laurent, iii. p. 225, § 128. It was necessary, in the recess of the empire in 1555, to provide expressly (§ 24) for the freedom of emigration of those who were of a different faith.

⁴ Cf. Vesque v. Püttlingen, p. 108.

"once a subject, always a subject" ("*nemo potest exuere patriam*"), although it must be admitted that this did not in practice lead to such bad results, since in practice the right of emigration was always recognised.⁵

At the present day,⁶ however, the principle of freedom of emigration⁷ is more and more⁸ considered as a universal principle among civilised States, and as a natural deduction from this principle the rule is recognised that the emigrant who really leaves the country cannot be prevented from giving up his former allegiance, and entering another State as its legal subject.⁹

RESTRICTIONS BY REASON OF SPECIAL OBLIGATIONS (MILITARY SERVICE):
EFFECT OF THESE IN RELATION TO OTHER STATES.

§ 61. No doubt the native State is entitled to require the emigrant first to fulfil his existing duties to her: this is in particular true of the

⁵ England at an earlier date used this as an extensive means of protecting native Britons abroad, and, in the year 1812, used it to justify the order that British-born sailors naturalised in the United States should be taken by force from American ships. Cf. v. Martens, ii. p. 171.

⁶ As long ago as the days of Hugo Grotius, freedom of emigration was described by him as a requirement of natural justice.

On the recognition of this rule in Germany, see Alex. Müller, *Die Deutschen Auswanderungs-, Freizügigkeits und Heimathsverhältnisse*, Leipzig 1841, pp. 6 *et seq.*; Karminski, pp. 56 *et seq.* *Preuss. Verfassungsurkunde*, art. ii. The German *Bundesacte* specially authorised for subjects of States belonging to the Bund, "free emigration from one State of the Bund to another, which can be shown to be willing to receive them, and also freedom from all taxes on such emigration" (*jus detractus, gabella emigrationis*).

The United States Congress declared, on 27th July 1868, the right of expatriation to be a "natural and inherent right of all people, indispensable for the enjoyment of life, liberty, and the pursuit of happiness" (Wharton, Dig. ii. § 184, p. 405).

⁷ The French constitution of 1790 has the merit of having proclaimed the principle of the freedom of emigration; but special French statutes of the time of the Revolution and the time of Napoleon I. have notoriously offended against this principle.

⁸ Cf. e.g. on the corresponding provisions of German legislation, Zacharia, *Deutsches Staats-u.-Bundesrecht*, i. § 89, note 12. Austrian *Staatsgrundgesetz* of 21st December 1867, art. 4: "Freedom of emigration is only limited, so far as the State is concerned, by military obligations." V. Martens (p. 173) says: "Russia excepted, all modern civilised States cherish the conviction that permission to emigrate is to be regarded as a fundamental right of every inhabitant of the State."

⁹ England has recognised, in her statute of 1870 (33 Vic. c. 14, § 6), the principle that, by the acquisition of a foreign nationality, English nationality is lost.

The course of legislation in the United States has been peculiar. It is provided, in the statute of 27th July 1868, that all persons naturalised in the United States shall have the same claim to protection as citizens of the Union born in the States, and that apparently even in questions with their country of origin. But we find no recognition of the proposition that a citizen of the States must, by naturalisation in another country, lose his citizenship of the States, and the practice of the courts is included to maintain the opposite rule, which is part of the old common law. See Jour. iv. pp. 388 *et seq.*, v. Martitz, pp. 812 *et seq.* and the materials in Beach-Lawrence, iii. pp. 227 *et seq.*

It is doubtful whether Russians, except those who have become Russians by naturalisation, can emigrate and acquire another nationality; apparently in the present state of the law they cannot. But a Russian woman, who marries a foreigner, becomes herself a foreigner. Cf. v. Martens, *Völkerr.* p. 178, Weiss, p. 258.

obligation to military service. But, as Bluntschli (Rev. ii. p. 116) has rightly insisted, in such obligations a certain limit must be observed, unless the freedom of emigration is to be again made illusory.¹

In the first place, the limitation of the liberty of emigration in this way is a matter for the legislation of the home State. No other State would have any right to protest against such limitations, set up by one State for its own subjects. But, on the other hand, apart from special treaties, such limitations have no operation beyond their own territory.² In the days of the old-fashioned prohibitions against emigration, no one in a foreign country thought of them, and often enticed emigrants by special inducements. In the same way, no one can assert that a State may only receive as its citizens those who have severed their connection with their home State in a regular way, *i.e.* in accordance with the law of that State.³ It is a rule that has often been laid down by the State department of the United States, that, as a matter of principle, naturalisation there cannot be made to depend on any consent of the home State, or on any release from the State connections that have hitherto existed (cf. Wharton, Dig. ii. § 172, § 193, p. 476). By undertaking any such duty a State would put itself in the position of making itself the instrument to execute the most far-reaching and possibly unjust regulations; and, if this principle were generally adopted, freedom of emigration itself would be put in peril.

But, on the other hand, the home State cannot be prevented from giving effect to its restrictive regulations, so far as that can be done without overstepping the restraints of public law. Thus, for instance, in the case

¹ The present law of Austria shows how far limitations of the right of emigration may be carried on the ground of military service. Cf. Karminski, p. 56 and p. 60. The result of this may be that freedom of emigration may turn out to be quite illusory, for all males that are still at all able-bodied. From this it follows, in my opinion, and in that of Stoerk, irresistibly that it is impossible that other States can hold themselves bound by such limitations of the State of origin within their own dominions. No doubt, in Austria the hardship is alleviated by the consent to emigration being given as a rule; but still it is possible that it might be refused.

² Stoerk, in v. Holtzendorff's *Völkerr.* ii. pp. 628-630 (cf., too, p. 619), proposes as a matter of principle to allow no one to pass into a new State, except in accordance with the laws of the State to which he has hitherto belonged, and thus in a case of conflict he will regard the *status* of the individual which is the older in date as the stronger.

³ See, too, Bluntschli, *Völkerr.* §373, and v. Martitz, p. 808, Halleck, *International Law*, edited by Sherston Baker, Lond. 1878, i. p. 350. Some States, *e.g.* Luxemburg (statute of 1878, art. 5, Weiss, p. 277), require that a person should be released from his home State before they will naturalise him. But Switzerland *e.g.* has already given up this principle. By article 2 of the statute of 1876, the only enquiry made by the Federal Council before naturalisation, is whether it will involve any prejudice to the Federation. It is a matter in the discretion of the Council, whether they shall consider the want of a release as any obstacle. The Swedish statute of 27th February 1868 (cf. Jour. vii. p. 437, and Weiss, p. 291) no doubt as a rule requires, as a condition precedent to naturalisation, proof that the person who is to be received into the Swedish State is free from all former State connection, but it recognises an exception in the case where the home State upholds the principle of the indissolubility of the relation. In such a case, the person who is to be received must renounce his connection with his native State, and declare that he will claim no protection from it.

of a man who has emigrated in disregard of his obligation to military service,⁴ it may, if it finds him again in its power, compel him to fill up the measure of his service, and punish him for his unauthorised emigration.^{5 6}

We must, however, never forget that freedom of emigration is the principle, and that provisions for securing the performance of the public duties of the citizen are only limitations of that principle, and must, therefore, not be strained into a negation of it. That is to say, we must hold that in questions of private law the unauthorised emigrant has become the citizen of a foreign State, and we can require of him merely the fulfilment of his public duties to his native State. The neglect of mere formalities, *e.g.* omission to obtain a certificate of release, should in reason, if another nationality has been acquired according to the laws of another State, be regarded even by the home State not as a ground for denying the validity of the naturalisation, but merely as a ground for imposing a disciplinary penalty. In addition, the want of a formal release, or the neglect to make to the home State a formal intimation of retirement must, until nationality in the new State is worked out, necessarily have this disadvantage for the emigrant, that the special duties of loyalty as from a citizen, and other duties also which affect subjects only, *e.g.* obligations to military service, continue.

There is thus always a strong inducement for the emigrant to make a formal and authentic declaration of his intention to emigrate, and it is desirable in the interests of good order generally that such a declaration should be made. To hold that it may be inferred from the intention of the emigrant, or more correctly, from the want of any intention to return, as French law at the present time infers, is far from practical. Until naturalisation in the foreign country has taken place, it is difficult to prove the want of any such intention, and in many cases the individual himself has not made up his mind. The law of England, which of all systems of the present day guarantees the greatest freedom of expatriation, requires no permission to be obtained, although it always requires a formal authentic declaration.

⁴ Stoerk proposes a general international union to compel the fulfilment of military duties. He thinks that there can be no difficulty except the duty of neutrality to prevent this. We believe, however, that human nature and a just respect for the feelings of individuals would prevent it. Even statutory provisions sometimes are powerless to prevent extraordinarily harsh treatment of those who are subject to military service, and a foreign State may often be unable to decide how much of the statutory protection given to these persons exists only on paper.

⁵ On the other hand, the State Department of the United States is unable to afford protection to persons naturalised there, except by friendly representations. But in the territory of any other State the protection is absolute.

⁶ Even in the 5th article of the law for the acquisition and the loss of right of citizenship in Switzerland it is provided: "Persons who, besides Swiss citizenship, possess some other, have in questions with this State, so long as they reside there, no claims for the rights or for the protection that belongs to a Swiss citizen. (Muheim, p. 48, thinks that this provision is exceptional.)"

2. NATURALISATION AS A GROUND FOR THE LOSS OF A PREVIOUS NATIONALITY.

§ 62. Freedom of emigration naturally tends to give as wide a recognition as possible to the rule, which French legislation again deserves the credit of having been the first to set forth, and which has acquired for itself recognition in a constantly widening sphere,¹ the rule, namely, that one nationality is lost by the acquisition of another.² We reach the same result, however, by following the principle that, if possible, every individual should be regarded as the subject of one State only and not of several, and should be liable to the claims of that State alone. This last proposition is justified by the fact that in the long run faith can only be completely kept with one State,³ and cannot be so kept with more than one, so soon as conflicts arise between these States, which is a very possible event in the case of independent States. The proposition purely stated is a mere postulate, an object to which systems of legislation should and will gradually approximate: it is not positive law, but has a positive significance to this extent, that in cases of doubt it may be used to interpret existing systems of law.⁴ We must not, however, give too wide an application to the deduction that naturalisation involves the loss of any previous nationality, however correct that proposition may be. It does not mean, and cannot, after what we have explained, be taken to mean that a State

¹ Constitution of 3rd Sept. 1719, art. 6, No. 1. Code Civil, art. 17 [as amended by the statute of 1889: "*Perdent la qualité de Français: 1 le Français naturalisé à l'étranger, ou celui qui acquiert sur sa demande la nationalité étrangère par l'effet de la loi.*"] But this effect is not produced in cases where the person is still subject to military service in France, unless the French Government allows it.]

² Cf. statute book of the Netherlands, art. 9; *Codice civ. Italiano*, art. 11; *Bayr. Verfassungsurkunde*, Beil. i. § 6, No. 1. (According, however, to the provisions of this last, the possibility of enjoying another citizenship along with that of Bavaria, under special Royal licence, is recognised.) The rule is recognised in Spain, Portugal, Turkey, Greece, Brazil, and Bulgaria (cf. Weiss, p. 270, and the illustrations in v. Martitz, p. 811). (V. Martitz also admits that the future belongs to this principle.) In fact, we may add Cisleithanian Austria to this list, as, according to the charter of 24th March 1832, those persons are to be regarded as emigrants who leave the Imperial dominions with the intention of not returning to them. The intention of not returning is most unequivocally announced by obtaining naturalisation in another country. Cf. Vesque v. Püttlingen, p. 112. There are no doubt systems of law which are to this extent illogical, that they forbid one naturalised in another country from bearing arms against the country of his origin, or even (*Codice civ. Italiano*) leave the obligation to military service still subsisting, although all the ties that bound the citizen are dissolved. What is to happen if the person so naturalised in a new country, perhaps according to the very forms which are recognised by his home State, is compelled by that new country to take up arms, it may be against his home State? That is an absurdity that must be rejected.

³ *Cicero pro Balbo*, c. 12 (§ 29): "*Sed nos Romani non possumus et hujus civitatis esse et cujusvis praterca.*"

⁴ For this principle, see especially Cogordan, p. 17; Folleville, p. xiv. et seq. (*Le mot même de patrie éveille l'idée d'une fidélité complète, d'un attachement absolu*); v. Martitz, pp. 1112 et seq.; Bluntschli, § 373, note 1; Karminski, etc. (Karminski looks on the principle as in fact non-existent *de lege lata*.) Brocher, *Nouv. Tr.* No. 50, who, however, seems not to have completely grasped the difficulties of carrying out this rule: he (p. 167) desires freedom of emigration, but that no State should confer naturalisation till the nationality that has hitherto existed be dissolved.

is bound to recognise as an expatriation from itself any naturalisation of its citizens by another State, however that may have been effected.⁵ It cannot involve the recognition of a naturalisation which only exists on paper, or of one that has taken place against the will of the person concerned, and in which even the tacit assent of the person naturalised was not required: nor again of one that has been carried out so hurriedly, and with such disregard of the existing obligations of the individual, that it necessarily wears the appearance of imperilling all permanent relations of loyalty due to the State of origin. The meaning of the proposition rather is, in questions with the home State, merely that naturalisation in another State takes the place of the formalities of a release from the ties of the original nationality, and that, accordingly, no more obligations can arise between the person who has been naturalised and his home State, from the moment that it has taken place. In other words, naturalisation in another State should take the place of a formal declaration by the emigrant of his intention to sever his old ties of citizenship, and also of a formal release by the home State, in so far as that cannot be refused on any substantial grounds.⁶ In so far as the adopting State is concerned,⁷ however, the rule has full operation so far as its territorial power, as defined by public law, extends. (This must all, too, be applicable for instance to consular jurisdiction in Oriental States. The Consul has no longer any jurisdiction over a person who has been naturalised in another State, even although he has not been formally released from his former citizenship: for the jurisdiction of the Consul rests solely upon a concession by the State in which the person lives.)

Finally, we are by no means entitled to say that it is utterly opposed to the principles of public law for a State to adhere strictly to the observance of certain formalities,⁸ which for special reasons it values highly, at the

⁵ Cf. judgment of the Belgian Court of Cassation, of 12th June 1876 (Dubois, Rev. xiii. p. 61).

⁶ The United States do not recognise that the omission of any mere formality of that kind is a delict, which can afterwards be visited upon a person naturalised in the United States. Cf. Wharton, Dig. ii. § 180 especially, *ad fin.*

⁷ What is the result if a person, who has emigrated without obtaining leave, has not yet been fully naturalised, but, with a view to being so, has taken the preliminary steps, and has already got a passport from the authorities of the State in which he intends to be naturalised? (As to the practice of the State Department of the United States in such cases, see Wharton, Dig. ii. § 193.) As the giving of a passport means that the holder is under the diplomatic protection of the State that gave it as known to public law; and as that State, if it seems *in abstracto* entitled to give naturalisation, can in like manner give this inferior concession, as a partial naturalisation, it follows that, in the territory of a third State, such a passport must have the effect of withdrawing the holder from the consular jurisdiction of his State of origin. In this way the Austrian Consul-General was distinctly in the wrong in the much-discussed case of Koszta at Smyrna, in so far as he had the Hungarian refugee Martin Koszta, who was provided with a passport from the United States, forcibly seized on Ottoman territory, and carried on board an Austrian frigate. See, on this case, Woolsey, Introduction to the Study of International Law, London 1875, § 81; Calvo, ii. § 830; Wharton, Dig. ii. § 175, p. 358.

⁸ Art. 5 of the statute of 19th January 1869. See on that subject, and on the relative negotiations of Turkey with France and Greece, Cogordan, p. 150, and Weiss, 259, 260.

release or dismissal of its citizens, and to disregard on this ground, within the sphere of its own sovereignty, the naturalisation of one of its own citizens which has taken place in another State, without these formalities being observed. The rule that what is on the one side naturalisation, is on the other expatriation, is a rule which we can only hope for. Accordingly, after consideration of many instances of abuses of the rule, it has been recognised as a principle, which is not at variance with public law, that Turkey will treat the naturalisation of any of her subjects by a foreign power as null and void, if that subject has not obtained the sanction of the Ottoman Government.⁹ It is desirable, as facts testify, to make a prudent use of such propositions of law as are concerned with mere formalities, and to let them give way to circumstances.

THE BANCROFT TREATIES CONCLUDED BY THE UNITED STATES.

§ 63. An application of the leading principle of freedom of emigration is the corner-stone of the treaties which the United States Government concluded, with reference to foreigners naturalised in the United States, with the North German Bund, Bavaria, Baden, Württemberg, Hesse, Austria-Hungary, and lastly with Denmark, between 1868 and 1872.¹⁰ These treaties¹¹ have in many instances been very unfavourably criticised by German authors, especially by Fr. Kapp,¹² and by von Martitz in the treatise to which we have so often referred. In many respects we can only agree with this criticism. In fact, the European Governments have in those treaties abandoned too much of their well-founded rights, and in particular they have made it possible for persons who have been naturalised in the United States, without having fulfilled their military duties in Europe, to return after a comparatively short time unmolested, and to live, themselves and their descendants, who again are born in Europe, as citizens of the United States, while in truth they are simply Germans or Austrians exempted from military service and many other duties of citizenship. This is, however, not a consequence of the principle we have

⁹ The Swiss citizenship is only lost by express renunciation. Cf. Decision of the Federal Court of 9th Oct. 1886, Jour. xiv. p. 115.

¹⁰ The Bancroft Treaties, so called after the famous historian Bancroft, who was at the time United States minister in Berlin. The treaty with the North German Bund, of 22nd February 1868, is the model. The others differ from it in subordinate points. The diplomatic negotiations on the same point with England led to the English statute of 1870 (33 and 34 Vict. c. 14), by which it is declared (§ 6) that "any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State, and not under any disability, voluntarily become naturalised in such State, shall, from and after the time of his having become naturalised in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien."

¹¹ On the history of these treaties, see Beach-Lawrence, iii. pp. 245 *et seq.*, and the treatise of Fr. Kapp cited in the next note. Also v. Martitz, as cited.

¹² *Preussische Jahrbücher* (1875), ed. by H. v. Treitschke, vol. xxxv. pp. 509 *et seq.* pp. 659 *et seq.* vol. xxxvi. pp. 189 *et seq.* This paper gives, too, a complete history of the North German Treaty. See, too, Wesendonck in Hirth's *Annalen des Deutschen Reichs*, 1877, pp. 205 *et seq.*

stated, which could not have been shaken even by Kapp's criticism of these treaties,¹³ a criticism which undoubtedly exceeds all reasonable measure, and is one-sided. It is rather a consequence of the fact, that the revival of the original nationality has been made to depend not merely upon a formal and unquestionable fact, but also on the intention of the individual, which is capricious, may very likely be doubtful, and is easily disavowed. This, again, must be taken in connection with the circumstance that the law of the United States, without laying any weight on settled formalities, declares the essential point for the expatriation of citizens, both born and naturalised, to be this intention, which is to be inferred from circumstances, *e.g.* from the circumstance that the person concerned has spent a very long time abroad, without paying taxes in the United States, or has taken his whole property away with him, etc.¹⁴ It would certainly give rise to very great inconveniences in the intercourse of Germany and the United States, if a two years' residence in Germany should be taken absolutely as a proof of a renunciation of the rights of an American citizen.¹⁵ That mistake¹⁶ has, for example, been avoided by the English statute. To that subject we shall again return. Those evils have, however, by unfortunate expression in the treaties, been enhanced in an important particular.

These treaties, then, stand in need of amendment. It would be an important, although indirect, improvement in their operation if the amendment of German law which we have already indicated were carried out. The general direction, however, in which these treaties moved, in so far as the leading principle—the extinction of a subsisting nationality by the acquisition of a new one—was concerned, deserves approval. The other principle contained in these treaties, that the claim of the original

¹³ Cf. Wesendonck, *ut cit.* For the principle of the Bancroft treaties, see Laurent, iii. § 209.

¹⁴ Cf. Wharton, Dig. ii. § 176. In this way we should assume more easily that expatriation had taken place, when the persons had returned to their State of origin, than we should in the case of a more prolonged stay in the territory of another State. As citizens of the Union are not bound to military service in times of peace, while it is the law of the domicile which furnishes, according to their jurisprudence, the rule for personal rights, the only importance which the question really has for the Union is in relation to the diplomatic protection which it is to give to the persons in question. Up to the time of the Bancroft treaties, that question had been treated with an arbitrary discretion. Such protection was not accorded absolutely, for instance, to a person who for a long time had not troubled himself about the country to which he claimed to belong, although his character as an American citizen was not disputed by any one.

¹⁵ Cf. the explanations as to the United States' State Department in Wharton's Dig. ii. § 179.

¹⁶ On the other hand, the German legal system suffers, just as the Prussian system did before it, from the mistake by which, in the case of naturalisation in a foreign country, effected by a formal declaration, the validity of the expatriation is made to depend on the formality of the previous release from the ties of an earlier nationality, except in the case of a ten years' residence in the foreign country. Whereas the omission of this formality, although on military grounds it is a thing to be observed, should only involve a police penalty and the disadvantage to the emigrant, that the burden of proving his intention to emigrate, and the length of his residence abroad, would rest on him. It might happen, for instance, that persons unlearned in the law, who had emigrated without truly doing any violence to their

State for fulfilment of military duty shall be extinguished by a residence for a certain prolonged term in another country, is also proper and practical. This is a principle, it seems, which is to be traced to an idea started in 1865, by the Minister President Count Bismarck (cf. Kapp, 35, p. 678).

G. NATURALISATION.

1. DEFINITION.

§ 64. There are various ways in which a foreigner may be adopted in a State. Of what description must this adoption be, to be held to be such a naturalisation as will destroy a subsisting nationality?

obligation for military service, and on whom as individuals no blame rested,—persons, it might be, who at an early age had emigrated with their father, who had omitted to preserve a permission for them,—might suddenly, on the occasion of some visit to Prussia after a long time, be arrested and compelled by force to serve in the army.

According to the existing law that was quite correct, but it was not very convenient or just, if for the moment we put positive law out of sight. In international law, an appeal to an existing positive law is decisive for the past and for the present, but not for the future, and thus the Prussian diplomatists had a part to play which must inevitably end in concessions, and did not deserve the violent abuse with which Kapp so profusely covered them. On the other hand, the diplomatists of the United States took their stand in a position which legally they could not maintain, by asserting directly the operation of naturalisation in the United States, even in the territory of the home State of the person who had been naturalised. Besides, this agreement was rendered more difficult because the Prussians felt that an obstacle to emigration was implied by the attainment of the age for military service (*i.e.* the end of the 17th year), while the negotiators on the other side had no idea that there could be any impediment in the way of emigration short of an actual summons to satisfy a public duty. As a matter of form, the United States must have made the corresponding concession that citizenship of the United States should be extinguished by the acquisition of North German citizenship and a stay of five years in that territory. But this concession was practically of no importance, because there is no immigration from the United States worth mentioning, and because the Union knows nothing of a general obligation to military service, but has merely proclaimed it as a temporary measure at times. If the whole matter was to be settled to the satisfaction of both sides, it was necessary to renounce the right of inflicting punishment upon persons whose military service was to be dispensed with, because they were to be regarded as citizens of the United States. It is rather an extreme measure, and one that by many nations would be regarded as unmerciful, to lay down that emigration in disregard of the obligation to enter military service is to be regarded, in accordance with § 140, subsec. 1 of the German Criminal Code, as a continuing crime, the prescription of which will not begin to run until the whole period of military service has expired. Hence the apparently peculiar provision of article 2, which certainly is so expressed as almost to convey the impression that the North German Confederation had now for the first time to affirm a right, which obviously belonged to it, and a right that could never have been touched by any questions of emigration and expatriation, *viz.* a right to inflict punishment for criminal acts committed on its own territory before emigration. Such an interpretation would also withdraw from the jurisdiction of the German Courts a naturalised American who, during his stay in North America, should have coined German money and forged German notes. (The provisions of the Austrian treaty are much more correct, although they too only protest the obligation to military service to a very moderate extent, cf. *Vesque v. Pittlingen*, p. 118.) It is no doubt true that naturalisation and long residence in a foreign country should never in reason be a ground for remitting a punishment which has been incurred. But if it was undesirable to alter the fundamental provisions of the criminal law, and by so doing to concede something all round, which, as matters stand, has only been conceded to American citizens, the procedure inevitably fell into

It is certainly not enough that a full legal capacity, equal to that of the State's own subjects, should be accorded.¹ Still less that mere honorary distinctions or grants of nobility should be conferred and accepted.² Honorary citizenships, etc., and even appointment to a public or State office, need not necessarily involve naturalisation, although this may be the case, as for example it is under § 9 of the German Imperial Statute.³ No doubt the devotion and loyalty, which are as a rule required of the holders of public offices, recommend the course of associating naturalisation with the holding of such offices in general.^{4 5} But we cannot ask that naturalisation, in

some such lines, which, as a matter of form, are incorrect. On the other hand, there is no doubt that art. 4 contains a real mistake.

"If a German naturalised in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalisation in the United States."

"Reciprocally, if an American naturalised in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalisation in North Germany."

"The intent not to return may be held to exist when the person naturalised in the one country resides more than two years in the other country."

The word "may" in this last paragraph has justly been found fault with. It has been said that it was by surprising the German diplomatists that the word "shall," which was the word used in the original draft of the treaty, had to give place to the word "may." It is true that a man, who has been naturalised in the United States, if he returns to North Germany and takes up his residence there permanently, can pretty easily exclude the simple statutory presumption contained in the word "may," by formal declaration taken before any United States Embassy; and he can also exclude it by taking up a shifting residence, now in North and now in South Germany. Indeed, in the Bavarian treaty, this meaning has through the relative protocol been attached to article 4, viz. that the home-State cannot prevent the returning emigrant from again acquiring Bavarian nationality; while in the treaty with Baden this meaning is given to article 4, that the returning emigrant will not be forced to re-acquire nationality in Baden. The interpretation of article 4 in North Germany seems practically to lead to the same result as that which follows from the treaty with Baden, for, as v. Martitz notices, the returned emigrant only becomes German by being adopted anew by the State, and this adoption cannot well be forced upon him. (Cf. Kapp, *ut cit.* 36, pp. 221 *et seq.* v. Martitz, p. 1123.) Wesendonck, *ut cit.* p. 208, proposes to alter the fourth article to this effect, viz.: "Expatriated Germans shall not be entitled to this treatment" (*i.e.* as citizens of the United States), if they have resided more than two years in German territory without permission from the German Government. "The beginning and end of this period shall be fixed by notices which the German Empire may within a period of at least two years serve upon the persons concerned." The idea at the bottom of this proposal seems to be sound.

¹ So judgment of the French Court of Cassation, of 16th February 1875 (Jour. ii. p. 439). Accordingly English denization will not in France be looked upon as naturalisation, so as to destroy French nationality (Cogordan, pp. 164-181).

² Cf. judgment of the Court of Ghent, 8th March 1882 (Rev. xvi. p. 140), Férand Giraud (Jour. xii. p. 228). The gift of Austrian nobility does not give rise to Austrian citizenship. Karminski, 13.

³ It may be doubted whether it is more desirable to hold that naturalisation takes place *ipso jure* when a public office is assumed, or, as a preliminary, to give the officer naturalisation. The former rule, logical in itself, would have this practical disadvantage, that one will sometimes be uncertain whether the function that has been assumed is in the sense of the rule a public office.

⁴ In relation to service as an officer, the remark in the text is not undisputed in the German Empire. Cf. Laband *Staatsr. d. Deutschen Reichs*, 2nd ed. i. p. 162. In Austria, by art. iii. of the Constitution, entry on an official office is made dependent on a previous acquisition of Austrian nationality. Cf. Vesque v. Püttingen, § 92, p. 87, Karminski, p. 29.

⁵ Even the right of voting on certain political occasions (and, of course, the actual exercise

order that it may secure these objects, should carry with it full political rights.^{6 7} All that needs to be given is a real and, at the same time, an irrevocable right of residence.^{8 9}

On the other hand, the extent of the territory over which the naturalisation is operative, must be immaterial, as also must be the question whether the naturalisation which has been obtained in a colony is good for it only, or is also good for the country upon which that colony is dependent.¹⁰

2. REQUIREMENTS. CONSENT AND CAPACITY OF THE PERSON.

§ 65. Since, however, the effect of naturalisation, in doing away with an existing nationality, is merely a deduction from the principle of freedom of emigration, the recognition of this effect will be refused, certainly by the State of origin, and probably also by other States, if the naturalisation is against the will of the person concerned,¹ or has taken place without the possibility of their being any presumption² that it has taken place with his consent.³

of that right) cannot absolutely be considered as involving the acquisition of nationality (Wharton, ii. § 173, p. 343). Cf. Karminski, pp. 11 *et seq.* p. 17. Judgment of the Court of Ghent, 1st February 1877 (Dubois, Rev. xiii. p. 61): "The exercise of the purely elective and gratuitous functions of a municipal councillor does not involve naturalisation."

⁶ Thus a Frenchman becomes a Norwegian or Danish citizen, as the case may be, by a two years' domicile in Norway or Denmark, although he acquires no political rights by virtue of this domicile. So Cogordan, pp. 197, 198.

⁷ So in particular Newton, Jour. x. pp. 453, 454; Judgment of the *Cour de Paris* 27th July 1859, and of the French Court of Cassation of 1875 reported there, pp. 453-455; *Trib. Civ. de Bourdeaux*, 18th June 1884, Jour. xii. pp. 185 *et seq.* (in relation to naturalisation in the Mauritius).

⁸ Cf. Stoerk in Holtzendorff, ii. § 117 *ad fin.* In France, up to the law of 29th June 1867, a distinction was taken between a "simple" and a "grande" naturalisation. This distinction still exists in Belgium, and, by a law of 6th August 1881, it is only the requirements for the *grande naturalisation* that are made more easy. Laurent has declared against this distinction.

⁹ Domicile authorised by Government in France gives no such right. In spite of that authorisation, a foreigner can be expelled.

¹⁰ The English colonies grant naturalisation, but this has effect only within the territory of the colony concerned. Cf. Foote, p. 7.

¹ On this ground any arrangement such as that which existed in Mexico for a time, by which all persons who were not registered with the Mexican Government as foreigners, were simply treated as Mexican subjects till they were registered, must be regarded as contrary to public law. See the negotiations of the United States' States Department as to this "Mexican immatriculation," in Wharton, Dig. ii. § 172*a*. The Government of the United States rightly insisted that the right and the duty of a government to protect its citizens in a foreign country could not in this way be made to depend upon the municipal law of that foreign country.

² Cf. Robinet de Cléry (Jour. ii. pp. 180 *et seq.*) on a decree in 1874 of the President of Venezuela, which declared that all immigrants into Venezuela became at once citizens of that State; also Cogordan, p. 165, and the judgment of the Court of Lyons of 19th March 1875 there reported: "*si l'acquisition d'une nationalité est régie par la loi du pays où elle est obtenue, la perte de la nationalité l'est par celle du pays, auquel appartenait l'individu naturalisé.*" This is the language also of a judgment of the Civil Tribunal of Bourdeaux, of 29th November 1862 (Jour. x. p. 297), which determines that, if the ownership of land in any country makes a man a citizen of that country perforce, or without proof of an unequivocal consent on his part, such naturalisation, in the case of a Frenchman, will have no effect in France in competition with French law.

³ During the war of Secession, the United States required military service from all persons who had taken part in political or municipal elections in the United States, although they

But, since a real assent is requisite, a person who desires to be naturalised in another State must be capable of declaring his assent, so as to bind himself. The question is, by what law this capacity is to be determined: must it exist by the law of the State that receives him, or by that of his home State, or must the legal systems of both countries recognise it?

The true answer seems to be that this capacity is to be held to exist, if the law of the home State recognises it. If we were to assume that legal capacity is merely the determination of the natural capacity which is conditioned by birth and climate, this proposition would need no further proof. We shall, however, be led to the same conclusion by considering that the home State will hardly be inclined to recognise the naturalisation in another country, of a person who is by its own law incapable of consent, and that, in questions of nationality, conflicts of legal systems are to be avoided as far as may be. The German statute, § 8, is thus expressed:—

“A certificate of naturalisation can be given to foreigners only if they, *first*, are of legal capacity by the law of the country that has up to that time been their home, provided that their want of capacity be supplemented by the concurrence of the father, guardian, or curator of the persons who are to be naturalised.⁴

might not have been formally naturalised. (On that, see Wharton, Dig. ii. § 202.) A claim of that kind cannot be maintained with such strictness on the principles of public law. In many States foreigners, who are resident in the country, are allowed to vote; again, in such matters it not unfrequently happens that a man may vote under error, or, again, a man may not give any serious consideration to the matter. Thus we do not find the requisite definite declaration of an intention to be naturalised in the fact that a man has taken part in an election, a privilege which is as a rule only allowed to citizens. At least we can only do so, if the legislature has declared antecedently that it will hold that to take part in such elections is a proof of such intention. If, under the pressure of necessity, the sovereign authority of a country, in which very many persons of doubtful nationality reside, takes a step of this sort, a reasonable time must be allowed to these persons to make it clear, by removing themselves from the country, that they do not desire to become its subjects. In the end this principle has been the rule of procedure in all cases in which an appeal has been taken against enrolment in the army, even in the United States. See Bluntschli, § 391, and the despatch of Lord Lyons cited by him, dated 29th November 1862.

⁴ Laurent, iii. § 110, in reference to art. 9 of the Code Civil, is to the same effect. That article allowed the child of a foreigner born in Belgium or France, as the case may be, to claim French or Belgian nationality on attaining majority. Cf., too, Folleville, p. 313. The rule of Swiss law is peculiar. According to article 6 it requires for the Swiss, who desires to renounce his nationality, no more than that he shall have legal capacity by the law of his new home; while, on the other hand, according to art. 2, subsec. 1, the Federal Council will not grant authority for the adoption of a foreigner as a citizen of a canton, if any prejudice or difficulties are likely to arise with the home State of the person so adopted, in respect of the adoption. But such disadvantages or conflicts will be very apt to arise, if, by the law of the home State, the person concerned has not legal capacity. The principle of article 6 of the Swiss law is that of the greatest possible freedom of emigration. In the abstract it goes too far, and its existence in the law is explained by the fact that, in the legal systems of particular cantons, there are to be found too close restrictions of the freedom of intercourse, which are in this thorough fashion deprived of all power of doing harm. See judgment of the Federal Court, of 5th April 1878 (Jour. vi. p. 95), on the application of article 6 to the case of one who has been placed under curatory in Switzerland on account of his prodigality, and who subsequently is naturalised in the United States.

But it would be unreasonable to require legal capacity according to the law of the State which receives such a person—if, for instance, it postpones majority to a later age—on this account, because in case of doubt the State to which he belongs by descent will be the best judge as to whether he has acquired the necessary mental and moral maturity.

A question, however, does arise whether, in international intercourse, we must have regard to every other incapacity to make a binding and real declaration of intention which may exist according to the law of the home State, as we must have regard to that incapacity which is founded on the immaturity of age.

The familiar instance of slaves proves that this question cannot be answered unconditionally in the affirmative.⁵ No one doubts that a man, who by the law of State A is a slave, becomes free the moment he treads the soil of State B, in which slavery does not exist, and is not recognised. Shall a man, who was a slave in State A, not be capable of being received in State B as one of its citizens, on the ground that, by the laws of A, it was impossible for him to dispose of his own person? This question must, of course, necessarily be answered in the negative, and so we have to lay down that limitations of capacity, which we must regard as contrary to our views of morality, are no impediments to naturalisation in our country.

THE BAUFFREMONT CASE.

§ 66. In this connection we may discuss one of the disputed points which had to be taken into consideration in the famous Bauffremont case.⁶ The Princess Bauffremont, who was by birth a Belgian, and by marriage a Frenchwoman, was separated from her husband, the Prince Bauffremont, from bed and board. Without her husband's consent she became naturalised in Saxe-Altenburg, with the intention of turning the separation by that means into a divorce, and so placing it in her power to contract another marriage. Thereupon she did contract another marriage in Berlin, before the proper official there, with Prince Bibesco, a Roumanian subject. The first question that arises is:⁷ Was the naturalisation in the

⁵ Thus Bluntschli, in the pamphlet cited in the next note.

⁶ This interesting case presents a series of difficult questions. It has given rise almost to a literature of its own. See Labbé (Jour. ii. pp. 410 et seq.); v. Holtzendorf, *Der rechtsfall der Fürstin Bibesco, früheren Fürstin Bauffremont*, Munich 1876 (French trans. in the *Review* 1876, pp. 189-198) v. Holtzendorff (Jour. iii. pp. 5-16); Bluntschli, *Deutsche Naturalisation einer separirten Französin und Wirkungen der Naturalisation*, Heidelberg 1876; D. de Folleville, *Un Mot sur le cas de Mme la princesse de Bauffremont, aujourd'hui princesse Bibesco*, Paris 1876; Ad. Stöbzel *Wiederverheirathung eines beständig von Tisch und Bett geschiedenen Ehegatten*, Berlin 1876; A. Teichmann, *Etude sur l'affaire de Bauffremont*; Landgraff, *Die Einwanderung der Prinzessin Bauffremont*, in Hirth's *Annalen des Deutschen Reichs*, 1876, pp. 1022-1030; Gabba, *Le seconde mariage de la princesse Bauffremont et le droit international*, Paris 1877.

⁷ In all the other treatises in which the Bauffremont case is discussed, so far as I know, it is attempted to overcome the difficulties which it presents, by propounding a series of

German empire valid, and should it in the course of events have been recognised by the French court? On this question depends the validity of the second marriage, which is disputed by Prince Bauffremont, and there also depends on it the answer to the second question, whether, as has been maintained in France, the Princess committed bigamy.

If we assume that a *femme séparée de corps* according to French law is in a position, even without her husband's assent, to acquire another nationality, there would be no difficulty in answering the first of these questions in the affirmative. But if, in agreement with the majority of French writers,⁸ we deny her that privilege, the first subordinate question arises, viz.: Could a German official, in accordance with § 8 of the German Imperial Statute which we have quoted (p. 157), give her a certificate of naturalisation? The answer to this question again depends on the question whether incapacity, which, according to the statute, will prevent naturalisation being given, includes that impediment which we find in the

questions and answering them in turn. Gabba, however, thinks that this is an entirely mistaken course of procedure. According to him, the only relevant question of law, and at the same time the only true question of international law, is: Is it possible for one spouse, in this case the wife, to the prejudice of the rights of the other, and with the result of leaving him still in the bonds of matrimony, to change her *status* by naturalisation in a foreign State, and attain the privilege of being able to marry again? He answers this question in the negative, because he says that the unity of the idea of the family will not allow this to be done.

In this method of my distinguished colleague, I can see nothing but a mistaken and unlaywer-like course of procedure. It is just by splitting up a complicated case into a series of minor questions, that you can gather light from all sides, and finally determine which rule, among the conflicting rules of different territories, is to be supreme. It was at least possible that such a conflict should arise, since France did not at the time recognise divorce, while the German legal system had begun to reject the perpetual separation from bed and board. As every question of private international law is in the end a question of the applicability of the laws of this or that State, it seems at the same time to be inadmissible, to start at once with the thesis, that a marriage cannot be dissolved for the one spouse, while it continues to subsist for the other. Such a thesis is simply a *petitio principii*. The question as to which territorial system of law is to apply, cannot depend upon a relation of private law, the recognition or non-recognition of which must depend on the question, What laws are to rule the question? It must rather depend either on a pure fact, *e.g.* the actual situation of the person or the thing, or upon a circumstance which is not exclusively a relation of private law, such as we undoubtedly find in the circumstance or relation of nationality. Besides, before the Imperial Statute of 1875, it was a matter of common occurrence in Germany, in the case of mixed marriages, that the Protestant spouse was divorced, while the Catholic, in conformity with the ecclesiastical law which he or she recognised, was only separated. That is exactly the relation of Prince Bauffremont to his wife, which Gabba describes as utterly impossible, if the naturalisation, which took place in Germany, and the divorce are regarded as valid.

⁸ See the notices in Teichmann's book, pp. 11 *et seq.*, and Jour. iii. pp. 183 *et seq.*, and judgment of the French Court of Cassation of 18th March 1878 (Jour. v. p. 505). Verger, *Des mariages contractés en pays étranger*, p. 27, is of opinion that even the husband, in the converse case, could not have obtained a one-sided divorce following upon such a naturalisation. He thinks that, as the concurrence of the wills of both spouses is necessary for contracting a marriage, the same concurrence should be required to subject them to a new law of divorce. I cannot agree with this argument. Marriage implies no contract as to divorce. Bondeau and D. de Folleville in France have declared themselves in favour of the power of the *femme séparée* to be naturalised in a foreign country. The Swiss jurist Pilicier (p. 292) most recently has declared against it.

marriage that has not been completely dissolved. If we follow the letter of the statute, we shall be inclined to say that it does. But the proviso as to the concurrence of the father, guardian, or curator, and the want of any mention of the husband, makes it improbable that it was intended to include the case of a wife, who by the legal conceptions of many countries has a right to demand complete dissolution of the marriage, and therefore has a good claim to complete independence in the matter of naturalisation. The matter should, in so far as the adopting State is concerned, be rather stated thus: If it does not recognise the doctrine of a permanent separation from bed and board, which was the only doctrine of the kind recognised in France after the statute of 1816 till that of 1884, as a legal doctrine or one that can be enforced in accordance with legal principle (as is undoubtedly the case with Germany according to the statute of the German Empire of 6th February 1876, § 77), if it holds a true divorce to be the only remedy that can be justified on public grounds, it must treat a separation from bed and board as a true divorce,⁹ in respect that any other course would really tend to give effect to the doctrine of separation, which it repudiates. A system which looks upon a true divorce as necessary in cases of a serious transgression of the laws of marriage, may regard such a doctrine as that of a permanent separation from bed and board, which, in any event, rests upon an incomplete conception of that remedy, as one that must be rejected. If the State were to refuse to grant naturalisation because, by the law of another country, a *separatio a thoro et mensa* was all that had parted the husband and wife, it would, in truth, be doing its best to work out a relation of these two spouses which its own law tells it to reject, just in the same way as if it were to refuse to naturalise a man, because by the law of some other country he was a slave or bondsman.¹⁰

⁹ Vesque v. Püttlingen, p. 234, *note*, states the question too broadly, in simply asserting that the princess could not have been naturalised in a foreign country without her husband's consent. The true point is the effect of the *Séparation de corps* in a State, which looks upon this separation as inadmissible, and one that therefore may be transformed into a real divorce.

¹⁰ Laurent, v. § 18, refuses to recognise the analogy of the case of a slave; the wife, he says, by her marriage, voluntarily gives herself up to the indissolubility of the marriage tie. But can we not conceive slavery or bondage of some kind founded upon a bargain? Did bondage in the States of Germany not to a great extent rest upon private bargains? Karminski who at pp. 32 *et seq.* makes a pretty thorough examination of the Bauffremont case, presses the capacity which is required by § 8, subsec. 1 of the German statute, applying this language to the case of the wife as such. On the other hand, he refuses to admit the analogy of the non-recognition of slavery, because the slave is to be regarded as a free citizen, not of our State, in which he now stands, but of the State which he has quitted, and his legal capacity is accordingly to be determined by the laws of that other State. This misses the point. The slave State allows the slave no capacity at all; it is therefore quite impossible to regard the State from which the slave has escaped, as regulating the personal rights of a person whom we regard as free. The State to which the slave escapes must, in any case, from time to time apply its own laws in such cases, as, for instance, it must establish a curatory according to its own law for a slave child who has escaped without its father. Just as fruitless is Karminski's reference to Lammasch's perfectly sound exposition of the extradition of slaves who have committed crimes in the slave State (*Auslieferungspflicht und Auslieferungsrecht*, 1887, p. 373).

Now, since the principles which are applicable to the so-called coercitive statutes would make it impossible, in the face of the statute of 1875, to require such co-operation from any German State, the Government of Saxe-Altenburg was justified in giving its naturalisation. No doubt it was necessary that the Imperial statute of 1875 should already be in force there, or that the same principle, according to which only a true divorce, and not separation *a mensa et thoro*, was recognised as permissible, should in some other way be already of authority there. The statute of 1875 was only in operation for the empire from 1st January 1876, while the certificate of naturalisation bore the date of 3rd May 1875. It may no doubt be objected to the conclusion which we have reached, that by such means any State, by its acts of naturalisation, may favour serious evasions of the laws of a neighbouring State, and may possibly, as a consequence, be the means of introducing most mischievous consequences into the family relation. But evils of this kind cannot, in truth, be avoided, either here or in other relations, if naturalisation is to be given without a domicile for some fixed period in the adopting State being required. The German statute rests upon this principle, which is in my judgment erroneous.¹¹ We shall return immediately to this question, when we come to take up the question of naturalisation obtained *in fraudem legis*.

3. NATURALISATION AN ACT OF SOVEREIGNTY. DEFECTS IN THIS ACT. RIGHT OF THE COURTS TO INQUIRE INTO NATURALISATION. THE BAUFFREMONT CASE AGAIN.

§ 67. If we suppose that the Government of Saxe-Altenburg, in giving naturalisation, acted against the rule of the Imperial statute, this further question then arises: Is a naturalisation, which has been conferred in disregard of some statutory direction, operative all the same, or must it be regarded as non-existent? We may also put this further query: Does it make any difference whether the question as to its validity comes up in that same country or in another, before native or foreign courts?

The first question is primarily a question of domestic law, or of the administrative rules of the particular State. In any case, we can save the validity of the naturalisation for the country in which it has taken place if, with Landgraff,¹ we assert a right of dispensation in the

¹¹ This important point, which in my view applies only *de lege ferenda*, and not for the decision of the concrete case, has been excellently raised by Gabba (p. 28). But there was no fraudulent act in any legal sense. Gabba, in assuming that there was, forgets the distinction between change of domicile and naturalisation.

¹ Hirth's *Annalen*, 1876, p. 1024. Laband (*Staatsrecht des d. Reichs*, i. p. 160, note 3), on the other hand, is of opinion that the governments of the several States in the German Empire have in such a matter no right of dispensation as against a statute of the empire. But, according to the judgment of the Prussian Oberverwaltungs Gericht, of 23rd June 1886, cited by him, an error in fact as to the conditions of naturalisation does not destroy the validity of the naturalisation.

particular case for the State which has performed the act of naturalisation, and at the same time an implied exercise of that right. The operative effect of the naturalisation, in spite of the slip that was made, may be demonstrated in yet another way. We may say, shall every little oversight in the preliminaries of what is an act of administration be a ground for annulling that act? Is the rule not otherwise in judicial proceedings, which are not liable to be annulled for every trifling error in procedure? Must we not in any case, if we are to avoid creating a monstrous uncertainty as to men's rights by treating acts of the administration as null, limit our sentence of nullity, as in the analogous case of the old nullity of judicial sentences, to cases of clear infringements of the law *in thesi*? Would it not be true to assert that, if the courts in the case in question were for themselves to undertake over again to test all the conditions of naturalisation, which the officials appointed for that purpose should have investigated, there would be an invasion of the domain of the administrative government, which would, if conceived as an application of a general principle, and applied in other cases, necessarily produce a confusion of legal ideas?^{2 3} Might it not in particular be asserted that, supposing the German law to direct its officials to refuse naturalisation, unless some particular requirement were satisfied in the eye of the foreign law as well as in that of its own, this refusal should only be given in case the foreign law were fixed beyond all doubt? Into what remote discussions might the subject not run, and frequently to the great disadvantage of the persons concerned, if it was necessary to have absolute certainty as to every single doubtful question of foreign law! May we not say with some reason: In doubt the officials are to proceed simply according to their own law; and they are to presume in cases of doubt, in which their own law offers no obstacle, that there is no obstacle known to the foreign law either?⁴

Seydel⁵ assumes quite broadly that naturalisation, conferred in spite of the failure of some condition required by law, is not null, because the law does not pronounce that any such result must follow, and there is no procedure known by which a sentence of nullity could be pronounced.

² It would, for instance, on this footing be necessary to hold the court entitled to declare a judicial sentence invalid, on the ground of an incompetent appointment to the court that gave judgment, in respect that, when one of the judges was undergoing his examination as a candidate for judicial office, the board of examiners had infringed the regulations of the statute for that examination. Folleville, pp. 353 *et seq.*, is right in so far as he denies the right of the French courts to inquire into the validity of the foreign naturalisation, conducted by the proper authorities.

³ In the United States, naturalisation is given after a *causæ cognitio* by the courts of record appointed for that purpose, and by means of a formal judgment. We suppose that a judgment of that kind could only be quarrelled in case of an intentional deceit practised on the court, provided always that the court was vested with the proper jurisdiction. In the case of treachery of such a kind, the foreign office will not extend the protection accorded to an American citizen to the person using it. Cf. Wharton, Dig. ii. § 174 and app. to § 174.

⁴ So, too, Bluntschli, pp. 29, 30.

⁵ Seydel, *Die deutsche Reichs und Staatsangehörigkeit in Hirth's Annalen des deutschen Reichs*, 1876, p. 142.

All these questions, however, are, as we have said, mere questions of the domestic law of the State and its administration.⁶ It is, however, a question of international law whether the courts of another State, in particular those of the home State, can declare this naturalisation to be null,⁷ on the ground either that the law of the adopting State has been transgressed, or that the conditions required by the laws of the home State for expatriation have not been satisfied.

It is plain that no court can directly, *i.e.* in the operative part of their judgment, declare a foreign naturalisation null, and to that extent those who assert that naturalisation, as the act of a foreign sovereign, is withdrawn from the jurisdiction of our courts, are right. In truth, the courts of State A can never with direct effect determine that a naturalisation shall have none of its proper effects, even in the territory of State B, which gave the decree of naturalisation. A decree to that effect would undoubtedly be an invasion of the sphere of a foreign sovereignty. But the courts of State A are hardly likely to be directly called upon to declare the naturalisation given by State B to be null.

The decision which they will be asked to pronounce will be of quite another kind;⁸ such, for instance, as the decision asked in the Bauffremont case, whether the wife, who had been naturalised, and in consequence had become a divorced woman, or must be regarded as one, still had distinct duties towards her husband, who had remained in the home State, and whether the marriage with him still had a legal existence. In questions such as these the foreign naturalisation affords a ground of decision, in the shape of a preliminary plea, and there can be no doubt that the courts must decide upon it. The case here is precisely the same as it is in the German

⁶ Perhaps the best course would be to admit the old *exceptio sub-et obreptionis* on the ground of intentional deceit and plain infringement of the law, but no other grounds of complaint. That would almost coincide with the practice of the American Union: see note 3. Many authors do not touch the question; *e.g.* Stoerk.

⁷ The question is answered in the negative—and to the effect that naturalisation, however it has taken place, in a foreign country, is to be counted as expatriation from the home State—by Bluntschli, p. 31, and in the judgment of the tribunal of Charleroi, of 30th January 1880, dealing with the Bauffremont case, reported in the *Journal*, vii. p. 215. See, on the other hand, the sharp and trenchant criticism of L. Renault, *Jour. vii. pp. 178 et seq.*: so, too, Laurent, v. § 176, Durand, § 136 (p. 269), and the reasons given for the judgment of the court of Brussels of 5th August 1880, *Jour. vii. pp. 508 et seq.* Cf., too, C. de Paris, 25th May 1878, *Jour. v. pp. 604 et seq.*

⁸ In a case decided by the Swiss Federal Court on 14th October 1882 (*Rev. xvi. p. 489*, reported by Martin), a German was held to have been naturalised in Switzerland on the ground of a certificate of release issued by a German official. The validity of this certificate was subsequently disputed. The Federal Court declared that it was not for them to declare the nullity of any certificate issued by the competent official abroad, and accordingly held the Swiss naturalisation good. We concur in the conclusion. If naturalisation in Switzerland requires proof of a previous release from the ties of foreign nationality, it does not follow that, if that release is invalid, the Swiss naturalisation becomes unconditionally invalid in Switzerland itself. The grounds of the judgment are not perhaps such as we could adopt. In the particular case it was alleged that the release was subsequently declared by the foreign officials themselves to be invalid.

common law, and in the law of France,⁹ in the case of judicial decisions as to acts of the administrative powers of their own country. The courts have no power directly to annul any determination of the administrative powers which they hold invalid; but they refuse to recognise such an act, in so far as it is made the foundation of the existence or non-existence of a right, which is claimed or disputed in the courts. This power, too, the courts have, not merely in cases where the foreign officials have given naturalisation in disregard of their own law, even when that law has been observed; but the native law declares the expatriation inoperative, it is the right and the duty of our courts to treat the naturalisation which has taken place abroad as inoperative within the sphere of sovereignty that belongs to our State.¹⁰ It may be that in so doing our courts are following a mistaken principle, which is at variance with international law, but courts must always adopt the theory which the legislative authority of their country takes as its guide. There can, of course, be no doubt that this may give rise to regrettable conflicts of law. A man may, in accordance with these rules, be regarded by the courts and officials of State A as a citizen of that State, and at the same time by the courts of B as a subject of State B, and both may make claims upon him. In a word, we have to deal with the effect of a foreign naturalisation as a means of expatriation, and we have already noticed (p. 151) that this effect cannot be recognised to the full without some limitation. The opposite theory would result in our having to recognise fully in our own country the most arbitrary laws of naturalisation of a foreign State: and to appeal to the fact that we are there dealing with an act of sovereignty of that foreign State proves simply nothing, for this reason, because, although judicial sentences passed in name of the sovereign

⁹ Cf. Code pénal, 471, No. 15, and Durand, p. 269, No. 135.

¹⁰ A judgment of the German Imperial Court (*Strafsenat i.*) of 2nd June 1881 agrees with this view (*Entsch. in Strafsachen*, iv. pp. 271 *et seq.*). Opinions of the Imperial Court in Criminal Affairs, iii. pp. 362 *et seq.*). See, too, Gabba, p. 27, Gerbaut, No. 397, Cogordan, p. 278. "*C'est à la France . . . qu'il appartient à décider si un individu a perdu ou non la qualité de Français.*" Cogordan is, however, wrong in adding, "*C'est à la France seulement à décider si un individu a perdu ou non la qualité de Français;*" he is also wrong in describing that as an inadmissible doctrine of law, in obedience to which the Belgian courts, and especially the Court of Cassation, have often decided that a person has lost French nationality. If this point came up for decision as a preliminary point in a suit which was competently laid before the Belgian Court, then the decision was perfectly right. Apart from the special provisions of an international treaty, which may proceed on grounds of utility, or some other grounds quite apart from those of strict law, it cannot be required that, as Cogordan desires, the certificate of the home State should have an absolutely binding force for the courts and officials of another country; possibly, too, it should be remembered, the State which is alleged or thought to be the home State is not so in reality. In questions as to entering military service, it may often be useful to give a liberative effect directly by means of a treaty to the certificates of a friendly government. But, without such a treaty, courts are not tied down to accept such certificates. The criticism, therefore, which Cogordan passes upon the practice of the Belgian courts, in forcing persons of indeterminate nationality to serve in the army, is unjustifiable. Karminski, pp. 52 *et seq.*, is more correct in maintaining that a judgment as to the invalidity (more properly the non-operation) of nationality, given by a foreign State, is only the other side of the judgment, that the person in question still belongs to our State. Karminski on this ground defends the judgment which the French courts pronounced in the Bauffremont case.

are acts of sovereignty, it is not all foreign judgments that will be recognised as operative in our country.¹¹ We allow the decree of naturalisation full effect in the territory of the foreign State, we deny its effect in ours.¹² Thus, assuming that a *femme séparée de corps* cannot without her husband's authority acquire a foreign nationality, the result in the Bauffremont case in our view would be, that, postulating the validity of the Imperial statute of 1875, the German naturalisation in Saxe-Altenburg would be recognised as operative in the German Empire, but as inoperative in France.¹³ As regards other States, however, the question must have different answers given to it, according as the marriage is looked upon as indissoluble, as was then the case in France, or as, on the other hand, divorce is regarded by the law or by the State as the only legal mode of affecting the relation of married persons. That result falls in with what actually came to be decided in the end. The French courts, in their judgments, held the naturalisation in Altenburg to be invalid; the Appeal Court in Brussels, on the other hand, definitely refused to put into execution the French decree, by which the Princess, under threats of exceedingly heavy fines, had been condemned to deliver her children to their father, on the ground that such compulsory procedure was contrary to the *droit public* recognised in Belgium. This ground of judgment is highly doubtful. For if it was only the compulsory procedure taken in France that was at variance with public law as recognised in Belgium, the answer is that, if the judgment of the French court was to be recognised as being the national tribunal of both parties, the Belgian compulsitors must be substituted for the French, or the French compulsitors reduced to the measure of those which are recognised in Belgium. But under the guise of the vague and elastic theory of the exclusiveness of the *droit public*, we find the working of the feeling that those restrictions upon freedom, which at that time the law of France imposed upon the *femme séparée de corps*, could not prevent

¹¹ So correctly Laurent, v. 176.

¹² No doubt it is a conceivable legal proposition that the loss of nationality should be attached simply to the fact of naturalisation in another State. It would then naturally be of no moment whether this naturalisation did or did not correspond with the principles of nationality which are recognised by us, or with general principles of public law; the only circumstance to be considered would be whether the foreign State would maintain its naturalisation. In that case, the view opposite to ours, which is specially represented by Folleville, p. 353, would be right. But the 17th article of the Code Civil [as amended in 1889] can hardly be understood in so literal a sense: "*Perdent la qualité de Français; le Français naturalisé à l'étranger.*"

¹³ We have already noticed that in Altenburg, at the time when the certificate of naturalisation was issued, the rule of the Imperial statute had not yet come into force. On this account the validity of the naturalisation was certainly exposed to serious doubt. Besides that, the validity of the marriage which the Princess afterwards contracted in Berlin, does not by any means follow from the validity of the naturalisation in Altenburg for the German Empire. On the contrary, Stölzel's pamphlet points out sharply and irrefutably that the Princess, to be validly married as a German woman, should first, by the decree of a German court, have had her decree of separation pronounced in France turned into a true divorce. If the Princess took the advice of counsel for the steps which she took in the German Empire, she was not extraordinarily well advised.

naturalisation in a country which recognises a full divorce as the morally justifiable and morally necessary remedy in cases where one of the spouses has irretrievably transgressed the proper relations of married persons. Lastly, it is worth remark that, as the foreign tribunals refused to give execution of the French decree, although that refusal was not put upon exactly correct and regular grounds, this result, which *de jure* was the correct result (supposing that the Princess observed the formalities required by the law of the German Empire), was produced in the end, that the Princess was in the dominions of the French State a Frenchwoman, and subject to the law of France, but, as far as the jurisdiction of other countries was concerned, was not a Frenchwoman.

NATURALISATION *in fraudem legis*.

§ 68. If the home State must refuse to recognise the validity of a naturalisation that is contrary to the requirements of its own law, and similarly must refuse to recognise the validity of a release¹⁴ from its ties of citizenship, the question arises whether the same thing is not to be said of naturalisation carried through *in fraudem legis*; that is to say, of naturalisation which is at once dissolved by a return to the original country? This question commonly comes up for discussion, when such an expatriation and re-acquisition of nationality has taken place with the clear intention of using the law of the country, in which the naturalisation takes place, to carry through a marriage or a divorce which is not allowed by the laws of the home State.

In the first place, we must remember, what is generally overlooked, viz. that there is in such questions a very real distinction according to modern German law, and also according to French law, between domicile and nationality. For domicile an intention of permanent residence is required; accordingly, if the emigrant had no such intention, and did not wish to stay at his new place of abode, he has in fact not acquired a domicile. If, then, for instance, a decree for divorce is obtained in the courts of the alleged domicile, founded on its law, that decree will not be recognised in

¹⁴ Eccius (-Förster), *Theorie und Praxis des heutigen preussischen Privatrechts*, vol. iv. § 232, note 11, and Dernburg, *Das Vormundschaftsrecht der preussischen Monarchie*, 3rd ed. § 62, note 48, maintain that the release from the ties of citizenship of a German State has, by the thirteenth and following sections of the statute as to German nationality, absolutely an operative effect, and has that effect, even although the application which it requires is invalid, e.g. if the direction of § 42, subsec. 1 of the Prussian ordinance as to guardianship of 1875 is disregarded, by the failure to obtain the approval of the Supreme Court, which is charged with powers of guardianship, to the application. This is unsound. The release from the ties of the State is simply an act of administration, and since when are such acts absolutely unassailable? Since when have they been absolutely withdrawn from the cognisance of the judge, even as incidental points in a civil process? The relation of Imperial law to the law of the different countries of which the empire is composed, on which Eccius relies, has nothing to do with the point. The validity of the application is to be determined by the law of the country in which it is made, and unless it is in accordance with law, the release itself is invalid. Could a release without any preliminary application be recognised as valid?

the home State of the divorced spouse, because of the incompetency of the court to determine the question. This is a true case of an act *in fraudem legis*. The fact to which the law was applied has been disguised:¹⁵ the pretended domicile was not the true one. The jurisprudence of England and the United States, which makes personal law dependent on the law of the domicile, is quite right in refusing effect to a change of domicile which is made *in fraudem legis*.¹⁶ But, on the other hand, that change is not *in fraudem legis* if the emigrant really has the intention of remaining in the foreign country, but has the purpose of availing himself of its law, which is more favourable to him, or pleases him better.¹⁷ If, then, a man, who has once really changed his domicile, afterwards, however, changes his mind, his emigration will not, of course, by any retroactive process, become a fraud upon the law. His return, and particularly his speedy return, at the most will, under certain circumstances, be held as proof that he had from the first no intention of making a permanent stay.

But the result is different, if the nationality has been acquired not by domicile or by a long-continued residence, but by a formal act of adoption into the community of the State. It is against the essential nature of any such formal act, to put its validity to the uncertain test of an intention which is known only to the person himself. The certificate of naturalisation must to some extent be a solemn attestation of the nationality of the person receiving it, and we must admit that the official, who gives out such a certificate, must hold that there exists a serious intention on the part of the immigrant to become a citizen. But, further, this intention does not require to be immutable, and so even a speedy return to the old State is no convincing proof against the seriousness of that intention. French practice, however, applies all the doctrine that is applicable to the case of a domicile¹⁸ to the case of nationality. A divorce obtained abroad by persons who openly, and simply to obtain this divorce, have had themselves naturalised abroad, and forthwith returned to France, and again

¹⁵ On the meaning of the expression "*in fraudem legis*," see in particular the excellent exposition of Thöl, § 65: "Evasion of a rule of law may take place either by way of a false interpretation of the rule, or by the concealment or disguise of a fact."

¹⁶ Cf. Story, § 219, Wharton, § 210, *note* (p. 296), also Wharton's Commentaries on Law, 1884 (p. 259). Westlake, § 46, requires for the recognition of a divorce pronounced abroad, a domicile in that foreign State. In truth, domicile and *bona fide* domicile are one and the same thing.

¹⁷ [This is precisely the doctrine laid down by the Scottish court in the case of *Carswell v. Carswell*, 1881, Ct. of Sess. Reps. 4th ser. viii. p. 901, where a husband had raised an action of divorce against his wife in the Scottish court, having left her in Canada, the home of their married life. The court held that, although a desire to avail himself of the divorce law of Scotland was one of the reasons that induced him to change his domicile, still if his domicile has actually been changed, and if credit be given to his statement that he intends to persist in that new domicile, effect will be given to the change.]

¹⁸ Cf. judgment of the *Cour de Paris*, 30th June 1877 (Jour. v. pp. 268 *et seq.*), and the judgment of the Court of Cassation of 27th July 1874, reported by Cogordan, p. 174; in agreement with this, Ferrand Giraud, in Jour. xii. p. 228, who is there speaking of a pseudo-naturalisation. Cf. Weiss, pp. 181 *et seq.*

obtained French nationality, has been declared invalid, because a naturalisation, obtained *in fraudem legis*, was to be regarded as inoperative.¹⁹

It is, as a matter of fact, true that by naturalisation of such a kind the laws of any State may be very simply evaded. But Cogordan and Weiss, for instance, do not fail to notice how dangerous it is to go into a proof of intention in such cases. Cogordan prudently says that the law by no means recognises naturalisation in such cases as altogether null; the person so naturalised shall only be prevented from pleading his naturalisation to the prejudice of third parties, and against those laws of the State which he intends to evade. But, if this cautious limitation be admitted, the whole theory becomes very arbitrary. Is it in fact possible to set up such a division of the effects of nationality, that we should regard a Swiss naturalised in Switzerland as still a Frenchman in his character of husband only, while to all other effects he is a naturalised Swiss? If we were to have regard to the interests of third parties who are in good faith, it may very easily turn out that these are at variance with each other.

It is then better to throw aside this theory; such is de Folleville's view (pp. 295 *et seq.*), to which Pilicier (pp. 281 *et seq.*)²⁰ has recently attached himself. It is nothing but an expedient to meet two principles which cannot be recommended as guides for legislation, one of them in particular being peculiar to French jurisprudence. It is a legislative error to give naturalisation to a foreigner, without requiring of him a protracted stay in the country as a preliminary, and it is likewise erroneous to make it excessively easy to recover the original nationality, as the law of France does. If the former of these erroneous principles is recognised in a neighbouring State, the Frenchman can change his nationality as he pleases, and, in fact, laugh at the coercitive or prohibitive laws of his own country. Cogordan, therefore, is not wrong in recommending the principle of the Bancroft treaties, which we have discussed above, as applicable to the law of citizenship everywhere.

4. CHANGE OF RESIDENCE AS A CONDITION OF NATURALISATION.

§ 69. It must, however, be laid down as an absolute condition of the international validity of naturalisation—and also of its domestic validity, *i.e.* of its validity even in the State which confers it—that the person to be naturalised should take up, or should already have taken up

¹⁹ The change of domicile necessary to give effect to the naturalisation may no doubt only be a simulated one, and the validity of the naturalisation may thereby be prejudiced (see below). But, as a rule, the actual fact of a change of residence will be present in the cases which we are now considering. See, too, what is afterwards said, §§ 77 *et seq.*, as to option.

²⁰ Pilicier seems to think that some distinction between theory and practice may in this matter be justified. I do not rightly understand what it is, as he remarks (p. 287), that is difficult to forbid the courts of the original home State to annul the naturalisation.

his residence in the territory of the State.¹ If nationality essentially consists in a right of residence, which cannot be destroyed by any act on the part of the State alone, the necessary consequence obviously is that a person, who enters into the ties of citizenship with the State for the first time, must work out this relation in fact,² by removing his residence into it. The tie between the person and the State must first be constituted in fact.³ In such a matter, in which the very foundations of the State are concerned—for the persons who belong to a State are certainly one of its most essential foundations, if not the most essential—no legal fictions can be allowed to take the place of facts, and on no terms whatever can they claim an international operation. In proof of this, we may refer to the fact that most States now require, as a condition precedent to giving naturalisation, that the applicant shall have made a stay or had a residence in the country for a considerable period. Italy⁴ and the German Empire no doubt are exceptions to this rule.⁵ In § 8, sub-sec. 3, of the German statute, the only condition for a grant of naturalisation that is required, is that the foreigner shall find a residence or lodgings in the place where he proposes to settle. It is not said that he must have taken a residence, and § 10 provides:—

“The certificate of naturalisation . . . gives rise to all the rights and duties connected with nationality, as at the moment at which it is issued.”

§ 10 therefore contains no express provision that the certificate of naturalisation shall first become operative when the person naturalised takes up his residence in the country. But we may very reasonably interpret these paragraphs to mean, that the person therein referred to may exercise all the rights of a citizen after delivery of the certificate, and

¹ Thus, before the first revolution in France, the royal letters patent, by means of which naturalisation was effected, first became operative when the person in whose favour they were granted had taken up his residence in France. Cf. Aubrey *et* Rau, *Droit Civil*, i. s. 71, note 3.

² It would be a distinct offence against the principles of public law, if a State were independently to give a right of citizenship to persons who never set foot on its territory. Wharton, *Digest*, ii. § 173 (p. 344).

³ Another consequence of this is, that if the local communities of the recipient State have a right to object to the incursion of persons who do not belong to the locality, the consent of these communities must either be obtained, or it must be held that the naturalisation does not take effect until their objections—it may be by lapse of time—are got rid of, although, when it does take effect, its effect may be retroactive. By § 8 of the German statute the local community, or the association for relief of the poor that may be concerned, can only be heard before the event. As to Austria, see Karminski, pp. 34 *et seq.*

⁴ Cf., too, *Codice civ. Italiano*, art. 10, subdiv. 2. In accordance therewith, the royal decree granting naturalisation first comes into operation when it is registered at the proper registry office of the place where the foreigner intends to take up, or has taken up his residence, and when the foreigner has in the same office taken the oath of fidelity and obedience.

⁵ In France no regard is paid to any domicile but one authorised by the Government. Although this rule is in general open to objection and not very desirable, it has this importance, that the period of antecedent domicile in France can thus be authenticated. In the [law of 1889] the requirement of a three years' authorised domicile antecedent to naturalisation is retained, [with the alternative of ten years' actual residence. Employment in French service abroad is held equivalent to residence in France.]

will be held to the performance of all the duties of a citizen. It may also be maintained that from this moment all the rules of criminal law may be applied to him, which are applicable only to Germans.⁶

On the other hand, the effects of nationality upon matters of private law, in so far as such results are attached to that character, cannot come into play without a change of residence, and just as little can diplomatic protection, which none but a citizen can claim, be given to one who has been naturalised without fulfilling this condition.⁷ An exception to the rule can only be justified—putting out of view the naturalisation of a married woman, which is privileged in another way—in the case of a foreigner being naturalised by an appointment in the service of the State with the sanction of his home State, or after a release granted by it. Active service to the State is not a pure fiction, like naturalisation without change of residence in other cases, and, if there is added to it a release by the home State, the appointment may be set at least upon a level with a change of residence.

Further, to establish as firmly as possible the formal and authentic character of naturalisation, it may be desirable to provide that the full effects of naturalisation, including those which it may have on matters of private law, should first come into play, when the foreigner has satisfied the local magistracy of his change of residence, and has received a certificate that he has done so. Such a provision is, of course, not necessary if one of the conditions of naturalisation is a residence for a settled period in the State. The legislation of the United States takes this view, and indeed goes further, by requiring all the conditions of naturalisation to be authenticated in a court of record.

DOMICILE FOR A CONSIDERABLE PERIOD ?

§ 70. We have already remarked that the overwhelming majority of legal systems require as a condition of granting naturalisation, except in

⁶ The German statute, as we have remarked, does not require a change of residence before issuing the certificate of nationality, but it does require (§ 8, subsec. 3) that the applicant shall point out a place in which he intends to settle, and shall find a house of his own or lodgings there. Besides, the provision which regulates the case of a release from citizenship (§ 18, subsec. 2) may be cited in support of the view, that the German law only recognises the full effects of naturalisation, when the person concerned has shifted his residence into German territory. Officials of the empire, however, who are to do their duty abroad, cannot well satisfy the requirement of finding a residence. A special Imperial statute, of 20th December 1879, accordingly provides, "That foreigners, who are appointed to the Imperial service, drawing a salary from the Imperial treasury, but who have their official residence abroad, cannot be refused naturalisation by any of the States of the empire from whom they demand it." § 9, subsec. 2 of the statute of 1870, as to citizenship, provides for other cases, "If a foreigner is appointed to the Imperial service, he acquires nationality in that State of the empire in which he has his official residence."

⁷ But, on the other hand, no objection founded on public law can be taken to a State protecting as its subjects in the territory of other States, persons domiciled in its territory, who have the intention of acquiring nationality there, but have not as yet fully and finally done so; for the State might have allowed nationality to be acquired with the domicile. Cf. Wharton, Dig. ii. § 198 (case of Koszta).

certain exceptional cases, of which the most important is the naturalisation of the wife by her marriage, a domicile that has existed in the territory of the State for a certain period antecedently. This requirement of a continued domicile is only a question of domestic policy. One State may be apprehensive of an excessive pressure of applications for naturalisation; another may think it desirable that foreigners should immigrate in greater numbers; another may think that the burdens which it lays upon its citizens are a sufficient deterrent against the incursion of undesirable elements into its population; while yet another may think that it is a sufficient safeguard to arm its officials with a large discretion to give or refuse naturalisation. At the same time, however, it does seem desirable, from an international point of view, to require a certain period of domicile,⁸ if it be not too long, *e.g.* one or two years, since by that means international conflicts on the question of nationality would be more easily avoided, and so too would these undesirable attempts at naturalisation, which French jurisprudence is inclined to regard as done *in fraudem legis*, and therefore as ineffectual. It is a pity that the German statute has not set up any such period. An exception might be made, for the case of naturalisation by appointment to the public service.⁹

From the international point of view, there is still less interest in the question, whether the naturalised person shall at once be allowed full political rights, and whether there shall be degrees of naturalisation, and, if so, what they shall be? The only point of importance for international law is the grant of a right of residence which cannot be revoked by either the State or the individual without the other. Again, it is a mere question of domestic policy, whether under certain conditions naturalisation can be demanded as a legal right, or whether it is to be regarded as a matter for the discretion of the officials of the State.¹⁰

Every State may refuse to admit foreigners according to its good

⁸ In our opinion such a period corresponds with the dignity of a sovereign State; the person who is to be received into the community of the State must first to a certain extent show by acts his dependence on the State, and at the same time prove by his conduct that he deserves admission.

⁹ Laurent, § 206. No equivalents, except appointments in the service of the State, can be recognised for the acquisition of domicile. Cf. the judgment of the court at Bourdeaux, of 24th May 1875, cited by Laurent (§ 207). Laurent (§ 208) is right in thinking that a system of keeping registers for giving publicity to naturalisation should be introduced.

¹⁰ There may be a distinction taken (Laurent, iii. § 174) between a *système de droit* and a *système de grace (faveur)* in naturalisation. Laurent, as a legislator, would hold in favour of the *système de droit*; but his reasons are very weak, and are indeed more phrases than reasons, *e.g.* "*La patrie avant tout un droit et une obligation.*" How could it be proved that any nation was obliged to receive any foreigners that chose to come, and to any number, as citizens, with all the rights that belong to that character? An exception is only practicable in the case where there has been residence for some time, during which the foreigner has behaved himself irreproachably. The system, by which naturalisation could be demanded under certain conditions, which were not difficult of fulfilment, only lasted a short time during the first French Code. Even in the United States it is not absolutely the rule. For although it is a court of law that disposes of applications for naturalisation, that court has to be satisfied of the character of the applicant, and of his attachment to the institutions of the United States.

pleasure. That is a result of the obvious, natural right of every free association to establish such conditions for reception into its membership as suit itself. Thus, for instance, the United States only receive immigrants who are white.¹¹ Lastly, it is of no importance as an international matter, whether a special act of the legislature shall be required for a naturalisation that is to have full effect—a thing which would, however, as a general rule be impracticable.^{12 13} It is, however, undesirable in the interests of international intercourse to allow naturalisation to be tacitly acquired by a residence that has lasted for some time. The proper way, as Laurent soundly remarks, is to look upon naturalisation as a formal act.

5. PRIVILEGED NATURALISATION OF MARRIED WOMEN.

§ 71. The naturalisation of a foreign woman who marries a citizen is a privileged species of naturalisation, which by almost all legal systems¹ takes full effect *ipso jure*, and without any special or formal legal act.

This rests upon the thoroughness of the tie which binds the spouses, and which even the law must recognise.² But, at the same time, the formal act of naturalisation has its equivalent in the marriage ceremony, or at least in the habit and repute of married life enjoyed by the spouses (*possession d'état*). If freedom of marriage is to be allowed, the State must,

¹¹ Against the view of Laurent, which is stated in the preceding note, see Brocher, Rev. xiii. pp. 531 *et seq.* Discretion is the rule, *e.g.* in the German Empire (cf. Laband, *Staatsr.* i. § 18, p. 160), and in Austria (Karminski, p. 28). [No alien has a right, enforceable by action, to enter British territory. *Musgrove v. Chun Teeong Toy*, L. R. 1891, A. C. 272, where the whole subject is discussed.]

¹² The only possible case in which such a step can be practically useful, is where there is a question of the very most important political rights. It is the case that in England, even after the Act of 1870 (33 and 34 Vict. c. 14), an Act of Parliament is necessary to give the right of sitting as a member of Parliament, or becoming a member of the Privy Council. Westlake, Rev. 1871, p. 603. Weiss, pp. 273, 274.

¹³ Thus in Italy and Belgium a distinction is made between ordinary naturalisation and grand naturalisation. It is only the latter that gives political rights, or at least political rights in their full extent (cf. Fiore, § 63, and Weiss (p. 286), on the Belgian statute of 6th August 1881).

¹ According to the Act of 10th February 1855, Revised Statutes, art. 1994, this is now the case even in the United States for free wives of white men (and negroes), cf. Jour. ix. p. 453, Weiss, p. 271. On the other hand, it is not free from doubt whether, by the law of the United States, a woman ceases to be a subject by her marriage with a foreigner, by whose law she is *ipso jure* naturalised in his home. Cf. Kelly (Jour. xi. pp. 162 *et seq.*), who, for his part, distinctly holds that she does. In the Argentine Republic, a woman married to a citizen does not become an Argentinian. But for matters of private law, nationality is of no importance at all there; domicile is the determinant, and a woman has no political rights.

² The element of consent which is necessary in naturalisation may, as a rule, be found here in the *consensus matrimonialis* (cf. Weiss, p. 144). We must not, however, require any special *consensus* for the acquisition of nationality: the wife, who is in minority, follows the nationality of her husband (cf. Laurent, iii. § 156. Folleville, No. 472, Cogordan, p. 257; *Habilis ad nuptias, habilis ad nuptiarum consequentias*). The law recognises the unity of the family, generally speaking, as proper and desirable. Even although she may have been mistaken as to her husband's nationality, her nationality will follow his.

in this equivalent for naturalisation, waive the performance of any of the conditions which in other cases it requires. A discretionary power in the government to interfere in such cases would be intolerable. Reasons of the same kind induce us to look upon the naturalisation of the wife, by means of her marriage, as a complete ground for expatriation, and one that would operate *ipso jure*.^{3 4} There are no particular duties to the State laid upon women at the present time, in connection with their nationality, and therefore this is not a matter of any importance. To this we must add the tradition of the Roman law of domicile, which has had its effect upon the development of the law of nationality. Thus, in almost all legal systems of the present day, the propositions we have laid down are recognised as law. Even the law of Russia recognises the expatriation of a woman born in Russia by means of a marriage with a foreigner.⁵ In the United States there is no doubt now that it is part of the statute law that the wife, by marrying a citizen of the United States, herself becomes a citizen of the Union: but it not so with the converse case, that the wife, by marrying a foreigner, loses her right of citizenship in the Union. But no practical consequences seem to attach to this retention of citizenship (Wharton, Dig. ii. § 186).

In this connection it seems to be a matter of debate:—

First, whether the wife, on entering on her marriage, can retain the nationality in which she was born. This question is more properly answered in the negative, and French jurisprudence is fixed to this effect,⁶ although that system allows the wife to retain for herself the nationality of her husband, which existed at the date of the marriage, or which was acquired by virtue of it, if the husband proposes to acquire a new nationality during the subsistence of the marriage, and although, too, in French law the dependent members of a family do not, as a matter of course, follow the naturalisation of the head of the family. In legal systems which, like the German, hold the minor child, who is still under his father's *potestas*, to share in his father's nationality, the question must *multo magis* be answered in the negative. The view of the German

³ In this case it is not necessary to take up a residence, as a matter of fact, in the State to which the husband belongs.

⁴ As the husband in all civilised countries is the head of the family, the wife must follow him. The legal system of the first French Revolution, however, gave naturalisation as a right to the foreigner who married a Frenchwoman, under condition of a domicile having for some time existed in France. Cf. statute of 30th April and 2nd May 1790, Constitution of 3rd and 14th September 1791, and Folleville, *Naturalisation*, pp. 52 *et seq.* See, too, in reference to Spain, Weiss, p. 289. But, because of the requirement of a domicile in that case, there is not involved in it any contradiction of the principle of the other legal systems.

⁵ Cf. ukase of 6th March 1864, art. 15; English statute of 1870 (33 and 34 Vict. c. 14), § 10, subsec. 1. The Italian statute book, art. 14, carefully restricts the expatriation of an Italian woman who marries a foreigner to the case in which she acquires her husband's nationality. (Cf., again, Norsa, *Rev.* vii. p. 201.)

⁶ See the citations in Weiss, pp. 144, 145, who does not, however, regard the reasons given for it as conclusive. Cogordan is of the opinion taken in the text, but Blondeau (*Revue de droit francais et étranger*, 1845, p. 143) is of the opposite view.

jurisprudence goes in the direction of holding that the wife cannot retain any other domicile for herself.⁷

Secondly, does the wife unconditionally follow her husband's nationality—so that no assent on her part is necessary—if her husband changes his nationality after the marriage is concluded.⁸ French jurisprudence⁹ answers this question in the negative. It is said that the wife who marries a husband of another nationality knows this, and must accordingly accept the consequences which this circumstance brings upon her. But the case is different when the naturalisation takes place for the first time during the marriage. Besides that, it suggests itself that a naturalisation of this kind, if it is to have immediate effect for the wife as well as for the husband, may be abused, *e.g.* to alter her legal capacity or her right of succession. English and [Scottish] jurisprudence,¹⁰ as well as that of the United States, and also that of Germany, appear to be overwhelmingly of the opposite opinion, although the question with which they have to deal is primarily a question of the domicile, as it, in the view of the jurisprudence of England [Scotland], and the United States, and the prevailing theories of law in Germany, gives the rule for personal law. The question is therefore a much more important one in British and German law than any question of nationality for a woman, who has nothing to do with most political rights.¹¹ This view may have much more to recommend it, and may be much the more correct view in principle,¹² from the necessity of maintaining the unity of the family. But here, as in the case of the obligation on the wife actually to follow her husband, these exceptions must be made, *viz.*: *First*, the wife shall not be required to naturalise herself in any uncivilised or non-Christian country, or in any country that is unsettled;¹³ *secondly*, that she shall be able to plead her right to demand, in the courts of the country to which the spouses have up to this time belonged, a dissolution of the marriage on the ground of some fact that has already occurred, as a reason for being

⁷ Cf. Struckmann and Koch, *Die Civilprozessordn. f. d. Deutsche Reich erläutert*, § 17, No. 2; Seuffert, *Comm. on § 17 i.* Hellmann, *Lehrbuch des deutschen Civilprozesses*, 1885, p. 96; Wach, *Handbuch des deutschen Civilprozessrechts*, i. (1885), pp. 406, 407.

⁸ Divorced wives (and women permanently separated by Catholic ecclesiastical law likewise do not (according to the sound view) follow their husbands' naturalisation (cf. Karminski, p. 28).

⁹ Cogordan, p. 256; Laurent, iii. § 526; Weiss, pp. 149, 150. But see, on the other hand, Brocher, *Nouv. Tr.* pp. 128 *et seq.*, "*qu'on introduise pas un élément de dualité et de désordre dans un rapport qui exige impérativement l'unité.*"

¹⁰ Phillimore, iv. §§ 78 *et seq.*; Dicey, p. 104; Richter-Dove, *Lehrbuch des Katholischen und evangelischen Kirchenrechts*, § 284, note 14. [In the case of Redding, 1888, Ct. of Sess. Reps. 4th ser. xv. 1102, the rule that the wife's domicile must follow that of the husband is laid down, under the qualification that, when a cause of action has arisen, a husband cannot by a change of domicile subject his wife to the courts of a foreign country.]

¹¹ Seydel, in Hirth's *Annalen*, 1876, p. 138, says as to the naturalisation of a foreign woman by marrying a German: "This effect of marriage is a necessary effect, which cannot be excluded by any reservation."

¹² Brocher is of this opinion. Rev. v. p. 149, says that a temporary separation, and even a divorce, must be allowed, if the wife refuses to share the domicile and nationality of her husband.

¹³ Cf. Richter-Dove *ut cit.* In European countries, the duty of following the husband is not in itself limited; on the other hand, it is out of the question if the residence chosen by the husband is shown by the circumstances to have been dictated by heartless cruelty.

free of her obligation to be naturalised. If the wife does actually follow her husband, and if the rule, that naturalisation at once extends itself to the wife, is recognised in the State in which the husband is naturalised, we may presume that she has tacitly accepted the naturalisation. Even the law of France would, in such a case, not hesitate to hold that there was a change of residence "*sans esprit de retour*," and therefore expatriation, and a new naturalisation.¹⁴

If the marriage is null, *i.e.* null by the law which decides as to the validity of the marriage, the naturalisation is also null, and the declaration of nullity must have a retrospective effect.¹⁵ In the case of a putative marriage the wife, if it seems to be for her advantage, can retain the nationality which could only have been acquired by her but for this circumstance through a real marriage, and if the nullity of the marriage cannot be pleaded *ope exceptionis*, the wife must be held to be naturalised in the State to which the husband belongs¹⁶ (*i.e.* must be entitled to put forward her claims to any special privileges that may belong to a person who is naturalised there) until the nullity of the marriage is judicially declared.

Divorce, on the other hand, has this effect, and this only, that it gives the divorced woman the power of altering her residence and her nationality at her pleasure. The effect of divorce in this matter must be determined according to principles which rule it as regards other matters also.¹⁷

6. IS THE DEMAND FOR NATURALISATION A HIGHLY PERSONAL ACT? NATURALISATION OF CHILDREN WHO ARE STILL UNDER THE *patria potestas*. NATURALISATION OF PERSONS UNDER AGE.

§ 72. In the subject of which we are now to treat, we find very substantial differences in different legal systems.

One section considers naturalisation to be an act which requires, as one of its conditions, a highly personal declaration of intention, which cannot be given by deputy.¹ Thus the curator can never apply for naturalisation

¹⁴ So Laurent, iii. § 160. It depends on the law of the place to which the marriage itself is subject, whether the husband when he marries can renounce his right of choosing his own domicile freely, or may put that right under certain limitations. (Cf. on this subject Pfeiffer, *Praktische Ausführungen*, v. (1838), pp. 98 *et seq.*; Judgment of the Supreme Court of Appeal at Darmstadt, on 19th February 1867; Seuffert, Arch. 21, No. 129.)

¹⁵ Cf. Cogordan, p. 257; Weiss, pp. 147, 210. In any case, the effect of the marriage must be provisionally recognised.

¹⁶ Cf. Cogordan and Weiss *ut cit.* Struckmann and Koch, *Commentar zur deutschen Civilprozessordnung*, § 17, express themselves to this effect on the question of domicile.

¹⁷ Cf. the French practice as reported in Jour. vi. p. 278; Aubrey *et* Rau, *Droit civil*, i. § 73, note 4.

¹ See Clunet, in Jour. v. pp. 622 *et seq.*, on French jurisprudence, which is fixed to that effect. See also judgment of the Court of Cassation, of 7th January 1879 (Jour. vi. p. 176). The child of a Frenchman born abroad retains its French nationality, although the father subsequently acquires another nationality (Weiss, p. 128). [The minor children of a father or of a widowed mother become French on the naturalisation of their parent in France, unless they declare to the contrary in the year following their majority. Statute of 1889. A father, mother, or tutor may in certain circumstances claim French nationality for a minor child.]

for his ward, or acquire it for him, nor can the father for his minor child. This is in particular the theory of the jurisprudence of France.² Other systems, the German³ for instance, and also the Italian,⁴ make the naturalisation of the father extend to minor children who are still *in patria potestate*. Besides that, the German statute (§ 8, 1) speaks expressly of the point, that want of capacity in the person to be naturalised may be supplemented or supplied by the consent of his father, guardian, or curator.

For the French system it is argued that the paternal power at the present day exists more in the interest of the child than in that of the father, and that it cannot decide as to the interest which the child may have in the retention of his former nationality. But that argument is a *petitio principii*. The question to be determined is simply how far the paternal power is to go; may it not be in the interests of the child that another nationality should be at once acquired? It can, however, hardly be denied that the actual dependence of the child in other respects upon his father, the right of the father to educate it, his right to fix its residence, is in most cases much more important for the destiny of the child than the formal determination of his nationality, especially if it be the case that the country of birth allows the children of a subject who has been naturalised in another country some privilege in certain circumstances in reacquiring the previous nationality. Thus the formal nationality is often of little importance. The French doctrine, however, is not unfrequently in contradiction to the real facts of the case; the son of a Frenchman naturalised abroad, who has been educated abroad, and who has all along grown up there, may learn, to his complete surprise, that he is still held to be a Frenchman and treated as one, and that he is to be called upon to discharge the duties proper to a Frenchman. The French principle, too, interferes with the unity of the family, which is so desirable. Parents and children will belong to different nationalities, and possibly one section of the children to this nationality, another to that. That easily begets confusion in their legal relations, and frequently operates otherwise in a disturbing fashion. We may say that in the higher stages of civilisation it is only education that completes the man: the separation of the children from their parents, particularly from their father, before they have attained full age, the recognition of individuality in its full scope before that point of time, is therefore anomalous.⁵ The most recent project for a

² Cf. C. de Lyons, 19th March 1875 (Jour. iii. p. 183); Court of Cassation, 29th April 1873 (Jour. iii. p. 29); Cogordan, pp. 238 *et seq.*

³ § 11. "The grant of nationality, unless it is expressly limited, extends to the wife and the minor children, who are still under the paternal power."

⁴ *Codice civil*, art. 10 *ad fin.* The children may, however, after attaining majority, exercise an option for the foreign nationality. Austrian jurisprudence also makes minor children follow the father. Cf. Beauchet, Jour. x. pp. 368, 369.

⁵ Laurent, iii. § 193, pronounces *de lege ferenda* in favour of the system, which prevails in the German Empire and in Italy, and also in Switzerland. So, too, Brocher, *Nouv. Tr.* No. 43, p. 153. No doubt Cogordan (p. 157) is of a different opinion: he thinks the French system is more in accordance with the liberty of the individual.

French statute to regulate the question of nationality (Weiss, pp. 300 *et seq.*), in its fourth and thirteenth articles has at least adopted the principle of the unity of the family, and thus extends the naturalisation and, as a rule, also the expatriation of the father to minor children and to the wife. [This has been law in France since 1889.]

But, from practical considerations, we conclude that the principle of the unity of the family is not to be dealt with as strictly obligatory. We shall rather concede to the father the right of excepting his children, or some of them, from his naturalisation.⁶

The laws of Germany and Switzerland deal with the matter in that way. If we start from the principle that the conditions of the capacity of a person who desires naturalisation are to be tested by the law of that State to which he has hitherto belonged, it follows logically that his naturalisation cannot be extended to his children, if the law of the State to which the children have hitherto belonged gives the father no power at all to regulate the nationality of his children.⁷ If, nevertheless, his naturalisation were extended to his minor children, the question for decision in the original State, in conformity with the observations made already in § 62, would be whether the naturalisation was still operative, and how far it was so. Cases can further be conceived where a father, on emigrating, desires for good reasons to preserve for sons and daughters, whom he proposes to leave behind him, the nationality which they acquired by birth. In these cases also such a reservation can be made available on the ground of the father's express declaration. If a mother is naturalised in the German Empire, the naturalisation does not directly extend to the children, for the mother has not the *patria potestas*. The principles as to the acquisition of naturalisation by guardians for wards must rather be the principles to regulate this case.

7. EFFECT OF RELEASE FROM THE TIES OF A STATE UPON THE DEPENDENT MEMBERS OF A FAMILY.

§ 73. It seems to be necessarily involved in the principle of the maintenance of the unity of the family, that loss of nationality by the head of the family draws with it the loss of nationality for the children who are

⁶ Brocher *ut cit. sup.* proposes to give the child, on attaining majority, an unconditional right to exercise an option for his original country, but would not give this option a retroactive effect. That would simply be a privileged naturalisation on the one side, and a privileged expatriation on the other. There would be nothing to object to in the proposal from the point of view of the law of the family and the individual. The individual of full age and of full capacity may enter another society or State, and therefore, of course, may enter the State in which he was born. But, looking at it from the point of military service, and generally from that of the claims of the State, we must declare ourselves distinctly against it. It is undesirable to multiply cases, in which a person may grow up under the protection of one State, and then suddenly, in some such privileged way, throw off the ties of that State.

⁷ It is upon this consideration that the provision of the 3rd article of the Swiss Federal statute specially rests. Cf. *Zeitschrift für Schweizer. Recht*, 20 (1878), appendix, p. 38.

still in family. This deduction is drawn in the German statute, § 19,¹ for the case of release from allegiance: it is also drawn in the Swiss statute, art. 8, which requires by its sixth article, in a case of renunciation of Swiss nationality, that the person renouncing it shall have already either acquired another nationality, or have at least an assurance that he can acquire one. The Swiss statute further requires it as a condition that the children must be living with the father in family. The German statute imposes this last restriction (cf. § 21, subsec. 2)² only in the case of the loss of nationality by an uninterrupted residence of ten years abroad, a method of losing nationality which is unknown to the law of Switzerland. In fact, we cannot well ascribe to the problematical legal institute of the absolute loss of one nationality without simultaneous acquisition of another such an effect on the circumstances of dependent members of the family. If the father leads the life of a vagabond, and consequently in the eye of the German law loses his German nationality, his family, which remains in the country, can hardly on that account become foreigners. The more general limitation of the Swiss statute seems, however, on other grounds, to correspond better with the nature of the subject. If a father emigrates with a number of little children, but leaves an elder son, almost grown up, behind him, who is, it may be, in attendance at some seat of education in the country, and has no desire to emigrate, shall this son, if the official who gives his father naturalisation omits to make the necessary reservation, become a foreigner? On the other hand, the question whether a child was living in family with his father may often give rise to doubts. This requirement does not suit very well the formal character which, as we saw, we must as much as possible, in the interest of legal security, give to the Act of naturalisation. It would perhaps be better to lay down some such rule as this, viz.:—"Release and naturalisation are always extended to the minor children, who are still under the paternal power of a father who is released from the ties of citizenship, or admitted to them, as the case may be, in so far as the father has the power, by the personal law hitherto enjoyed by him, of altering the nationality of his children. The official who is concerned with the release or naturalisation, as the case may be, is, however, bound, besides attending to the obligation of military service in

¹ The release extends, in so far as it is not expressly limited, to the wife and to children who are still under the paternal power.

² The legal system of the United States (Revised Statutes, p. 2172. Cf. Wharton, Dig. ii. §§ 184, 185) regards children, who at the date of their father's naturalisation in the United States had not yet attained the age of twenty-one years, as citizens of the States, if they are resident in the territory; and, according to the practice of the State Department, the rights of citizenship are lost by those children of an American citizen who go abroad with their father, after attaining full age certify, it may be by acts that lead to the inference, their intention not to return again to the United States. It is, further, assumed that the will of the father is decisive of the question whether the child, in a question of nationality, follows the father (cf. Wharton, p. 409), and that this will, which may be declared by acts leading us to infer it, may also go so far as to prevent a child from following him, and thus make it retain its subsisting nationality.

cases of release, to exclude expressly those children who are living apart from their father, and who in all probability will not follow their father.³

The question of minority in such cases is, however, to be determined solely by the law of the State to which the party has hitherto belonged.⁴ The point is as to the maturity of the individual, whereby he shall be put in a position to take a decisive resolution for himself, and this question of maturity must be determined by the law of the nationality to which he has up to this point belonged. There can be no such question in that case as that which arose in the discussion of the Bauffremont case, viz. a question of a restriction on the freedom of the individual, which the law of the State that is asked to naturalise must regard as absolutely inadmissible.

The question whether the State will receive as independent persons into its citizenship, persons who by their own law are not yet of full age, is quite a separate question. It may perhaps be convenient to answer that question in the negative. The rule of French law (see statute of 1889, § 5) seems to imply this, for it requires an authorised residence of three years, an actual residence of ten years, important services to France, or marriage to a French woman, coupled with a year's authorised residence. But in addition to the provisions of that law, it would be necessary to require the applicant to have attained majority by the law of the State to which he has hitherto belonged, as, for instance, Weiss (p. 109) distinctly holds to be incumbent even in French law.

REACQUISITION OF A NATIONALITY THAT HAS BEEN LOST.

§ 74. Should the reacquisition of a nationality that has been surrendered or lost be facilitated or privileged?

The question raises no point of international interest, in so far as a State may give its old citizens a legal claim to reacquire their citizenship in certain cases,¹ while naturalisation is in other cases purely a matter of discretion for the officials. There is no question of international law raised, if the reacquisition of nationality has simply been preceded by the loss of it, and not at the same time by the acquisition of some other nationality. For the only matter here dealt with is the revival of rights and duties, which cannot in any way come into conflict with the laws or the rights of any foreign country.

It is a more serious matter if the law, in a question of reacquiring a former nationality, gives up its requirement of a domicile for a certain period, or reduces to a minimum the length of domicile which in other cases it requires. The law of such a provision facilitates a fraudulent

³ It is possible to administer the provision of the German statute in this sense, and it would then be preferable to the Swiss statute.

⁴ See the distinct direction of the German statute as to nationality, § 8, No. 1.

¹ The German statute, § 21 *ad fin.*, makes a new grant of naturalisation obligatory in the case of the loss of it by an uninterrupted absence for a period of ten years.

evasion of legal duties in another aspect. The French system, influenced on this point by the vague idea of a connection with the country of birth or of descent that has its source in the law of nature, and must therefore, as far as possible, be respected, facilitates the reacquisition of French nationality to the utmost. French law recognises no particular periods at all for the reacquisition of nationality. This has led French jurisprudence to have recourse to the theory of a naturalisation that has been effected *in fraudem legis*, and is therefore invalid, a theory which is legally most doubtful. The *fraus*, according to this doctrine, is found in the object, and not in the conditions of the naturalisation. Of course, if any system of law requires a long period of domicile to give complete naturalisation, that period may be shortened for persons who wish to return to the country of their origin.

The only cases requiring exceptional treatment in this matter are that of the wife who by marriage with a foreigner has lost her nationality, and on the dissolution of her marriage desires to reacquire it, and that of children who by the naturalisation of their father in another country have become foreigners.²

We must, however, hold fast to the proposition that the reacquisition of the former nationality requires a formal and an express declaration before an official. No exception from this requirement can be made, even in favour of a wife returning from abroad or remaining in the country after dissolution of the marriage.³ The English statute, by its eighth section, provides that the British subject who by naturalisation abroad has lost his

² See the Code Civil, art. 10, 18 and 19, as to the privileged position of the widow and children according to the law of France.

³ The ruling French doctrine is shown by the judgments of the Court of Cassation of 19th May 1830 and 13th Jan. 1873 (Jour. viii. p. 151), and in relation to Belgium the judgments of the Belgian Court of Cassation of 10th Feb. and 1st Mar. 1876 (Rev. viii. p. 489). On the other side is Laurent, *Principes de dr. civ. i.* § 397. The 19th article of the Code Civil *ad fin.*, viz. "*Si elle devient veuve, elle recouvrera la qualité de Française, pourvu qu'elle réside en France, ou qu'elle y rentre avec l'autorisation du chef de l'Etat, et en déclarant qu'elle veut s'y fixer*," is interpreted by him to mean that the wife, if the spouses have at the last been living in France, by the very fact of remaining in France may again become a Frenchwoman (cf. Weiss, p. 245). [This section is practically unaltered by the statute of 1889.] It leads, however, to legal uncertainties. See against it Lehr, Rev. xvi. p. 248, and Weiss, *ut cit.* The Italian municipal statute book very properly requires, by its 14th article, an express declaration before an official, whether the widow is in the country or is returning to it (cf., too, the English statute of 1870, § 10, subsec. 2, whereby the widow requires, for reacquisition of her English nationality, a certificate which is to be given to her at any time she asks it). Is a preferable position of that kind only to be given to a widow, or is it also to be given to a divorced woman, or to a woman who became a foreigner not on the occasion of her marriage, but at a later date, by following her husband to another country? It looks as if these latter questions should be answered in the affirmative. [The French Statute of 1889 expressly does so answer them.] The wife who follows her husband abroad at a later period, is in truth less free in her acceptance of her expatriation than one who marries a foreigner; if the expatriation of the husband is to have an immediate effect upon the wife, that is all the stronger reason for giving her a privilege in the reacquisition of her nationality. But as regards the wife who has been divorced abroad, she in the same way will as a rule deserve the privilege of being entitled to claim the restoration of her

British nationality, can only recover it by the same means that are necessary in the case of a born foreigner who is claiming to be naturalised as a British subject. It gives him no legal right to claim it. In this statute a privilege is also given to a widow, who has become a foreigner by her marriage. In the case of readmission, minor children follow the father or the widowed mother, as the case may be, upon condition that they are resident in England.

H. NATIONALITY IN FEDERATED STATES.

§ 75. In federated States there is a double nationality to be considered, *first*, that which consists in the attachment to the federation as a whole, and, *second*, the right of citizenship in the different individual States, out of which the federation is made up. In such cases, the citizenship which has reference to the federation as a whole may be looked upon as the foundation of the citizenship of each individual State, or, again, the latter may be regarded as the primary citizenship. In the former case, the acquisition of citizenship in the federation will directly involve the acquisition of the rights of citizenship in a particular State: in the latter case, the acquisition of citizenship in one of the constituent States will directly involve the acquisition of citizenship in the federation. The two kinds of citizenship may, however, be so connected that the co-operation of the federal authority, and of some official of one of the constituent States, is necessary in order to confer citizenship. The first principle is the law of the United States,¹ the second the principle of German Law,² and the third is that of the law of Switzerland.³ But these are all questions solely of domestic legislation. They do not need to be any further considered here.

I. CHANGE OF NATIONALITY IN CONSEQUENCE OF A CESSION OF TERRITORY. OPTIONS.

§ 76. But if a territory is ceded by one State to another, a change of nationality is introduced which is peculiar, and which has a very strong interest for international law.^{1 2}

nationality as a legal right, if she desires to return to her own country and her own people. But this right should not come into existence at once; it should only be recognised after the lapse of some fixed period, so that the native law of marriage may not be too easily evaded by a foreign naturalisation, and a foreign divorce following on it. According to French law, the wife of a foreigner divorced abroad does not *ipso facto* reacquire her French nationality by being divorced. See the judgments reported in Jour. vi. p. 278.

¹ Cf. Rüttimann, *Das Nordamerikanische Bundesstaatsrecht*, i. pp. 88 *et seq.* Any person, who is a citizen of the Union, acquires the citizenship of any State by taking up his residence there.

² Cf. Laband, i. pp. 125 *et seq.*

³ Cf. *Zeitschrift, f. Schweizer. Recht.* xx. (1878); app. p. 36.

¹ Cf. Pothier, *Traité des personnes*, i. 2, p. 2; Jour. v. pp. 13, 14; Aubrey et Rau, *Droit Civil*, i. § 72, note 1. More detailed historical illustrations may be found in Beach-Lawrence, iii. pp. 187 *et seq.*

² The case of a complete *debellatio* or annexation is different from that of a cession. In that case the natives of the conquered, or (if the less exact expression "annexed" is preferred)

It is a rule sanctioned by usage, and one that is absolutely necessary, if the inhabitants of the ceded territory are not to be driven out, that these inhabitants become citizens of the State³ to which the territory is ceded. More modern custom in matters of public law, however, allows the individual inhabitants of the ceded territory the right, under certain conditions, but free of any tax for withdrawal, to preserve for themselves the nationality of the State which has made the cessation, to declare their option in its favour.⁴

The first question, then, which comes up is, Who is a citizen or inhabitant of the ceded territory?⁵ Who is it that, unless circumstances are

of the annexed country simply become citizens of the conquering or annexing country, not, however, by the simple fact of the occupation of the country by the enemy, but by subjecting themselves to the conquerors by remaining in the country after the occupation. Cf. Burlamaqui, *Principes ou éléments du droit des gens*, iv. c. 8, § 2; Vattel, iii. c. 14, § 213. A formal vote of the population, a so-called Plebiscite, can certainly not be regarded as necessary. Cf. v. Martens, i. pp. 353 *et seq.*

From this it follows that natives of the conquered country, who leave it before the conqueror definitely takes possession of it, do not become citizens of the conquering country. Cf. specially on this point (in connection with a case which occurred after the occupation of Hannover, a process of high treason against Count Platen-Hallermund) Zacharia in the *Gerichtssaal*, xx. (1868) p. 225: *Allgemeine deutsche Strafrechtszeitung*, 1868, pp. 304-320, and opinion there quoted of L. Neumann of Vienna; Stoerk, *Option und Plebiscit*, pp. 152 *et seq.* The Royal Prussian Court of Justice, by its judgment of 8th July 1868, *in contumaciam* recognised the opposite view (cf. Goldammer, *Archiv. f. Preussisches Strafrecht*, 1868, vol. xvi. p. 798). Stoerk, *ut cit.* p. 156, is of opinion that the conqueror must allow the inhabitants of the conquered country a free right of emigration up to a certain point of time, unclogged by the fulfilment of any oppressive political duties. The principles laid down in Wharton's Dig. ii. §§ 187, 188, with reference to the consequences of the American declaration of independence, agree with that opinion of Stoerk. A dethroned sovereign has in no case a domicile or a right of citizenship in the country which he has left, nor is he subject to its courts. Cf. judgments of the Appeal Court of Turin of 8th Mar. 1871, and of the Court of Cassation at Turin of 25th Aug. 1866 reported by Norsa, Rev. vi. p. 253.

³ This rule is a consequence of the circumstance that in modern times the inhabitants of the ceded territory are not considered as slaves, or ranked in any such disadvantageous position. The effect of the acquisition of a territory may however be restricted to this, that its inhabitants should for matters of public law, and in their external relations, be regarded as subjects of the State that has made the acquisition, while, in all other matters they are held not to have entered into the legal community of that State. It is also possible that in these matters a distinction may be drawn between members of sharply defined races of mankind, to this effect, that Europeans who have settled in a colony should become citizens in every sense, while the native negroes or Indians should not. See, on circumstances of that kind, Beach-Lawrence, iii. p. 188. This is accurately expressed by saying that the law of the State that makes the acquisition must determine the question, how far the citizenship of the inhabitants of the territory which it acquires is to extend. On this account the circumstance, that the sovereign of one country acquires for himself the crown of another, cannot, according to modern public law, make any alteration in the citizenship or nationality of the inhabitants of the two countries. (See Beach-Lawrence, iii. pp. 188, 189, on the former relations of England and Hannover.)

⁴ Cf. E. Löning, *Die Verwaltung des General-Gouvernements im Elsass*, Strassburg, 1874, p. 197. The earliest formal recognition of the free right of emigration is a provision in the Peace of Ryswick, in 1697, in favour of the inhabitants of Strasburg. But, as Stoerk (*Option und Plebiscit*, p. 97, note 3) aptly remarks, this was a mere theoretical recognition, for the Peace of Ryswick was concluded seventeen years after Strasburg had been surprised by Louis XIV. and for all that time the inhabitants of Strasburg were restrained.

⁵ If the ceded territory were a semi-sovereign State, or one of a federation of States, then, naturally the rule would be supplied by the special citizenship of the ceded territory.

altered by a special option, will for the future be a citizen of the State that has acquired the territory? Is it the person who has been born in the ceded territory, or the person who was domiciled there?⁶ Of course, in putting this question, it is assumed that the person who is to change his nationality, by such a cession of territory, belongs in every case to the State that is making the cession. For citizens of a third State, even if they be assumed to be domiciled in the ceded territory, cannot be affected in their nationality by the cession. There is this practical advantage in determining the question by the place of birth,⁷ that there is less opportunity for doubts and disputes, especially when we consider the accuracy of the records of statistical offices in modern times. But that rule is at variance with actual facts. The place of birth is of very little consequence for individuals within one and the same State. The only place of practical importance is the place of residence, the centre of the man's whole activity, which as a rule is at the same time the place where he exercises his political rights, and is the place in which, in the event of his falling into poverty, he will find relief. Löning (p. 203), Cogordan, and Weiss declare for the place of residence.⁸ Mixed systems, whereby either those alone who have their residence in the ceded territory, or were born there, are to change their nationality, or those only who combine these two qualifications, are to do so, are capricious and devoid of principle. The former system unfairly prejudices the State which is making the cession, the latter the State which is receiving the territory. No doubt, as Löning properly notices, with the principle of domicile may quite well be combined a permission by the contracting States, in the case of an important cession of territory, in order to fall in with the wishes and necessities of individuals, by which their respective subjects, within a specified period, may claim a right to emigrate and to naturalise themselves elsewhere. This was what happened *e.g.* in the Peace of Zürich of 29th Nov. 1859, and in the Peace of Vienna of 30th Oct. 1866, in connection with the cession of Venice. The principle of domicile was accurately observed, *i.e.* to the effect that, failing the exercise of a special option, it was those who were domiciled in the territory, and those only, who changed their nationality. On the other hand, the treaty of 24th March 1860, by which Nice and Savoy were ceded to France, is indistinct; and still more indistinct is the treaty of peace concluded between France and Germany in 1871.⁹

⁶ Cf. Cogordan, p. 299; Weiss, pp. 212 *et seq.*

⁷ On this side, De Folleville, pp. 208 *et seq.* But, on the other hand, see Weiss, *ut cit. sup.* Steork, p. 164, thinks he can discover a sufficient link with the ceded territory in the entries in the register of births.

⁸ See the practice of the United States, Whart. Dig. ii. §§ 187, 188; Foote, p. 6.

⁹ The French and German treaty, in its second article, was concerned simply with the question of option. The question as to what persons, by virtue of the treaty, and apart from any option, became Germans, is not touched. This defective drafting has been the source of disputes and mutually contradictory decisions. There was probably a difficulty in understanding what the principle embodied in the treaty truly was. The treaty itself spoke of the option of those only who were *sujets originaires domiciliés*. In accordance with this expression,

§ 77. Option, in its historical origin, is simply a formal declaration of emigration. In order that it may receive effect it is, strictly speaking, necessary for any person who exercises an option in favour of the State that makes the cession to transport his residence into its territory; and the State which has acquired the ceded territory must be allowed the right¹⁰ of expelling all persons who have made this option, but who, as a matter of fact, still remain in the country. Otherwise the incorporation of the ceded territory with the State that has acquired it would be made impossible by a disaffected population, and the conquering State would lose all the price of its conquest and the consideration for the treaty of peace.

§ 78. In our view, the definite formal act of taking possession must *ipso jure*¹¹ change the nationality of all persons whose nationality can be changed. Were that not so, then the conquering State, uncertain who would declare for the option, would, until the expiration of the time for making that declaration, have no subjects at all in her new territory, supposing that every one had a right to declare this option. One need only contemplate the consequences of such a state of things, to pronounce it to be from the point of view of public law an impossibility.¹² Is it to

it may have been supposed that the interpretation of the treaty, much to the disadvantage of Germany and impracticable in its results although it was, truly was that, even without exercising an option, all remained French who, *first*, were resident there under the French Government, although not born there, and, *second*, all who had been born in Elsass Lothringen, although they had no residence there. The supplementary convention of 11th December 1871 (*Reichsgesetzblatt*, 1872, p. 7), in its first article regulated the matter of option for persons who were born in Elsass, but who had no residence there; its provision was that the second class described above should necessarily exercise an option, but, strange to say, it left the first class, which doubtless was much more important for the German Government, without any mention. The German Government subsequently maintained the necessity for an option on the part of that class, and a change of residence to give effect to it; the French Government has refused to recognise this ruling. (On this point see the thorough examination by Cogordan, pp. 340 *et seq.*)

¹⁰ Both, for instance, are recognised as necessary by Weiss, pp. 213 and 217. But the treaty between France and Germany has again, by its faulty draftmanship on this point, led to many mistakes, many disappointments to the inhabitants, and subsequent measures of constraint by the authorities. It is said in the second article that "*sujets originaires des territoires cédés domiciliés actuellement sur ce territoire*" who desire to maintain their French nationality, "*jouiront . . . moyennant une déclaration préalable, faite à l'autorité compétente, de la faculté de transporter leur domicile en France et de s'y fixer.*" That looks as if a formal declaration of the option was sufficient, and the persons exercising the option had the privilege merely of afterwards transporting their residence to France, this transportation of domicile not being necessary to give full effect to the option. This idea is still further encouraged by the German text, which speaks of the privilege (*Befugniss*) of shifting the residence.

¹¹ This is the older French theory. Cf. Jour. v. pp. 13, 14.

¹² On this ground we must support the view taken by the German Imperial Ambassador, in a despatch of 1st September 1872 (cf. Cogordan, pp. 345 and 410), addressed to the French Government, although the peace of Frankfurt left the point doubtful (see note of v. Rémusat, in Cogordan, p. 344), and the French Government took a different view of it. The literal words of the second article of the treaty where it speaks of options, "in which case their character as French citizens shall be maintained"—"*auquel cas la qualité de citoyen français leur sera maintenue*"—no doubt supports the opposite view. On the other hand, in the protocol to the

be supposed that the State which is surrendering the territory should attend to the interests of its inhabitants in the meantime in questions with third States, although it is perfectly certain that by far the largest part of the inhabitants will, and must in the end, follow the fortunes of the surrendered territory?

§ 79. Then, too, the retroactive effect which, for instance, Weiss ascribes to options, must in our view be most distinctly negated. Such a retrospective declaration of intention, in so fundamental a matter as nationality, is extremely hazardous, and has only been adopted in French jurisprudence because that system denies guardians and fathers the right of emitting binding declarations in regard to nationality for wards or minor sons, as the case may be.

§ 80. In this question of option, we find again the question coming up for consideration whether, and to what extent, the dependent members of a family, wives and minor children, follow the nationality of the husband and father. In truth, if we assume that persons belonging to the ceded territory *ipso jure* enter the civic bonds of the conquering State, and that no retrospective effect can be ascribed to option, it is merely a privileged form of expatriation and of naturalisation on the other side. The same may be said of the question as to how far persons generally, who are under age, can with the assent of father or guardian, as the case may be, exercise an option. Here, too, we find the futility of the principle by which minors and their legal representatives are absolutely denied the right of choosing their nationality, and by which the exercise of an option is necessarily therefore deferred until the young persons have attained full age.¹³ A State, which must do its best to win over a still disaffected population, cannot assent to such a postponement of the choice of nationality, by which the rising generation would be allowed to remain in the country, and then suddenly, at the very time when they reached an age to bear arms, to

treaty of 31st August 1877, by which Sweden gave up the island of St. Barthélemy to France (given in Cogordan, pp. 376 *et seq.*), this language is used of those who, up to this time, had been Swedish subjects domiciled on the island, "*et la nationalité française, leur sera acquise de plein droit à dater du jour de la prise en possession par l'autorité française.*" In the same protocol, we find immediately afterwards a mention of the "*conservation*" of Swedish nationality (art. 2). As these two articles 1 and 2 cannot be in their literal acceptation read together, we may take that as a proof that we should not press the literal reading too far. Folleville, p. 428, is, in agreement with the judgments of several French courts (*e.g.* Nancy, 31st August 1871), of the opinion that the inhabitants of Elsass Lothringen remained French *pendente conditione*. This opinion hangs upon the words "*maintenue*" and "*conserver*:" it overlooks, as we believe, the juristic impossibility of such a state of things which we have laid down in the text. In the judgment of the German *Reichs Gericht* (2nd Civilsenat) of 8th January 1884, reported in Jour. xii. p. 332 (Blum. *Annalen des Reichsgerichts*, ix. p. 330), stress is laid upon the literal expression of the Frankfort treaty, and the inference is drawn that the husband in question never became a German; but the decision itself would have been the same in the circumstances, if the court had started with the opposite assumption, *i.e.* the assumption in the text.

¹³ French writers certainly take this view, especially Weiss, pp. 218 *et seq.*

declare themselves to be foreigners.¹⁴ Obviously this cannot be the case, even although, according to the law recognised in this surrendered territory, expatriation and naturalisation are in ordinary circumstances recognised as competent only to persons of full age. We must, then, give in our adhesion, at least for the time when the German law of nationality had not yet come into force, to the view which was, for instance, adopted by the German authorities, who refused altogether to recognise options exercised by non-emancipated minors in Elsass Lothringen.¹⁵ On the other hand, this shows us how impracticable it is, in the matter of nationality, to set up the principle of individual choice, or to take any other principle but the unity of the family as the rule. If a son who is under age, and not yet emancipated, is allowed to exercise an option independently of his father, the State which has acquired the province is exposed to a peril which is contradictory of the spirit in which the province was ceded. The father, who is growing old, makes his son exercise an option in favour of his own old country, and sends him across the frontier to some place of education, in order to satisfy the requirement of the law that he shall change his domicile. The son will fulfil his military duties there, and afterwards return into the ceded territory without hindrance, and without being threatened with any loss by reason of having evaded the law. For the State is unwilling, after the lapse of a considerable time, to have recourse to the highly unpopular remedy of expulsion from the territory, while the family property and family trade remain in the hand of the father, who has never left his home. [By an agreement of 1st July 1890, embodied in the statute 53 and 54 Vict. c. 32, which deals with the cession of Heligoland to the German Empire, the German Government allows all natives of the island the right of declaring for British nationality, personally or by their parents or guardians, before 1st January 1892, and all persons who make such declarations will be free from obligations for military service.]

¹⁴ Against this principle, which was the principle applied by the French Government on the acquisition of Nice and Savoy, see the pointed remarks of Stoerk, p. 132, to the effect that France would in that case allow it without difficulty, while Germany could not, in the case of the forcible acquisition of her provinces.

¹⁵ Cogordan, pp. 339 *et seq.*, gives a detailed exposition of the differences which have arisen between the French and German Governments and their respective law courts on the questions of options in Elsass Lothringen. As against the opinions expressed by Cogordan, see E. Löning, *Die Verwaltung des General-Gouvernements im Elsass*, p. 222, and Stoerk, p. 156. This is no place to go fully into these controversies, which have no doubt called forth all sorts of literary discussions, but which for the most part possess, or rather possessed, a merely transitory interest. We may, however, in answer to the objections raised on the French side, confess that apparently much obscurity prevailed on the German side, and that the subsequent correction of that obscurity (especially in the proclamation of the Ober-Präsident v. Möller of 7th March 1872, which has been so much discussed) was certainly calculated to beget discontent. The declaration, too, of the German plenipotentiaries at the conference of Frankfort as to minors, who were to be entitled to exercise an option "*avec le concours de leurs représentants légaux*," could not, as Löning (p. 227) rightly shows, easily be brought into harmony with the existing law, while it could make no claim to have itself the effect of an alteration in the law.

§ 81. Lastly, the question may be raised on this subject, too, to what extent we may speak of acts *in fraudem legis*, and of an invalidity resulting from that cause in the option which is exercised. In so far as the option consists in a formal declaration, we have no right to concern ourselves, in accordance with what has already been laid down with any inward intention or *reservatio mentalis*. On the other hand, a change of domicile may very well be merely illusory: it is in such a case no change at all, and cannot be recognised. Under certain circumstances, it may be inferred from the speedy return of the emigrant that his change of residence was not seriously intended to be permanent. This conclusion, however, is open to error, in so far as it is based exclusively upon the speedy return of the person who has exercised an option. For a merely temporary return does not prevent there having been a real intention of emigration, and if this intention did truly exist in the case of the change of residence, a subsequent return to the original domicile would in its turn again be of no importance.

We must, therefore, in cases of doubt pronounce the exercise of the option to be valid, if only we can find a fact which can be regarded externally as a true change of domicile. This course, too, is specially commended by the consideration that the interest of the public generally, and very frequently too of third parties, is concerned to maintain the formal *publica fides* which is involved in a grant of nationality. The State which has acquired the territory will find the proper weapon, with which to defeat options followed immediately by return to the country, in its powers of expulsion.¹⁶ However much freedom we may as a rule concede to foreigners to take up their residence in our country, the exceptional circumstances of a territory which has been newly won demand exceptional rules. The abnormal fact—a fact, however, which may very possibly happen in the case with which we are dealing—that the majority of the inhabitants of the ceded territory should as a matter of form attach themselves as citizens to the country making the cession, while as a matter of fact they retained their business and their property in the territory which is given up, might render fruitless the acquisition, and would be apt to retain for generations, as the owners of property and the directors of the commerce of the country, and so

¹⁶ Folleville, p. 298, declares himself in favour of refusing all right to return as a proper measure to be used in cases of naturalisation made *in fraudem legis*. No objection can be taken on principle to the regulations of the Government of Elsass and Lothringen for the expulsion of persons who return after having exercised their option in favour of France. But a temporary stay for unimportant objects should of course not be forbidden. Since, however, the power of expulsion must be left to the discretion of the Government in such cases, no objection *de jure* can be taken to its actings: indeed, it is quite right that strict measures should be taken against persons who make demonstrations of hostility to Germany. The proclamation of v. Manteuffel, governor of these provinces, of 20th Aug. 1884 (Jour. xi. p. 678), applies the remedy of expulsion as a matter of principle only to young men of military age. Others who have exercised the option are not to be expelled if they behave peaceably. See, on the expulsions that took place in the districts ceded by Denmark, Hänel (Jour. xi. p. 477).

indirectly as the controlling factors in politics, a population which is distinctly hostile to the State which made the conquest.¹⁷

§ 82. The question whether the State that makes the cession should grant the privilege of naturalisation to the persons who belong to the ceded territory on easy conditions, is a matter solely for the legal system of that State to consider. In our opinion, however, it is juridically wrong¹⁸ to place the inhabitants of a ceded territory on the same footing as persons who have emigrated voluntarily. It may no doubt be said that persons who have ceased to be citizens of any particular country, in consequence of some compulsitor of public law, deserve such favourable consideration more than men who give up their country voluntarily. But in so arguing, it is forgotten that, juridically considered, regulations of territory sanctioned by public law must carry with them the presumption of being proper demarcations of States and nationalities till they shall be altered again. The man, then, who belongs to the ceded territory, and was before its cession a Frenchman, is in the eye of the law to be considered as if he were not a Frenchman by extraction. On this point, it is quite immaterial whether the surrendered territory has belonged for a long time or only for a few years to the State which has now ceded it: the boundaries between two such cases would be difficult to draw on legal principles. Conflicts can only arise, however, out of such privileged treatment if the State which has ceded a territory proposes to set itself above the conditions of expatriation which are recognised in other circumstances, and, without regarding the conditions, tries to protect persons who have left the ceded territory against the demands of the other

¹⁷ In so far as birth in a particular territory is a foundation for citizenship, the citizenship will invariably be that of the ceded territory, but not that of the State which makes the surrender, in case such a distinction should exist. If, then, the rule that the child born in the country of a foreign father, who has himself also been born in that country, becomes *ipso jure* a citizen of the country of its birth, be recognised, it does not apply to the case in which the birthplace of the father has in the meantime been severed from the State in which the son is born. A case of this kind was decided by two French judgments in different ways, and without really touching the *punctum saliens*. The judgments were, one of the Cour de Paris (Chambre Correctionnelle) of 11th June 1883, the other of the Court of Cassation of 7th December 1883 (Jour. x. p. 505, and xi. p. 268). In such a case, there can be no question of the family having been incorporated with the State: the place of birth in such a case is simply of no consequence, and the descent of the child decides the question. The Court of Cassation held French citizenship to be established in the case in question according to the literal reading of the statute, because the father's place of birth was French territory when he was born.

¹⁸ This opinion, which in our view is mistaken, is, in modern times—formerly the drift of opinion was in the opposite direction—adopted in France by Cogordan, p. 72; Chavegrin, Jour. xii. pp. 169 *et seq.*, and, according to a citation which will be found there, by a judgment of the Court of Cassation of 7th December 1883. No doubt it is wrong to base the view which is adopted in the text on the fiction, that the cession of a territory has a retroactive operation of such a kind that questions must be determined as if the citizens of the ceded territory had always been citizens of the State which now acquires it. The Belgian Court of Cassation had frequently determined that the sons of citizens of Luxemburg and Limburg born (the sons) in Belgium before these provinces were ceded, could only become Belgians on the terms of the 9th article of the Belgian Code Civil. An authoritative interpretation of the law by legislation determined, on 1st June 1878, the contrary: this was on the grounds of expediency, because the public frequently fell into mistakes on the subject. Cf. Dubois, Rev. xiii. pp. 52, 53.

State, *e.g.* for military service, even while these persons are residing in the territory of the conquering State.

§ 83. That piece of territory, however, in which a man is born, or, if domicile be assumed as a regulating principle, in which he is domiciled, must always in strictness be considered his country, and not that greater whole from which that piece of territory has been divided. That an individual has the power of electing to belong to the greater whole rather than to the part is an exception, a privilege, to preserve the freedom of individuals; for public law must proceed upon the assumption that the inhabitants of any territory have grown up in it just as plants have grown up in different parts of a garden. The opposite theory is at variance with the practical necessities as well as with the logic of theory. In this way, the older French jurisprudence, which held children born in France to be foreigners, if the father belonged to a ceded province, and had not specially reserved his French nationality, was right. The most recent jurisprudence, which was inaugurated by a judgment of the criminal chamber of the Court of Cassation, of 7th November 1883, adhering as it does merely to the letter of the statutes of 1851 and 1874, has led to unexpected difficulties in the matter of the obligation of the sons of Belgians born in France to bear arms, and is properly criticised by Roche (*Jour.* xiv. pp. 303-312).

K. FORMAL DETERMINATION OF NATIONALITY.

§ 84. It is a question of great practical importance how nationality is to be determined¹ in cases of dispute or doubt. We have here to consider both how such questions are to be determined within each country and for each particular State, and how they are to be determined for international intercourse. The one set of questions touches the other, but they are by no means identical.

As regards the former, we may instance the case of the German Empire: in it there are no means of determining nationality recognised as authoritative everywhere. The determination of nationality rather comes up as a prejudicial question in lawsuits, or in matters brought before administrative officers for their decision. In every case in which nationality is the condition of a right, a power, or a duty, the official that has to decide upon this right, power, or duty, settles the existence or non-existence of the nationality according to his own convictions. The view which some other official has taken of the applicant's nationality, in deciding as to some other right or duty of the same individual, is in no way binding. It may, therefore, happen that different officials may some of them affirm, some of them negative, the nationality of the same individual; and it is by no means rare for judicial decisions to contradict the views of administrative officials.

¹ As regards the proof to be led in such a question, Aubrey et Rau, *Droit Civil*, i. § 69, say that a person who, as the son of a Frenchman, lays claim to the character of a French subject needs, as a rule, merely to show that his father was *en possession d'état*, acted as a Frenchman and was considered to be a Frenchman; otherwise the proof might be stretched *ad infinitum*.

In France,² on the other hand, it is the case that in many, if not in all matters of administration, an objection taken by any interested person that the view taken by the officials on the matter is wrong—*e.g.* that one who has been drawn for the conscription or placed on the list of electors is not a Frenchman—can be disposed of by legal procedure, by a special process of determining nationality. There then takes place a kind of preliminary suit. In so far as the decision arrived at in this suit regulates all questions that touch this individual, whether in matters of administration or of public law, the arrangement is excellent, and one that is to be generally recommended. It is, however, a matter for consideration, if it is proposed that a decision thus reached shall have binding force for civil suits with third persons, who have taken no part in the preceding judicial enquiry. At the same time, it must not be forgotten that these decisions are *de facto* looked upon by the public as decisive, and, relying on them, people contract with him who has been recognised as belonging to the State. If a contrary decision were subsequently to be given, it might involve mischievous disturbances of these beliefs. It may, perhaps, be worth while to suggest a middle course. While it should be made possible to get a judicial decision on the question of nationality in all matters of administration, the determination of which is at all dependent upon the fact of nationality, it might be provided that this judicial decision should be *res judicata* for all like points of administration, and should regulate them, but besides that for the future, in so far as private disputes are concerned, it should have the effect of naturalisation, or of a release from the ties of nationality, as the case might be. In this way the decision would have, in the matter of private legal relations, the effect of conferring or of destroying rights not *ex tunc* but *ex nunc*, and for the future it would serve the desirable end of guaranteeing a formal determination of nationality. The person whose nationality is in question would also have the right to appeal to such a decision even if no question were in contest with any third party, if he had an interest to have it determined, *e.g.* in order to be able to contract a valid marriage.

§ 85. A judicial decision on nationality can never claim a formal and binding validity in another State, and in the processes that may arise there; it can never be recognised as *res judicata*, since no judgment except that of a tribunal that is competent in an international sense has such an effect, while, again, the question of competency in such matters must itself necessarily depend on the nationality of the person concerned. We shall have more to say on this subject later, in discussing the doctrine of *res judicata*. A judicial decision on nationality is, within another State, never anything but evidence, the weight of which depends on the grounds on which it is based, and on the estimation in which the tribunals and officials of the other State are held. If it is known that, as in the German Empire,

² Cf. on the subject Cogordan, p. 381.

the officials of the State, to the courts of which it fell to pronounce judgment, are not themselves bound by judgments of the same sort which *incidenter* settle questions of nationality, little force can be given to these judgments in a foreign State. It would be otherwise if the decisions served at the same time as a process of naturalisation or of release, as the case might be. A certificate of naturalisation or of release irrefutably demonstrates itself to be a document that in the former case creates, in the latter annuls certain rights. It is, therefore, evident to the other State that at the specified time the person in question either was a citizen of the former State, or, if the judgment is to a negative effect, that that State would make no claims upon him which could interfere with naturalisation elsewhere, and all its natural effects. The judgment would then acquire the force of a so-called certificate of nationality, and of a certificate as to the recognition of which, by all the officials and all the courts of the State from which the judgment proceeded, there could be no doubt.

In modern times much use is made of so-called certificates of nationality—that is, certificates by some official that So-and-so is a citizen: there is no great objection to allow such certificates to have the effect of proof in the case of voluntary jurisdiction, *i.e.* on the question whether certain acts of voluntary jurisdiction can be done by the person concerned. They have, however, no absolute effect as proof in the case of litigations;³ and as the issue of such certificates should in many cases be preceded by very difficult enquiries, but in fact is not, the public has no sufficient guarantee for the legality of legal transactions undertaken on the basis of such certificates, if the legality of these transactions, *e.g.* in the case of the solemnization of a marriage, depends upon the nationality of the persons who take part in them.⁴ This misfortune would be avoided if, in cases where it was needed, a decision such as we have spoken of could serve as a certificate. Besides that, many States hold that there is an objection to allowing any such certificates to be issued;⁵ or it may be that, as in France, there are no officials competent to issue them.

³ On their effect, see the judgments of the Court of Alexandria on 15th November and 13th December 1877, given in the *Journal*, v. p. 187. According to these, it would appear that such attestations by Consuls are held sufficient in a private lawsuit, but not in the case of a dispute between Governments (*i.e.* the certificate fails the moment the foreign Government hesitates about it?). The French statute of 1889 is peculiar and in truth irrational, in so far as it treats the child that is born in France of a foreign parent, and is domiciled there at majority, as a French citizen, if the child does not claim the character of a foreigner and prove that he has preserved his foreign nationality by means of a certificate issued by the proper foreign Government. In this way, the view of a foreign official is absolutely decisive (*cf.* Cogordan, p. 91).

⁴ As things stand, it is often impossible to proceed with great exactitude in issuing such certificates, for fear of delaying or perhaps preventing altogether the execution of important legal transactions, *e.g.* in particular marriages. There is often nothing for it but that the parties should to a certain extent act at their own risk, and in cases in which there seems to be no doubt they will for the future just stick to the certificates that have hitherto been in use.

⁵ The State that issues such a certificate by some authorised official is bound, unless it can establish its non-liability, to receive the person who is described in it, if he is not naturalised elsewhere, and to support him if he becomes a pauper.

L. PLURALITY OF NATIONALITIES.

§ 86. Should legal systems allow the possibility of two or more nationalities existing in the same individual at the same time?

Long ago¹ no difficulty was found in recognising a plurality of nationalities in one and the same individual,² but in the present day the overwhelming weight of scientific authority is against it.³ Every individual bears a certain obligation of loyalty towards the State to which he belongs; in the case of a conflict, which may take place at any time between two completely independent States, he can only observe this loyalty completely towards one of them.⁴ But, in so far as we are to make the so-called personal law dependent on nationality, it will be impossible for us to recognise more than one nationality in any individual.⁵ If, then, a State, in giving a license to a subject to become the citizen of another State, at the same time reserves that person's existing nationality, no other meaning can in doubt be attributed to this reservation than that, if the new citizenship be lost or surrendered, the old one shall at once revive. Thus, on the one hand, a right to be received back again into the citizenship of the former State is conferred upon the person in question, and, on the other, no naturalisation of any kind whatever is required for the purpose; the reacquisition takes place *ipso jure*. In any event, it would be convenient, that in cases where a special license is given to enter the citizenship of another State, the State which gives the license should concede to the other the first right⁶ to dispose of the resources of the

¹ The cities of Greece allowed a plurality of citizenship (cf. Weiss, p. 13). The law of Rome was different: "*duarum civitatum civis esse, nostro jure civili nemo potest: non esse hujus civitatis, qui se alii civitati subjecerit*" (Cicero *pro Balbo*, c. ii.).

² Cf. Heffter, § 59a.

³ So Feuerbach, *Themis* (1812), ii. pp. 213 and 323: cf., too, e.g. Vesque von Püttlingen, § 12, p. 41; Phillimore, i. 378. See, too, the letter of Crémieux, the French minister of justice, to Lord Brougham, cited by Cogordan, p. 14, and Calvo, ii. p. 93; v. Martitz, p. 806; Bluntschli, Rev. ii. p. 110; *Völkerrecht*, § 373; Cogordan, p. 171; Geffcken, note on Heffter, § 59a; v. Martens, ii. p. 184; Laurent, iii. § 144; Weiss, p. 11.

The theory of public law means, by *sujets mixtes*, owners of property whose properties, once subject to one and the same sovereignty, are, in consequence of changes of territory, put under separate sovereignties, and who on this account have special advantages secured to them by treaties, e.g. facilities in obtaining passports, right of free residence, etc. See, on this subject, Vesque v. Püttlingen, pp. 41-43.

⁴ This becomes especially manifest, if two States should at the same time require military service of the same person. No doubt exceptions may be admitted in the case of States that have been intimately and long connected, so that all thought of conflict is excluded. Noble German families, whose rank springs directly from an Imperial source, often exercised political rights in several German States, and at the present time the case of one person belonging to several States in the German Empire is by no means uncommon. Cf. Falcke, "*Ueber die gleichzeitige Staatsangehörigkeit in mehreren deutschen Bundesstaaten*, 1888, pp. 10 *et seq.*

⁵ Cf. Lehr, Rev. xii. p. 312, for a very sound demonstration that it would be easier to recognise a double right of citizenship in political matters than in matters of private law, if, that is to say, personal law is to be dependent on citizenship.

⁶ Bluntschli, *Völkerrecht*, 3rd ed. § 374, note 12, has declared in favour of this view. Logically, the same decision must be given in the case that the native State, in place of giving

individual who has gone over. How could he always be in a position to withdraw himself from the power of the State in which, as a matter of fact, he happens to be? That connection which, as a fact, comes more closely round the individual, must naturally take precedence in the case of any such conflict: the principle of freedom of emigration leads to the same result.⁷

M. GENERAL RESULT. CONFLICTS. TREATIES.

§ 87. The results of the foregoing enquiry may be thus summarised:—

Nationality is the formal right to live or reside permanently in the territory of a State, a right which cannot be taken away by the State's own action. Although its origin is in descent, it presents, as regards a second acquisition or a dissolution, the formal features of the law of domicile in this sense, that it cannot be acquired unless a residence is acquired, and cannot be dissolved without a change of residence, while, if it is once established, a mere change of residence is of no consequence. While the principle of nationality agrees with that of domicile in allowing the individual the largest possible freedom to give up the national connection he has up to this time had, it is distinguished from the domicile of the common Roman law in respect that, *first*, one nationality can only be completely dissolved by the acquisition of a new one,¹ and, *second*, that as a matter of principle we cannot recognise a plurality of nationalities subsisting at the same time and complete to all effect.

§ 88. If these principles are rightly carried out—principles which, strange to say, Cicero is known to have described as those of the Roman law, and which are in modern times supported by a constantly increasing number of votes²—there will be very few conflicts between different legal

permission to acquire a foreign citizenship, has allowed a subject to enter a foreign military or civil service. The question whether such a permission has been legally given must be settled by the domestic law of the State of origin.

⁷ The matter may be regarded in a different light by the State of origin, if it has given no permission. Where permission is given, the State renounces its rights: if a permission is wanting, the individual takes the risk. The note of the Danish Minister for Foreign Affairs, of 28th May 1863, is obscure, as reported by Cogordan, p. 14: "*Notre législation ne s'oppose pas à ce que la coexistence de deux nationalités puisse être admise dans la personne du même individu seulement en principe, sa qualité d'étranger, ne doit porter aucune atteinte à l'accomplissement des devoirs auxquels il est astreint comme sujet danois.*" That the last-mentioned case will not occur, can never be certainly predicted. Besides, the despatch had reference to the case of a foreigner who immigrated into Denmark.

¹ We have frequently pointed out that some effects of a nationality may continue, while others have already ceased. It is a mistake for a legal system and for science to neglect this possibility, which disposes of a great number of the conflicts that occur.

² Cogordan formulates these principles thus, viz.:—

"1. *Que tout homme doit posséder une nationalité.*

"2. *N'en avoir qu'une.*

"3. *Pouvoir la changer.*"

systems. But in the present condition of legal systems they are anything but scarce. The question is, how they are to be dealt with?

These conflicts may be of a positive or of a negative kind. A negative conflict exists, if none of the States that can be taken into account in the particular case will recognise the individual as belonging to it, while we have a positive conflict in a case where several States simultaneously regard the individual as belonging to them. In practice, the former kind of conflict will hardly admit of any other result than that the nationality, which has existed up to that moment, should be held to continue if a new one has not been set up.³ As we have already seen, States have *de facto* been unable to get rid of this result, in so far as concerns the reception of subjects who have at some time emigrated from it. The positive conflict, on the other hand, in so far as it arises from the opposition of a thorough-going *jus soli* to the principle of descent, which, in modern times, is advancing further and further, is juridically and scientifically insoluble.⁴ The strict *jus soli* is in fact, as we have said, a principle which belongs to a past period, and does not suit our times. In point of fact, at the present day, if a conflict occurs, the claims of the State which founds upon the *jus soli* must be repelled. As regards conflicts, however, which spring from naturalisation, here the native State cannot so easily be required absolutely to surrender its claims. For every State must primarily test the justice of its claims, and the freedom of emigration, by its own legal system.⁵ Freedom of emigration is, however, the ruling principle: it has a presumption in its favour, whereas all presumptions are against any effect being given in international questions to restrictions upon this right. While, therefore, two States with rival claims may each give effect to its own claim within the sphere of its own jurisdiction, third parties (States) must test questions of nationality by reference to the judgment pronounced by the individual himself in question, in accordance with the principle of

³ A peculiar case of a negative conflict arose at one time between the laws of England and the United States, on the one hand, and French law on the other. The cause of it was that by French law a wife, by her marriage with a foreigner, lost her French nationality without acquiring a new nationality, as the English and American law then stood. This conflict would disappear if the principle were adopted that one nationality should not cease unless and until another is acquired. Besides, the conflict was not one as to municipal law. The law of France referred the wife on such questions to the foreign country, while the foreign country proposed to determine the personal law of the wife on the ground that she had a foreign domicile. On this controversy, see Weiss, pp. 208 *et seq.*

⁴ The only means to which recourse can be had in such a case is a right of option to be conferred by the legislation, such as is recognised by the English statute of 1870.

⁵ Positive legislation must in this connection consider that, "whereas the acquisition of any nationality depends on the law of the State in which it is to be acquired, the loss or the dissolution of nationality is dependent on the law of the State to which the individual has hitherto belonged." Judgment of the Court of Lyons, 19th March 1875, Jour. iii. p. 183, and of the French Court of Cassation, 19th August 1875, Jour. iv. p. 9, quoted by Labbé. Judgment of the Belgian Court of Cassation, 12th June 1876, reported by Dubois, Rev. xiii. p. 61. On the other hand, the question whether any person is naturalised in any particular State must be determined by the law of that State. Judgment of the Swiss Bundes-Gericht of 21st April 1882, reported by Martin, Rev. xvi. p. 487.

freedom of emigration. The result is that States, other than the two rival claimants, must, apart from special treaty, recognise the State which the individual has himself last selected, as entitled to claim him.⁶ The procedure recognised by English diplomacy,⁷ and now, too, by English legislation,⁸ whereby one who has been naturalised in England, although he has not been legally released from his previous allegiance, will be recognised and protected as an Englishman all the world over, except only within the territory of that State from whose allegiance he has not been legally released, is therefore absolutely correct. By this means the conflict, if not altogether settled, is, as regards public legal claims upon the individual,⁹ reduced to tolerable dimensions. Weiss (p. 292) proposes to make such a conflict impossible, by recognising it as an universal rule that no one should be naturalised, unless he has been released by the State in which he has had his home. But this must be rejected as an universal rule, because naturalisation might be unduly limited by the selfishness and narrowness of other States, and the freedom of emigration might be in a great measure rendered illusory. Although smaller and weaker States may, in order to escape difficulties, have resolved to betake themselves to this or to some similar rule, it would form an unworthy principle of conduct for great and powerful States.¹⁰

§ 89. Undoubtedly, however, nationality is a subject which admits of regulation by treaty without any insurmountable difficulties, and with remarkable advantage in the avoidance of conflicts. We may then emphatically recommend the conclusion of treaties on the subject of nationality from the scientific point of view. The Bancroft treaties, which we have already discussed, prove how profitable such treaties are, even although they are not faultless. We must not, however, set to work hastily. Before such treaties can claim a wider recognition, science must explain still further the principles which should be followed in such

⁶ Labbé, *Jour.* iv. p. 10, is of a different opinion. But see, on the other hand, especially Bluntschli, § 374, and our own discussion on the Bauffremont Case.

⁷ See the information on this subject given by Martitz, p. 818, and Halleck's *International Law* (*Ed.* Sherston Baker), i. p. 350.

⁸ § 7 of the statute of 1870, and Weiss's commentary on it, p. 273.

⁹ We can but approve the decision of the courts of the country in which it is contended that naturalisation has taken place, in upholding this as valid, and assuming it as a ground for judgment, although the native State may in such a case refuse to recognise the naturalisation or expatriation of the person in question. So the Civil Tribunal at Geneva, 9th December 1882, *Jour.* x. p. 531. The judgment dealt with the naturalisation of the wife of an Italian who had been naturalised in Switzerland: she was said to have retained her Italian nationality in virtue of the provisions of article 11 of the *Cod. Civ. Ital.* It is perfectly clear that our country must recognise a nationality which, according to its own law, exists in spite of some other nationality which by the law of some other country still subsists, in all relations, at least, which are for the benefit of the person concerned. For instance, the State can never extrude as a foreigner a person who by its own law is not a foreigner, even although by the law of some other State he is to be recognised as a citizen of it.

¹⁰ Clunet, *Jour.* v. p. 622, cf. ix. p. 416; Cogordan, p. 63.

matters, and must have laid them down with their logical results. Besides that, it may well be that deviations from general principles may recommend themselves to particular States for adoption with reference to the release of their own citizens, and the reception of foreigners as new citizens in respect of geographical, political, or politico-economical considerations. A general combination of civilised States seems to be in the immediate future possible only as regards certain points. The answers received by the Italian Government, on the occasion of its laudable attempt to introduce a general agreement on certain principles of private international law, even on this question of nationality, were as a rule to the effect either that there was no disposition to change the principles hitherto observed in the different countries in the direction of establishing an international agreement, or that they saw no reason for it, or held such attempt to be very serious. Again, many conflicts might be got out of the way, if true and practical principles were adopted by the different legal systems. A most productive source of conflicts, on the other hand, is to be found in the material agreement of different legal systems on legal propositions which are unsound. The constant conflicts between France and Belgium on questions of nationality are a striking proof of this.¹¹

N. DETERMINATION OF PERSONAL LAW BY DOMICILE OR BY NATIONALITY.

POSITIVE LAW.

§ 90. The last of the more important questions which falls to be discussed in this connection is this, viz.: Is the personal law of each person to be dependent on the law which prevails at his domicile, or on the law which prevails in the State, the citizenship of which he enjoys? We may, too, put it in this way, viz.: If, in certain questions, the decision must be in accordance with the law of the home of the person, are we to understand, by the expression "home," the domicile or the State which is entitled to lay claim to the person as one of its citizens?

This question, as we have said, could not arise while the conceptions of nationality and domicile were identical, or were not sharply separated from one another, and while naturalisation had quite a subordinate importance. For the first time in modern times, the question was sharply put by Tronchet,¹ in consultation on the third article of the Code Civil. The result was the second subsection of this article, viz.:—

"Les lois concernant l'état et la capacité des personnes régissent les Français (i.e. Français within the meaning of the Code Civil) même résidant en pays étranger."

¹¹ Cf. on such conflicts, Jour. vii. p. 613; ix. p. 416.

¹ Cf. Locré, "*La législation civile, commerciale et criminelle de la France*," i. pp. 399 and 463; and Rosshirt in his "*Archiv. für die civilistische Praxis*," 46, p. 318.

At the same time, the ideas of French jurisprudence² have also affirmed that foreigners in France, in all that concerns their “*état*” (within the meaning of the civil law) and their “*capacité*,” shall be judged not by the law of the place where they are living, but by the law of the State whose subjects they are.

The French theory was very soon adopted by the Austrian legislator, but, unfortunately, it was so obscurely expressed by the latter that it gave rise to a controversy which has not yet been completely settled. The fourth section of the General Civil Statute Book for Austria, of 1811, provides:—

“Citizens of Austria continue bound by the laws of Austria in all transactions and undertakings which they may make or carry on beyond Austrian territory, in so far as their personal capacity to do so is limited, and in so far as these transactions and undertakings may be alleged to give rise to legal consequences in Austria.”

On the other hand, the thirty-fourth section provides:—

“The personal capacity of a foreigner to enter on legal transactions is in general to be determined by the law of the place to which the foreigner, in virtue of his residence, or, if he has no proper residence, by virtue of his birth, belongs as a subject: in so far, that is to say, as this or that particular case is not otherwise provided for by the law.”

In consequence, it is plain that Austrians are to be judged by the law of their own State, and the great majority of Austrian writers

² Cf. Aubry et Rau, i. § 23; Bard, § 131; Durand, p. 249; Brocher, i. No. 43; Asser-Rivier, No. 23 (p. 56); Laurent, ii. § 97. (Cf. also Asser, Rev. vii. p. 400.) No doubt Haus, p. 66, Demangeat on Fœlix, i. p. 28, and Barilliet, *Revue pratique du droit français*, i. p. 66, are of a different opinion. The text of the code is obviously incomplete. If we are to criticise it closely, we should require a statement as to what law is to regulate foreigners in France. That the French legislator should make such an enactment would not be any excess of his jurisdiction, any more than it is an excess of jurisdiction for the code expressly to subject French people, during their stay in a foreign country, to the laws of France in all that concerns their status and their personal capacity. Of course, the French legislator cannot ordain foreign courts to apply this principle; but he can provide that French courts shall, for instance, test the dealings of Frenchmen carried on in a foreign country by the law of France. If any such objection as we have indicated is taken to the authority of the French legislator, it merely shows a forgetfulness of the fact that in the ultimate resort, in questions of international law, the determination rests with the court in which the question is depending. (But see, on the other hand, Durand, p. 249, who commits the very fault which he is criticising, because he pronounces that no legislative provision as to the status and capacity of foreigners is admissible, and on that ground defends the incompleteness of the French enactment. It is well known that other more modern systems have not placed any such erroneous limitations on their own powers.) Haus *ut cit.* defends his divergent view on the ground that article 3 of the code leaves the *droit des gens* in force for foreigners, and that it makes domicile the criterion. Nationality, he thinks, is a principle unknown to the *droit des gens*. Haus (p. 68 and p. 130) lays down also that a Frenchman or a Belgian, who has acquired a real domicile abroad (and not a mere residence there), has lost the character of a Frenchman; for a domicile with an *animus redeundi* (*esprit de retour*) is in truth no domicile. In his view, the principle of domicile is the ruling principle for Frenchmen and Belgians abroad. There is, however, in the somewhat vague expression, “*sans esprit de retour*,” something more involved than the purpose which the older jurisprudence of France required for the establishment of a residence within the bounds of France.

hold³ that foreigners too must be judged by the law of their nationality. Others, and among them especially Unger (§ 23, 1), hold, on the other hand, that the law of the domicile will regulate the case of non-Austrians.

All those countries in which the Code Civil, or some adaptation of it, constitutes the law,⁴ have therefore adopted the principle of nationality. Besides these, we must include the Italian Civil Statute Book,⁵ as must seem obvious after what we have said (§ 28), on the principle of nationality, and the Royal Saxon Civil Statute Book.^{6 7} In Switzerland, in the majority of the cantons,⁸ the principle of determining the personal law according to the law of the place of a person's nativity is the ruling principle; while in other cantons, especially in the west, the principle of domicile prevails.⁹ This latter principle has been curiously described by recent Swiss writers as the territorial principle.¹⁰

On the other hand, we shall not be surprised to find the *Allgemeines Landrecht* of Prussia, which belongs to the last century (Introduction, §§ 23-25),¹¹ makes domicile¹² the rule, and the same is true, in consequence of traditional usage, as a rule in all the countries in which the so-called common law prevails.¹³ There have been, however, some recent decisions of German courts, especially on matrimonial questions, in which some weight has been laid on nationality.¹⁴ Lastly, the principle of domi-

³ So Vesque v. Puttlingen, p. 57, and the authorities cited there, in note 1. Cf. Stoerk, Jour. vii. p. 334. He thinks that for future legislation the other principle should be adopted.

⁴ See the statute book of the Netherlands, art. 6, and Asser's criticism, Rev. i. p. 112.

⁵ "*Disposizione . . . in generale*," art. 6.

⁶ Cf., too, the German General Statute on Bills, art. 84.

⁷ According to Asser, Rev. vii. pp. 401, 402, the principle of nationality is the rule in Russia.

⁸ These are the German cantons.

⁹ Articles 46 and 47 of the Federal Constitution of 1874 have certainly in appearance laid down that questions of this kind are to be regulated by the principle of domicile. In truth, however, they only make promises for the future, and at the same time the law of Civil Status of 24th December 1874, in so far as the legal relations of other than Swiss citizens are concerned, proceeds again on the principle of nationality. See on this subject Brocher, *Nouv. Tr.* No. 20, and Muheim, p. 86.

¹⁰ Cf. Savigny, § 359, Guthrie, p. 125, and Nüscheler, p. 116. Huber *System und Geschichte des Schweizerischen Privatrechts*, Basel 1886, i. p. 78. There are so-called concordats as to the personal rights of the citizens of the different cantons subsisting between those States.

¹¹ Cf. Forster, *Theorie u. Praxis des Preussischen Privatrechts*, i. § 11.

¹² See, too, *Codex Maximilianeus Bavaricus*, i. 2, § 17.

¹³ Cf. Stobbe, i. § 30, note 2; Beseler, *D. Privatr.* § 32, note 4; Windscheid, *Pandekten*, i. § 35; Dernburg, *Pandekten*, i. § 46; and decision of the Reichsgericht (Civil Senate, i.) on 29th January 1883 (Dec. viii. No. 37). The decision of the Civil Senate, iii. of 7th May 1880 (Dec. ii. No. 39) shows that there are cases to which the principle of domicile is inadequate. In the latter decision, it is truly remarked that the legal relations of German nobles must be determined in German courts according to German law, although the nobles concerned may be resident abroad.

¹⁴ Cf. e.g. the judgments of the Supreme Court at Stuttgart (Seuffert, xxxi. No. 104); judgment of the court at Celle, of 14th July 1876 (Seuffert, xxxii. No. 2); judgment of the court at Cassel, of 5th August 1865 (Seuffert, xx. No. 3).

cile is beyond all question the rule in the extensive sphere of English and American law.¹⁵

REASONS FOR THE TWO DIFFERENT PRINCIPLES.

§ 91. Traditional usage is the leading ground on which the supremacy of the principle of domicile is founded in countries where the so-called common law, or the law of England or America, prevails. Recently, however, attempts have been made to base this principle on general considerations. The most thorough of these attempts have been made by Lorimer and Wharton. Lorimer (i. p. 428) declares himself in favour of the principle of domicile in accordance with his general theory, by which fact and right ought never to be separated. The "localisation" of the individual, in fact, must therefore determine his personal rights, whereas, on the other hand, political rights and private rights should be sharply divided from each other. To make a person's private rights depend on a merely formal naturalisation—one that has taken place without a residence having been acquired in the country which grants it—would be to fly in the face of actual facts: if, again, we require residence in the country as a condition of naturalisation, in the first place it would be the residence that would be the truly important factor, and at the same time we might impede that free movement of individuals which is so desirable. The theory of the necessary correspondence between fact and right, however, can only be applied under the greatest caution, and with large limitations: otherwise it upsets all law and right. In our view, nationality itself is nothing but a residence under special qualifications or conditions, and, again, it seems to us to be anything but desirable to separate, as Lorimer proposes, for generations it may be, private and political rights in the same persons; and to allow families, whose members have lived for generations abroad, to exercise political rights in our country. The opposition between fact and law would become

¹⁵ Westlake, p. 51; Wharton, § 20. [The distinction between nationality and domicile as institutes of law is thus stated by Lord Westbury in *Udny v. Udny*, 1869, Ct. of Sess. Reps. 3rd ser. vii. H. of L. p. 89, and L. R. 1, Sc. App. 457: "The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states or conditions, one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status; for the political status may depend upon different laws in different countries, whereas the civil status is governed universally by one specific principle. Domicile, or the place of settled residence of an individual, is the criterion established by law for the purpose of determining the civil condition of the person, for it is on this basis that the personal rights of the parties—that is, the law which determines his majority or his minority, marriage, succession, testacy or intestacy—must depend." As we see from the statements contained in the text, it is no longer true to say that "civil status is governed universally by one specific principle," viz. domicile, or that the determinants of political and civil status are different; nationality, or the tie of natural allegiance, is by many authors and legal systems adopted as the determinant in both cases. See *supra*, p. 114, for a reference to the view entertained by Mr Westlake, and based by him on decided cases, that the law of England is tending in the direction of requiring something more than the fact of residence, and the intention of unlimited residence, to constitute domicile.]

specially glaring, if we were to divide private from political rights in the same individuals in any such fashion. The free movement of individuals may often, too, be impeded if the position is to be that every change of domicile, which is simply a *de facto* change—and such cases may often be very difficult and doubtful—is to threaten a change of a man's whole personal rights. Wharton, in repelling an attack made on this theory by Laurent, who again sees in the respect paid to domicile a mere survival from the feudal system, is of opinion that the principle of nationality or citizenship will suit only States that are themselves unities, and will be unsuitable for compound States like the United States or the British Empire. In these a large number of different systems of law are recognised, and nationality accordingly has no connection with any particular system of civil law. Besides, he argues, nationality is far more difficult to determine than domicile; and again, in the case of the United States, the principle of nationality is unsuitable on this account also, that in a country which still desires a constant increase of her population, and into which there is continually streaming a flood of emigrants of various nationalities, it would operate as a mischievous restraint and as a peril for all intercourse, and especially for the law of marriage, and would open the door to deceit and treachery, if any regard were to be paid to grounds of incapacity, which by the law of the nationalities of these immigrants might possibly be found to exist. In this last argument we get a glimpse of a tendency, which is more and more passing out of view in English jurisprudence and practice, but which not unfrequently turns the scale in the practice of the United States, viz. a tendency to set a simple residence of some not too short duration on a level with domicile; and generally to make the law of the home—under which term we may understand domicile to be included—give way to the prevailing force of the law that is recognised at the place of the transaction, *e.g.* the ceremony of marriage.

Now there can be no doubt, and this much we shall concede to Wharton, that the principle of nationality suits best States that have an uniform system of private law. But it may also be quite well adopted by States which are compounded out of several provinces, and have manifold systems of private law. For, supposing that the person in question belongs to the Empire State as a citizen, it may quite well be that his domicile should settle the particular rights that are to belong to him; this is a point on which we shall have something to say on another occasion. Again, the determination of a man's nationality no doubt has to encounter pretty frequently juridical difficulties, as our investigation has already shown, and from a juridical point of view the theory of domicile seems simpler. But this greater simplicity as a juridical idea is *de facto* more than compensated by the great difficulties which arise in the proof of domicile; and if we determine personal rights by domicile, we cannot avoid the danger of subjecting the circumstances of individuals, even in matters of family law and of succession, to some particular law which shall be contrary to their own views and expectations. Least of all can we

support the last of the reasons adduced by Wharton. If it is a matter of importance to the United States that grounds of incapacity, by which domiciled foreigners are affected according to the law of the country of their origin, should not receive effect in the United States, we should recommend them to facilitate naturalisation so far as to allow it to take place before the lapse of the time that is at present required for its completion, without its being held to confer on the immigrant any political right which could be acquired subsequently. To identify real domicile with a stay of short duration, however, leads to a system of international law whereby insoluble conflicts in the spheres of marriage law, family law, and the law of guardianship, are made the prevailing state of things, and must in the long run, as commerce and intercourse increase, have more and more serious consequences for those whose interests are affected by it. It is also just as likely that mistakes in reference to domicile should give rise to damage to third parties; and these risks of damage can be more easily met by some general provision which shall protect *bona fides*, a subject we propose to bring under consideration when we come to discuss the question of legal capacity.¹⁶ But to all this we must add that the theory of residence or domicile, as it originated in the law of Rome, cannot be applied to the determination of personal law without important modifications, as we see in the practice of England and the United States, and sometimes, too, in that of Germany. Even when these modifications have been made, it is easy to lose oneself in capricious presumptions, while it is quite impossible to say that the interests of third parties are any better protected.

Domicile in the sense of the law of Rome is, with some isolated exceptions, entirely dependent on the caprice of the individual. That is not a convenient principle for the determination of personal law,¹⁷ although it may be sufficient for the determination of the general jurisdiction of courts over the person, and for all those occasions which the individual is free to regulate as he pleases. The State of origin has no right to prevent the individual from emigrating and attaching himself to another State. But that this may take place, we naturally must demand that there should be some process of adoption on the part of the other State.

Again, a part of the so-called personal law consists of regulations, the object of which is the permanent protection of the person, *e.g.* those statutes which are concerned with incapacity and with guardianship. Are we entitled to lay this permanent burden of protection upon any State in which the individual takes up his residence at his own good pleasure,

¹⁶ The law as to the acquisition or loss of nationality must not be established on any mistaken or onesided basis. Thus the pure principle of descent, if logically carried out, may easily result in error, if, for instance, a family who have continually for generations resided in one country, should still as foreigners be subjected, as regards their personal law, to the legal system of another country. To this extent Haus is quite right in his practical attack upon the principle of nationality. But the law as to nationality is capable of amendment; the principles on which domicile is dependent are not.

¹⁷ See, in this sense, particularly Brocher, *Nouv. Tr.* p. 80.

especially when this establishment of a residence is effected by a process that attracts very little attention, and requires but a short space of time for its accomplishment? On the other hand, the law of the family and the law of succession are in very close connection with national sympathies. Do we not do violence to the individual if we ascribe to domicile, which is often acquired quite unconsciously and without any particular purpose, a power of altering entirely the law of succession and of the family, without requiring some authentic declaration that the head of the family was bent upon such an alteration? Lastly, however, the domicile of foreigners in a country is a thing which the State of its own motion can bring to an end, as it can decree their expulsion. In the former edition of this book I disputed, and I was wrong in disputing, the possibility of a true domicile in cases in which the individual can be expelled from the place which he has selected for his domicile. This indefinite chance of expulsion, and of the consequent dissolution of domicile independently of the will of the individual, does not prevent the acquisition of domicile. But is it really possible that we should reasonably, in accordance with the principles of international law, attribute a permanent care for domiciled foreigners, and the right to regulate their succession and family law, to a State, which can at once banish any foreigner from its territories, a thing which, in many States, can be done by the simple scratch of a minister's pen, and for which he needs not so much as to assign a reason. The jurists of England and the United States, who have no knowledge of any such means of expulsion in their own countries, are apt to forget that the residence of foreigners in any territory has *de jure* to a large extent a precarious character. For this reason an expedient suggested by Westlake, in the deliberations of the Institute of International Law (Annuaire, v. p. 46), is inadequate. According to his view, a transportation of domicile to some other place should be accompanied by a formal declaration, to be registered under the authority of the Government. By this means a new intermediate class of foreigners (or of citizens?) would be created, and possibly the difficulties and doubts of the subject might be increased in other directions.¹⁸

We know that at present the jurisprudence of England and of the United States gives a decided negative to the proposal to determine these questions by the principle of nationality.¹⁹ Since there is but one nationality, *i.e.* citizenship, within the wide dominions of these respective empires, it must necessarily be that the law of the domicile, where there is such absolute freedom of migration, should rule; although, in order to be made available

¹⁸ See Lorimer's answer to Westlake, i. p. 431. Such a voluntary registration would in most cases be neglected: men would put it off all their lives, just because they are not themselves certain about it.

¹⁹ In the Argentine Republic, too, the principle of domicile is uniformly the rule, *i.e.* the simple domicile of the Roman law, only modified by a few special rules. The intention is to attract and to assimilate foreigners as much as may be. Cf. Daireaux, Jour. xiii. pp. 290, 297, 298. In deciding the question whether any one has acquired a domicile in a place, the question of nationality is completely set aside.

as a determinant of personal law, the doctrine of the Roman law of domicile must be subjected to important modifications. English and American jurists may therefore naturally regard it as an unnecessary complication to invoke and to develop a new doctrine, and one that is by no means easy, the doctrine of nationality, even for those cases in which non-Britains, or non-Americans, as the case may be, are concerned.

THE PRINCIPLE OF NATIONALITY LIKELY EVENTUALLY TO PREVAIL.

§ 92. We believe, however, that the future will pronounce in favour of the principle of nationality.²⁰ Not only did the Institute of International Law in 1880²¹ declare itself in favour of it at its meeting in Oxford, but even among English jurists we find that the authority of Dicey,²² who has made the doctrine of domicile, with all its difficulties and incongruities, a matter of special investigation, describes the principle of nationality as the sound principle for future legislation. In Germany,²³ again, several specially prominent authors have expressed themselves in this sense,²⁴ and so, too, has the assembly of German jurists.^{25 26} It is admitted²⁷ that it is still frequently a matter of great difficulty to determine a person's

²⁰ Cf. Laurent, ii. § 60: "*On a dit dans la discussion du code italien que le principe de nationalité fera le tour du monde. Telle est aussi ma conviction.*" All the authors who belong to the more modern school of French, Italian, or Belgian jurisprudence declare in favour of the principle of nationality. So, too, Brocher, Rev. iii. p. 431; Stoerk, Jour. vii. p. 336; v. Martens, § 69. Prof. G. König, too, in a pamphlet published in Basel in 1889, upon the Swiss law which regulates the mutual relations of settlers and residents, substantially adopted the principle of nationality. [So does Westlake to some extent, see § 256 *ad fin.*]

²¹ Annuaire, v. p. 57, No. vi. § 1 of the Oxford resolutions: "*L'état et la capacité d'une personne sont régis par les lois de son domicile.*" Likewise the congress of the jurists of Spanish America in 1878, and the draft treaty which reproduces their resolutions, art. 2 (*Zeitschrift f. d. ges. Handelsr.* 25, p. 546, and *Motive*, p. 553).

²² Dicey on Domicile, p. 362.

²³ Rosshirt, *ut cit. sup.* pp. 328, 329; Fr. Mommsen, *Archiv. für civ. Praxis*, vol. 61, p. 150; Stoerk, Jour. vii. p. 336; Stobbe, p. 212, note 5e, at least for that not very remote time when the German Empire shall attain a uniform civil code. Bähr, in v. Ihering's *Jahrbücher für dogmatik des heutigen Privatrechts*, vol. xxi. p. 343.

²⁴ The German Imperial tribunal, in a judgment of 9th June 1883 (Civil Sen. i.; *Entsch.* ix. No. 116, pp. 407, 408), says: "If we examine attentively German legislation and proposals for legislation in modern times, we remark a gradual tendency to place a higher value on the importance of that ideal link which is to be found in nationality." Goldschmidt, too, *Handelsr.* 2nd ed. § 38, note 2, who, as regards the existing law in so far as the common law of Germany is concerned, declares in favour of the principle of domicile, is of opinion that in future nationality, as its meaning comes more sharply into view, may establish itself as the regulative principle, in so far as the loss and the acquisition of the bond of citizenship are facilitated.

²⁵ Transactions, vol. ii. pp. 106-143, in agreement with the motion of Jaques (Vienna) and the opinions of Bähr and Bar, vol. i. pp. 82 and 95. See, too, Jaques in Rev. xvii. p. 562.

²⁶ See Rosshirt, *Archiv. für civ. Praxis*, vol. xlv. p. 326, on the occasional recognitions of the principle of nationality in German public treaties.

²⁷ In Switzerland there is now a strong movement on foot, which desires to set up the principle of domicile as a universal law of the Confederation, in place of the principle of nativity, *i.e.* determination by the fact of belonging to this or that canton (see Muheim on the literature of the subject, and the relative transactions of the union of Swiss jurists). The principle of nativity must, in the present day, when there is so much freedom of intercourse

nationality. But these difficulties will be mitigated as legal systems are amended, and treaties are concluded, and as the [theory is more fully developed. On the other hand, the difficulties of ascertaining domicile cannot be lessened, because in this matter we have always to refer to an implied declaration of intention by the person concerned, and to take into computation his individual and peculiar habits of life. We may, indeed, affirm that these difficulties will even be increased by the speedier and wider intercourse and commerce of modern times. We see signs of this already in the fact that the more modern systems of law to a certain extent hold, in questions of jurisdiction, that a prolonged stay in some particular place, or the habit of making a stay there from time to time, may be treated on the same footing as a domicile.²⁸ We find evidence of the difficulties which the principle of domicile causes in questions of succession²⁹ in the English statutes on that subject of 1861 (24 and 25 Vict. cc. 114 and 121). In the former of these statutes, the "domicile of origin" is quite arbitrarily put upon the same footing as the true domicile, in order to exclude any doubt as to the formal validity of a testament. In the latter, power is given to Government to provide, by means of treaties with other States, that the acquisition of a domicile by a British subject in any foreign State shall only be possible if combined with residence there for a year, and a written declaration to that effect: otherwise, as regards moveable succession, the former domicile shall be held to subsist.³⁰ V. Martens has recently (ii. p. 291) distinctly pronounced in favour of the principle of nationality. This is remarkable, because in his treatment of other questions of international law he is disposed rather to attach himself to the German school than to the French-Italian school.

among the little Swiss provinces, involve many practical inconveniences. But, as Muheim properly points out, these will more and more disappear, and, in place of them, the advantages of the principle of nationality become more and more apparent, the more uniform the constitution of the Swiss legal system is made. Muheim himself holds the principle of nationality, and, as far as Switzerland is at present concerned, the principle of nativity.

²⁸ Cf. e.g. the *Civilprozessordnung* for the German Empire, § 21. In my first edition, I pronounced in favour of nationality, but some people, e.g. Rosshirt, p. 333, did not fully understand my position, because I had to define for myself, in the condition in which the theory of the matter then stood, the idea of nationality. As I found this to be the right of residence in the State, for the sake of clearness I founded personal rights upon the right of residence, in place of making use of the term nationality, which at that time was quite indefinite. See my Opinion, in the Transactions of the 18th Conference of German Jurists, p. 95.

²⁹ The difficulties which are often associated with the ascertainment of domicile, are shown with particular clearness in Jour. i. p. 86, in the report of a decision of the Supreme Court of the State of New York. An invalid American lady lived ten years in Nice: in summer she travelled in Europe, for the winter she always returned to Nice, where she took rooms in a hotel for the whole year. It was said that she must be held to have meant to give up her domicile in America, as she could never hope to recover. The court, however, held that the American domicile continued to subsist. Cf. judgment of the court at Berlin, 2nd May 1867 (Seuff. 23, No. 3), and at Stuttgart 1862 (Seuff. 15, No. 184). We have also necessarily had to recognise the continued existence of a domicile that has been abandoned, in questions of personal law, if a new one has not been acquired. In this, however, we have wandered from the principles of the domicile of Roman law. See decision of the court at Stuttgart, of 14th April 1882 (Seuffert, 38, No. 203).

³⁰ Phillimore, iv. § 844; Foote, p. 22.

DOMICILE AN AUXILIARY GROUND FOR DETERMINATION: IN PARTICULAR
IN CASES OF CONFLICT AMONG THE PARTICULAR LAWS PREVAILING
WITHIN ONE AND THE SAME STATE.

§ 92A. There is no doubt that we may, and must, have recourse to domicile as an auxiliary principle for the determination of personal law. This is, of course, the case if we cannot demonstrate the nationality of the person in question;³¹ and, in the same way, if it is possible to hold that one and the same person has a plurality of nationalities, domicile must be the decisive consideration. Plurality of nationalities cannot be a common occurrence, except for some special circumstances, such as the case that several States can require the discharge of military duty from the same person. Domicile too may, in cases in which different legal systems are recognised within the territory of one State, be taken as the convenient rule for determining which of these systems is applicable. That will be so where the population enjoys complete freedom of movement and of settlement all over the territory,³² and laws of local citizenship enjoy accordingly a comparatively trifling importance. The same rule may indeed apply to the case of a confederation of States: if, for instance, the legislation of the German Empire should hereafter adopt the principle of nationality to regulate its relations with extra German States and legal systems, it might still be desirable to allow the principle of domicile to determine the personal law of individual citizens of the empire in the several federated States belonging to it, rather than the principle of birth or origin, which in questions of private law is fast losing ground as compared with domicile.³³ If, then, in modern times the effort in Switzer-

³¹ See judgment of the civil tribunal of Marseilles, of 15th February, and of the court of Aix, of 9th July 1873 (Jour. ii. p. 273), and of the Appeal Court at Lucca, of 8th June 1881 (Jour. viii. p. 553). In the last resort we may even have to fall back on the place of residence (Civ. Trib. of Antwerp, 13th January 1886, Jour. xiv. p. 219). In the same way Laurent, *Avant projet*, art. 18, § 3: "*Le statut de celui qui n'a point de nationalité, est déterminé par son domicile, et s'il n'a point de domicile par sa résidence.*" Laurent, however (*Avant projet*, i. p. 124), proposes to apply this rule to the case in which a person has lost a nationality that can be distinctly affirmed to have been his, and has not yet acquired a new one, whereas in my view the personal law of the former nationality continues in such a case to subsist.

The rule of the most recent project for a Belgian code, art. 12, § 6 (Rev. xvi. p. 492), viz. "*Celui qui ne justifie d'aucune nationalité a pour statut personnel la loi belge,*" is wrong, and scarcely possible to be carried out. Is that to be the rule if the person lives or trades in a foreign country? On the other hand, § 2 is quite properly conceived, viz.: "*Il en est de même de celui qui appartient, à la fois, à la nationalité belge et à une nationalité étrangère.*" In so far as the Belgian judge is concerned, the application of the law of Belgium cannot be excluded by the fact that some other law declares itself to be the sole law applicable. Muheim, p. 123, proposes that where nationality cannot be determined, the *lex loci actus* should rule. But that cannot be justified on principle, and leads to singular results in practice.

³² I have already, on a former occasion, expressed myself to this effect (*Münchener Kritische Vierteljahrschrift*, vol. xv. pp. 19, 20).

³³ See on this subject Stobbe's remarks, § 30, No. 2; also Bar, Opinion for the conference of German jurists (Transactions of the 18th Conference, i. p. 101). Before the North German Federation and the present German Empire were established, the relations of the different German States were different. This explains my modification of the view which I expressed in

land to stand for the future upon domicile,³⁴ in place of the municipal law of the canton, as has hitherto been the rule in the German cantons, gains more and more ground, it is quite compatible with the fact that the Swiss should in foreign countries be judged by the law of his nationality,³⁵ *i.e.* by the law of the last domicile which he or his parents had in Switzerland. But we are not here to set up a universal rule which shall suit alike all united and federated States. The question must always be settled by the domestic constitution of the particular federated State that is in question. Therefore the Oxford resolutions of the Institute of International Law are quite sound in saying:³⁶

“ Dans les cas où différentes lois coexistent dans un même état, les questions relatives à l'état et à la capacité de l'étranger seront décidées selon le droit intérieur de l'état auquel il appartient.”^{37 38}

DISTINCTIONS ACCORDING TO DIFFERENT LEGAL TOPICS.

§ 93. It may seem to be a question to what chapters or topics of law the principle of nationality is to be applied. The answer must simply be to this effect, that it is to be applied universally, where the application of a territorial law has to be associated with the permanent attachment of a person to some territory. Thus the law of nationality (*i.e.* the law of the State to which the person belongs) must decide not merely on questions of capacity, but also on questions of succession³⁹ to the estate of this person, on questions of his family law, and also on questions of guardianship.⁴⁰

my first edition. Olivi, too (Rev. xv. p. 217), recognises that domicile may be taken as a determinant of personal law, in so far as different laws prevail within one and the same territory.

³⁴ See Nüscheler, p. 173 *et seq.*; Curti, *Der staatsvertrag zwischen der Schweiz u Frankreich betreffend Gerichtsstand u. Urtheilsvollziehung*, Zürich 1879, p. 177.

³⁵ So Brocher, *Commentaire pratique et théorique du Traité Franco-Suisse du 15 Juin 1869*, Geneva 1879, p. 128.

³⁶ Cf. Oxford resolutions of the Institute, No. vi. § 2, and the judgments of the French courts, reported in the Jour. ii. p. 273; Olivi, Rev. xv. p. 217.

³⁷ *Annuaire*, v. p. 57.

³⁸ Thus there may be different systems of law for the inhabitants of the same State, based upon descent or religion, *e.g.* as for Jews, Mohammedans, or Hindoos. With regard to Jews, see judgment of the Appeal Court at Lucca, 8th June 1880 (Jour. viii. p. 553); on the natives of Algeria, see Weiss, p. 151; on the Indians in the United States, Wharton, §§ 9 and 252.

³⁹ As regards succession, see L. Renault's exposition in Jour. ii. pp. 336 and 342, Laurent, vi. § 159. The jurisprudence of France (see judgment of the Court of Cassation, 5th May 1875, Jour. ii. p. 358, and Clunet's note) requires a *domicile autorisé* in France, as a condition of regulating succession by the law of France. That is illogical, and only explicable on the ground of old tradition. Renault cites the second article of a Franco-Austrian Convention of 11th December 1866, according to which the succession of the subjects of these States is to be determined by the law of their nationality. But a convention between France and Russia in 1874, also cited by him, is to a different effect. The Institute of International Law (*Annuaire*, v. p. 57: Oxford resolutions, No. vii.) has declared for the law of nationality.

⁴⁰ This may be inferred to be the result of the Franco-Swiss treaty of 1869. Cf., too, Lehr, Jour. vi. p. 535, and Clunet, *ibid.* vii. p. 413. Martin (Jour. vi. p. 129) is of another opinion, and thinks that the law of the domicile and the courts of the domicile are more convenient. See, below, the doctrine of guardianship. Of course, the new Franco-Italian school takes the view of the text. Cf. Fiore, § 394; Durand, No. 186.

Nor can any distinction be drawn between the case of what are called coercitive laws and what are, on the other hand, called dispositive or permissive. It is just in matters affecting the law of succession and the family that Germans, French, Italians, Englishmen, etc., will cling most closely to the ideas that have been transmitted to them by descent: the law of succession is in close connection with that of the family, but the family again is the core of the State itself. Again, the law of guardianship is in close connection with the law of the family—indeed the father has a kind of guardianship over his minor children who are still under his *potestas*—while, on the other hand, it is a matter of interest for the State which is to guarantee the children a right of residence, and in case of their falling into pauperism is to receive and support them, to watch over their education and their property. To separate the so-called coercitive laws, which are not to be swayed by the will of the individual concerned, from the so-called permissive rules of law, would on the one hand result in intolerable confusion;⁴¹ while, on the other hand, its irrationality is obvious from the fact that the State, to which the persons in question belong, has a very pressing interest in keeping alive the national ideas of these its subjects even in matters of private law, and in the name of reciprocity must recognise that other States have a corresponding interest to regulate questions of succession and family law among their subjects, which have emerged within its jurisdiction. It is the confusion of the so-called permissive laws with an implied declaration of intention by the person—a confusion which we frequently observe⁴²—that has led to the exclusion of the permissive laws from the application of the law of the nationality. In interpreting implied intention, it may be quite right to have regard not to a person's national law, but to the law that prevails at his domicile, just as to the law of the place where the transaction has taken place, or the alleged declaration been made.

It may, however, be certainly laid down, that where a person carries on a business from some particular centre, he thereby impliedly refers all those with whom he trades to the law of that place. In so far, then, as it is possible for a party by a free exercise of will to subject himself to some particular foreign law,⁴³ to that extent the permissive law

⁴¹ On the other hand, and with special reference to Bähr's divergent views, see the judgment of the *Reichsgericht* (iii.), of 13th March 1885 (Blum. Ann. i. No. 300, p. 481). The judgment demonstrates the impossibility of allowing the law of the nationality to determine the legal limitations on the power of testing, while the law of the domicile shall regulate intestacy. See Bähr's recent views in the Transactions of the Conference of German Jurists, vol. i. p. 92.

⁴² Jaques (Rev. 18, p. 572) proposes to subject status, capacity, and questions of succession and of family law, to the law of the State to which the person belongs.

⁴³ How far this is possible is a question for the law of the nationality. An example will make the case clear. A, who belongs to the State X, has in the State Y a trading establishment. The question whether A has any capacity to bind himself will be decided by the law of the State X, but all judgments as to the particular transactions concluded from the State Y must be determined by the law of Y.

that is recognised at the place where this business is established must prevail.⁴⁴

CONFLICTS.

§ 94. Lastly, what is to be the solution, if the laws of the two States that are concerned differ in this respect, that the one looks upon the law of the domicile as regulative of the legal question that is at issue, while the other holds the law of the nationality to be regulative?⁴⁵

Such a conflict may be positive, *i.e.* each of the two legal systems may claim right to decide the question in issue. Now every tribunal must defer, in questions of international law, to the law of the State to which it belongs: the decision of the tribunal cannot therefore be doubtful, if each of the two systems claims the case for its own decision. But if the courts of both countries actually do determine the question, there will result a conflict of decisions which the resources of science cannot solve. In such a case, each of the conflicting judgments must be carried into execution so far as the jurisdiction of each of the States extends.

But what shall be the result if, conversely, the legal system of the State in which the person has his domicile holds that nationality must determine the question, while the system of the other, whose nationality he enjoys, says that the law of the domicile shall rule? For instance, the law of England holds the law of divorce to be dependent on the domicile of the spouses; the law of Belgium, on the other hand, holds it to depend on their nationality. Labbé⁴⁶ notes that a decision might be put upon the ground of the theory, which recognises the application of the *lex fori* as the ruling principle in international law, and refers the application of any other rules of law to considerations of convenience merely: in the case we have put there are no such considerations, as it is the foreign law itself which declines to exercise its jurisdiction: there is then, it may be said, nothing for it but the simple application of the *lex fori*. Labbé, however, who appeals to Laurent on this point, rejects this solution. The native system of law can only justify its competency, he thinks, on legal grounds,

⁴⁴ I recommended the Institute of International Law in 1883 to adopt the following rules, viz.: "*En matière commerciale pour tout ce que peut être réglé par la libre disposition (Volonté) des parties, la loi nationale est remplacée par celle du domicile. Pour les actes et contracts émanant d'un établissement de commerce en pays étranger la loi du lieu de l'établissement est considérée comme loi du domicile.*"

I think now, however, that it would be better to delete the former of these rules, for the doctrine of the text is not applicable to any commercial transaction, but merely to one that is concluded by a trading firm.

⁴⁵ Clunet (Jour. vii. p. 188) is of opinion that the only possible solution of such cases lies in international treaties, since the question is not merely as to a conflict of laws, but a conflict of different systems of reconciling these conflicts.

⁴⁶ Jour. xii. p. i. Labbé takes up at the same time the discussion of the question that the law of one of the States in question should hold the *lex domicilii* to be the rule in a question of succession, while the *lex domicilii* of the deceased holds the *lex rei sitæ* as determinant. This case will be considered by us in another connection.

and all the legal rules known to it point to its incompetency: the judge cannot, on consideration of convenience, adopt the theory of some foreign legal system as to international law. It is, however, as I think, unnecessary to fall back on that theory of the *lex fori*, and an evasion of it by a sort of *comitas*. What in truth is implied in the system of law, which makes the law of the person dependent on his domicile instead of on his nationality? Simply this, that this system holds that in the sphere of private law there is no such thing to be recognised in the technical sense as nationality. As, then, the person in question has no nationality in the other State claiming to regulate his private legal relations, the case is just the same as if he had had no nationality at all. The only competent law is therefore that of the domicile. This result is in a practical view the best, and, so far as actual decisions are known to me, has been adopted in practice, although perhaps on other grounds, which I must regard as mistaken.⁴⁷

The opposite view, which is supported by Labbé, lands us in the purely negative, and therefore undesirable result, that the persons concerned cannot get any decision on the point; whereas a reference to the law of the domicile will produce a decision which the other State also must recognise, and all the more so, as it is hardly possible that this latter State should

⁴⁷ Cf. the two judgments discussed by Labbé at p. 13; the judgment of the French Court of Cassation of 5th May 1875; and that of the Court of Brussels of 14th May 1881: an appeal against the latter was refused. In a case which was decided by the Supreme Court of Appeal at Lübeck, on 21st March 1861 (cf. Seuffert, xiv. No. 107), the suit came to depend in the country the nationality of which had been enjoyed by the deceased, and in which the rule of determining succession by the law of the domicile was the prevailing rule. The Supreme Court held that the law of the nationality, the law of Frankfurt, which was also the *lex fori*, must rule. In this way, recognition was given to a kind of reference or delegation to the other law, it being always assumed that the law of the domicile really had the force which it was represented to have. The reasons for the judgment are untenable, viz.: "If the common principle is followed out, as it should be, it requires that the law which prevails at the domicile of the deceased should be applied in its totality, and the succession therefore should be treated exactly as it would have been, if it had fallen to the courts of the domicile to deal with it." This leads to a *circulus inextricabilis*, to an unending reference from the one law to the other. Decisions of the German court on this point may be found in Bolze (*Praxis*, ii. No. 20, p. 5, and iii. No. 28). In their results we must agree—results by which the law of the domicile, which was also the *lex fori*, was declared to be the rule—the reasons for them, however, involve a *circulus inextricabilis*. In the first of these decisions it is said that, although the law of Baden will not withdraw the regulation of an estate left by the citizen of some foreign country who was domiciled in Baden from the rules of the foreign law in question, yet the law of Baden must be applied, if the foreign law itself prescribes that it should. Cf., too, Court of Toulouse, 22nd May 1880, Jour. viii. p. 61; if the national law of a foreigner who has died provides that his succession shall be regulated by the law of his actual domicile, and this domicile is in France, the law of France will rule his moveable estate, although in ordinary cases a domicile in fact receives no consideration in the law of France. The revised statute book for Zurich of 1887, § 3, gives the proper decision, viz.: "The family relations of foreigners domiciled in the canton will be settled by the law of their home, in so far as the law of the State to which they belong prescribes this." § 4 makes the same provision for succession. The origin of the idea is from Bluntschli. More recent judicial decisions seem to have misinterpreted it. (See, on the other hand, Schneider, comm. on § 4, No. 2.) There will probably be some alteration after the revised code is published, as the revisers did not approve of the view taken in these decisions.

reserve for its own courts an exclusive jurisdiction to decide questions, the merits of which must be determined according to the law of the domicile.

III. EQUALITY OF FOREIGNERS AND NATIVE SUBJECTS BEFORE THE LAW.

THE PRINCIPLE OF THIS EQUALITY.

§ 95. We have already noticed that law in the Middle Ages does not by any means bear the same exclusive character, or deny foreigners equal treatment in the same way, as we know it did in many nations in more ancient times. In the later Middle Ages, it is true that the development of some particular systems of law moved in an opposite direction, and in many cases there were instances of serious disadvantages of the most selfish description being imposed on foreigners; but the later commentators even declared that, as a matter of principle—so far as there were no special exceptions created by law or statute—foreigners and native subjects in the sphere of private law enjoyed the same recognition from the law.^{1 2} This, too, is the principle³ of the common law of Rome,⁴ and of the various local German systems.^{5 6} With regard to the acquisition of real property, however, limitations on the legal capacity of foreigners were common up to the most recent times, and foreigners, too, are frequently subject to what is known as "*Ausländer-arrest*" (arrestments, or foreigners' attachment), and to the obligation to find caution for expenses.⁷ These two regulations are not, however, any real inequality in legal capacity, but are rather a special

¹ Cf. e.g. Baldus, in *L. Si non speciali*, 9, num. 2, *C. de testamentis*; Barthol, de Saliceto, in *L. Cunctos*, *C. de S. Trin.* num. 8. Laurent, i. § 207, combats this, but he is mistaken.

² The proposition must, however be restricted to this, that they have the like capacity for acquiring all rights. That does not involve that they shall be treated absolutely alike. The consequence of that would be, that the law recognised in the territory of the court which was dealing with the case, would always be applied.

³ See Fiore, § 11, as to the development of this principle.

⁴ Cf. e.g. Mevius, *Ad Jus Lub. Proleg.* qu. 4, § 37; Walter, *D. Privatr.* § 60; Mittermaier, *D. Privatr.* 6th ed. § 109; Hofæker, *de effie.* § 23, and authors cited there; Oppenheim, *Völkerr.* p. 357; Bülow and Hagemann, *Prakt. Erörterungen*, ix. pp. 142, 143; Spangenberg, in Linde's *Zeitschrift für Civilr und Process*, iii. p. 431; Feuerbach, *Themis*, p. 325; Maurenbrecher, *D. Privatr.* 2nd ed. § 141; Judgment of the Supreme Court at Berlin of the 26th September 1849 (Dec. xviii. p. 148); *Preuss. A. L. R.* §§ 41-44 of the introduction; *Pr. Allgem. Gerichtsord.* i. 50, § 162; Supreme Court of Berlin, 16th July 1857 (Striethorst, xxvi. p. 139); Austrian Civil Code, § 33; Saxon Civil Code; Wächter, i. pp. 252, 253; Bopp, in Weiske's *Rechtslexicon*, iv. pp. 359, 360; Stobbe, § 43.

⁵ So, too, the laws of the Swiss cantons, except in so far as they rest on the law of France. The canton of Tessin has recently adopted the principle of equality substantially on the model of the Italian Code. See Huber, *Schweizer. Privatr.* i. (1886), p. 146.

⁶ In the Argentine Republic, the principle is proclaimed at the very beginning of the constitution (Daireaux, Jour. xiii. p. 418).

⁷ [By the common law of England and Scotland, aliens were under various disabilities, e.g. were incapable of purchasing or taking by succession heritable property; but by 33 Vict. c. 14, this and various other disabilities are removed: aliens are still incapable of exercising

privilege given to the other litigant,—in consequence of the fact that the foreigner can more easily withdraw himself from the tribunals of this country—by means of which he can protect himself against the risk of legal process being in that way defeated.⁸ Political rights are denied to foreigners everywhere. They imply a share in the government of the State, which cannot be exercised unless there is a permanent obligation to loyalty.

The right, too, of carrying on trade and commerce is at the present day generally conceded to foreigners: there are, however, exceptions of various kinds recognised in the case of trades.^{9 10}

In England, a longer period was required for the full recognition of the principle of equality: it has, however, been fully recognised by the statute of 1870, that foreigners can acquire English real property and can inherit it.¹¹ In the United States, we still in some States find this limitation, that none but residents in the country can own real property. This rule has, however, very little to do with the old-fashioned disabilities of foreigners.

political rights—the statute is declared not to qualify an alien for any office, or for any municipal, parliamentary, or other franchise: nor can an alien be owner or part owner of a British ship, or in Scotland be appointed tutor or curator. In Scotland, a litigant resident furth of Scotland must, as a condition of suing in Scotland, sist a mandatory to be responsible to the court for the proper conduct of the case, and to the opposite party for expenses. But see *infra*, § 401.]

⁸ Unger, i. p. 303.

⁹ Strangers must be denied all rights, which, without being in truth political, *i.e.* implying a certain share in the government of the State, or of the community, assume in their nature a permanent attachment to it. For instance, foreigners can never claim that in school instruction any regard should be given to their language: they have no concern in such matters. But, as we have noticed, these things may be otherwise ordered in the relations of federated States. Here it seems conceivable that members of the federation should be admitted to political rights in one of the federated States to which they do not, however, belong.

¹⁰ It generally depends on the discretion of the State to what extent it shall impose duties on foreigners. It settles conditions for the residence of foreigners. It may not, however, make sudden and excessive changes on its rules, to the prejudice of foreigners already domiciled and in violation of good faith, or impose duties which in the end may give occasion to a breach of the loyalty due by the residents to their own country, *e.g.* a duty to serve in the army, in place of a mere obligation to serve in some kind of police force. Where a residence has lasted for some time (five years perhaps), the children of foreigners may very well be declared to be under obligation to attend school, or receive education otherwise, as a condition of being allowed to continue to reside. For the presence of a number of totally uneducated foreigners in the country may be a serious matter. Cf. Laurent, viii. § 101. He, however, certainly goes too far in this matter.

On the subject of school attendance, reference may be made to the *Convention entre la France et la Suisse en vue d'assurer la fréquentation des écoles primaires par les enfants des deux pays résidant sur le territoire de l'autre pays*, dated 14th December 1887, and published in France by a decree of 13th June 1888 (printed in J. xv. p. 857). In accordance with it, children of Swiss nationality will be treated in France, and children of French nationality will be treated in Switzerland, as regards the duty of attendance at school and the indispensability of elementary education, on the same footing as children of native subjects. The person, with whom the children are being brought up, may be made responsible for their attendance at school. Such treaties are to be recommended, if the system of instruction rests upon somewhat similar principles in both countries. A system of a strictly denominational kind will, it must be admitted, generally prove an obstacle to such measures.

¹¹ [See note 7, *supra*.] Phillimore, iv. § 385.

A foreigner, who acquires property by inheritance, may retain its value. He must, however, dispose of it within a certain time, and the exclusion of foreigners from the rights of landed proprietors is maintained merely on the ground that the accumulation of great tracts of land in the hands of foreigners is considered dangerous.¹²

In reference to the capacity of foreigners to enjoy legal rights, a retrograde movement has begun in a number of countries. But it is only in Russia that the movement has, as yet, resulted in rules of law of positive disadvantage to foreigners. According to the text of statutes which have been published in the newspapers, foreigners in Russia seem to be more and more excluded from the right of owning property in land, or holding manufactories, etc. History will show who has been the means of originating this retrograde movement, and who will have to bear the consequences if it continues.

CIVIL AND NATURAL RIGHTS.

§ 96. It is strange, but true, that the Code Civil constructed under the first empire has taken as a fundamental principle, in contradiction of the cosmopolitan ideas which prevailed at the outset of the Revolution, an erroneous theory by which the legal equality of foreigners is limited. The result is the 11th article of the Code Civil, which only allows the foreigner in France the enjoyment of *droits civils*,¹³ in so far as the country of that foreigner allows Frenchmen the same rights, and guarantees them by public treaties. Other foreigners are, therefore, excluded from this privilege; they seem to be capable of enjoying those rights only which have been described, in the sense of a well-known theory of natural law, as *droits naturels*.¹⁴ No definition, however, is given either of *droits civils* or *droits naturels*: there are particular rights which, as *droits civils*, are expressly denied to foreigners by French legislation; at the same time, a more exact investigation shows that the distinction taken in the Code Civil is upon the whole completely untenable in theory, and practically useless.¹⁵

¹² Wharton, § 17. The Court of Appeal of New York (*Luhrs v. Timer*, 1880, Jour. viii. 279) held that the real estate of an American citizen, *i.e.* a naturalised citizen, who had died intestate, did not fall to his father, who would have succeeded in the ordinary course, in respect that the father was an alien: a sister, who had been naturalised by marriage, was preferred. Wharton, Dig. ii. § 201 (p. 490), cites from a dispatch of Secretary Adams in 1827, the principle that the rule of treating foreigners and natives on an absolutely equal footing, as regards all subjects of commerce and navigation, "is altogether congenial to our institutions." Limitations on the right of succession to real property are gradually being removed in most of the States. Besides that, these limitations have been entirely removed as regards the whole territory of the Union, in so far as the subjects of some foreign States are concerned. See Wharton, Dig. ii. p. 495.

¹³ Foreigners who are domiciled in France with the authority of the Government enjoy, by art. 13 of the Code, *Droits civils*. Cf. Massé, ii. p. 22 and p. 26.

¹⁴ See, as to the diverse interpretation placed on article 11, Durand, § 106.

¹⁵ Brocher, i. p. 164, remarks very truly: "*Les droits les plus naturels ont besoin d'une réglementation et peuvent sembler difficiles à classer.*"

There are certain rules of law, especially those which are concerned with ordinary commercial intercourse, which are alike among all civilised peoples. In spite of that, the idea of a law which is originally entirely independent of any recognition of it by particular States must be pronounced to be a mistake; this can easily be shown by examples. Nothing, for instance, appears more natural to the universal legal conscience than that bargains, in whatever form they may be concluded, should be observed. Many kinds of bargains and contracts, however, have some special form prescribed for them by positive enactment: such forms are undoubtedly to be reckoned as belonging to the *droit civil*, if any rules at all are to be considered as distinguishable from natural law. These forms of contracts, therefore, will have no application to intercourse with foreigners. But a French author or a French court of law will hardly be found to lay down that in a case where writing is required by French law to complete a contract, this rule is not to be applied to contracts concluded by foreigners with Frenchmen in France. Roman law, no doubt, as we have seen, recognised such a *jus gentium* common to foreigners and Romans, and this idea was justified if the foreigner was only to be recognised as having legal capacity in reference to certain definite branches of law. But if we assume, as the legal mind of the present day does, that foreigners in matters of private law are not to be placed at a disadvantage with citizens, a distinction of the kind loses all definite meaning, and results at last in an arbitrary oppression of foreigners. As a matter of fact, even in French jurisprudence the greatest conflict prevails over the division of the different rules of the law into these two classes,¹⁶ and at last, in theory at least, the proper rule has been adopted, that by the law of France foreigners as a rule enjoy *droits civils*, and all rights which the law has not expressly denied them.¹⁷ By reason of traditional usage,¹⁸ many other private rights¹⁹ are denied or disputed in the case of foreigners.²⁰ The Codes of Holland and of Italy, although in so many respects they rest upon that of France, have dropped this distinction. The Italian Code in its third article categorically declares: "*Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini.*"²¹

¹⁶ See Rosshirt in his *Zeitschrift für Civil. und Criminalr.* iii. p. 335; and especially Savigny, Syst. ii. p. 154.

¹⁷ Laurent, iii. § 321 *et seq.* vi. § 63. A judgment of the Court of Cassation of 5th August 1823 (Sirey, xxiii. 1, p. 253) is to the same effect. See, too, Gand, No. 135, 165, 168; Demangeat on Fœlix, i. § 36 (p. 98), and Durand, § 111. Brocher, i. p. 161, tries to save the traditions of French jurisprudence: he cannot, however, be said to be successful.

¹⁸ Aubry and Rau, i. § 78, and Haus, § 3 and § 11, declare in favour of this: Haus proposes to contrast with *droits civils* those rights which are guaranteed to foreigners by public law, *i.e.* by a pretty (!) general usage. He proceeds, however, very arbitrarily in particular cases.

¹⁹ For instance, a foreign wife is often denied the *hypothèque legale* which is given by article 2135, on account of claims arising out of the *dos* and marriage contracts.

²⁰ Of special importance are the 726th and 912th articles of the Code, which limit the capacity of foreigners to succeed.

²¹ The present Dutch Code is to the same effect, art. 9. See Asser, Rev. i. p. 113.

If we desire nations to have free intercourse with each other, we must pronounce in favour of the liberal principles of these later statute books.²² That foreigners should not be equally recognised by the law, and should be put at a disadvantage with native subjects, gives an element of uncertainty to all intercourse, prevents full use being made of the capital and industrial resources of foreigners, and, lastly, operates to the loss of all mankind, as it is only by freedom of movement and certainty of intercourse that the globe can be occupied to the fullest advantage.²³

SYSTEM OF RECIPROCITY ?

§ 97. These considerations lead us to reject the system of reciprocity ;²⁴ they will prevent us from making the equality of foreigners with subjects in the eye of the law, at least as a general rule, dependent upon whether the State to which the foreigner belongs gives our subject the same rights,²⁵ or, to speak more correctly, treats the subject of our State in the particular case like its own. The advantage to be derived from a favourable treatment of foreigners, a treatment that suits the nature of the circumstances, is above all other considerations, and as a general rule we should not make that which is sound in principle depend upon whether other States also adopt this sound view, since it is precisely by such limitations of sound principles that their beneficial results are laid open to dispute, and thrown into the shade.²⁶

A system of reciprocity is in practice less hurtful, if all that is required of the other country is that our citizens shall receive a practically equal

²² See Phillimore, iv. § 385 ; v. Martens, ii. § 69.

²³ For the selfish arguments by which it has been tried to set foreigners at a disadvantage, see Asser Rivier, § 16.

²⁴ It is defended by Haus, p. 52. On the other hand, see the excellent exposition of Hamaker, *Das internationale Privatrecht*, pp. 12, 13, and art. 9 of the Dutch statute book of 1838 : this article reserves power to make exceptions, but a close examination shows that this does not require to be expressed. It is more correct not to set up such exceptions by any general article, but to enact them simply as the different subjects to which they refer are taken up. In that way it is more probable that the exceptions will be confined to the cases in which they are really required, *i.e.* that the foreigner will be placed at a disadvantage to the native subject only in so far as his foreign character is really an objection to an equal treatment by the law. See, too, Fusinato, *Introduzione*, p. 55.

²⁵ A distinction may be taken between material or relative reciprocity, and formal or absolute reciprocity (see on this subject Norsa, Rev. vi. p. 260, and Vesque v. Püttlingen, § 42, who does not, however, distinguish sharply enough between the various cases). By the system of relative reciprocity, the privilege in question is given to the foreigner only if in the like case a subject of our State would enjoy it in the State to which the foreigner belongs ; in the system of absolute reciprocity, the only question is whether in the particular case the foreign State makes no distinction between its own subjects and foreigners, or the subjects of our State. The former system is meaningless ; it implies a pretension to impose our law upon a foreign State. Modern legislation knows nothing of it ; it is, however, the controlling principle of the French statute of 1819, as to the acquisition of French successions by foreigners.

²⁶ But see, on the other hand, Laurent, ii. § 37.

treatment.²⁷ But such a system is specially mischievous, if, as is the case in the 11th article of the Code Civil, the treatment of foreigners is made to depend upon reciprocity being guaranteed by international treaties. By that means a satisfactory state of the law maintained by practice and usage is undermined, to make way for a vague prospect of international treaties, the conclusion of which is dependent on all sorts of accidents, and the conception of which is frequently by no means unobjectionable.

It may, no doubt, as an exceptional case, be practically useful to make a State feel in its own experience the effects of some of its own rules of law, that it is in a very high degree unjust in placing foreigners at a disadvantage, or in expressing an unfounded distrust of our administration of justice; and in an extreme case the rule of material reciprocity may be applied.²⁸ The latter course is justified if the foreign rule of law makes, in so far as formal expression goes, no distinction between natives and foreigners generally, or between natives and subjects of our State, as the case may be, while its sting is aimed at foreigners, because its own subjects can very rarely find themselves in the position contemplated by it, or if the non-reciprocity gives foreigners generally an advantage as against our subjects in legal relations.²⁹ This exceptional prejudicial treatment of the subjects of particular States should not, however, be the direct result of a general enactment, but should proceed upon some special statute, or upon an ordinance of the Government, for which provision has been made in the general statute. Retaliation, then, can be justified, but any system of reciprocity must absolutely be rejected, as having practically a retrograde tendency.

Further, it may, as an exceptional measure, be justifiable to exclude foreigners absolutely from certain rights, and without any reference to the treatment of our citizens in foreign countries, if it can with good reason be maintained that the exercise of the rights in question require certain guarantees, which it is hardly possible for a foreigner to give us. In matters of private law,³⁰ and even in the sphere of commercial law, presumptions are very decidedly against such exceptions, and it is

²⁷ The system of the Austrian statute book, § 33. In the Royal Saxon statute book, § 20, mention is made of the "statutes" of the foreign State. See, however, note below. The 661st section of the *Civil processordnung für das Deutsche Reich* very properly requires merely that there shall be security for corresponding treatment. This may be by treaty, statute, usage, declaration by the foreign Government, or consistent practice. See, on this subject, Seuffert, comm. on this section, No. 7, 6.

²⁸ This is the case, for instance, in the *Codice di procedura del regno d'Italia*, art. 105. See Norsa, p. 261. Such measures of retaliation are particularly justifiable in matters of process, if the foreign State inequitably stretches the jurisdiction of its own courts, or absolutely refuses execution to the decrees of ours.

²⁹ For instance, if probative force is by us ascribed to regularly kept books, while the foreign State rejects all books as evidence. See, on this subject, *Vesque v. Püttlingen*, p. 126.

³⁰ As a rule, it is only true political rights that should be denied to foreigners. It seems, for instance, at first quite proper that it should be impossible for a foreigner to be adopted by citizens of our State (Judgment of the Court of Cassation at Paris, 5th August 1823; *Sirey*,

unworthy of a State, which has any feeling of confidence in its own existence, to be anxious on such a point.

If, however, the principle of reciprocity in the sphere of material private law is to be retained, it is proper, just because, in spite of possible exceptions, the whole of our modern international intercourse rests, as a matter of principle, on the legal capacity of foreigners, to require proof of the inequality by which our subjects are alleged to be affected in any other country, *i.e.* in doubt to assume that their treatment is the same.³¹ That is the meaning of the 20th section of the Saxon statute book, whereas the Austrian statutes express the contrary presumption, although, as a matter of practice, it is never acted on.³² Notice may no doubt be given by the legislature, that the presumption will be reversed in exceptional cases, in the case of rules of law in connection with which foreigners are frequently put at a disadvantage out of their own country, or where recognition is frequently arbitrarily refused to the legal proceedings of another State. This holds good in particular for many of the rules of the law of process.

RIGHTS WHICH WERE ORIGINALLY PRIVILEGES. RIGHT TO A PARTICULAR NAME.

§ 98. There are further rights attached to a man's personality, which were originally regarded not as rights but as privileges, by which the natural freedom of the rest of the population of the State was limited. To this class belong the rights of copyright and of invention, and the right to the protection of trade-marks. In this department it might seem to be more doubtful whether full legal capacity should *de plano* be extended to foreigners. But the more the first origin of these rights is forgotten by the different nations, and the more they are, accordingly, set upon the same level as other rights, the less is it possible that they should be denied to foreigners as such. On the other hand, rights of this kind are here and there looked upon as privileges of native industry, and, according to this view, the question as to the personality of him who claims them is not so important as the question of the locality in which his privileged activity first comes into play. To this subject we shall return hereafter.

The right, too, of bearing a particular name must be conceded to foreigners to the same extent as to native subjects, but to no other or greater

xxiii. 1, p. 353). It is found, however, to be of no importance, when we remember that foreigners are allowed to set up great trading establishments, and so to exercise considerable influence over a large number of persons. In the view of the majority of French jurists (Massé, ii. p. 32), foreigners cannot be witnesses to legal solemnities in France. It is, however, obvious to the legal conscience of the present day that it is unjust to regard the capacity of bearing witness as a political privilege.

³¹ Norsa, p. 261, and the judgments of the Court of Cassation at Turin, of 30th April 1862, and 13th September 1870, cited by him.

³² Vesque v. Püttlingen (p. 127) remarks, on the 37th section of the Austrian Code, that if it is alleged that Austrian or Hungarian subjects are not treated on the same footing as its own subjects by some foreign State, this must be proved.

extent, and in so far as our law gives him who has a right to any name an action to prevent unauthorised persons from bearing it, we must allow foreigners a like right.³³ Even the law of France holds this, because it looks upon the right to a name, or to a firm, as a *droit naturel*.³⁴ But if a foreigner in his own country has acquired right to bear some particular name in accordance with its laws, and that may be by simply having used it, he cannot, on sound principles, be forbidden in our country to bear this name.³⁵ Because the right to a particular name is an exclusive right in this sense only, that no one may bear it unless he has a title to do so. But this right can never ensure that the same name shall not occur elsewhere; and how could the case of two claimants, each of whom could with justice appeal to the unforeseen event, be decided? The right to carry a particular name can hardly be regarded as anything but a personal statute which will have an extra-territorial effect; on the other hand, it may be that the rights of the native of one country may stand in the way of the claim of some foreigner to bear a particular name.

RIGHTS TO *res nullius*. FISHERY RIGHTS. PROPERTY IN SEA-GOING SHIPS.

§ 99. Vattel (ii. § 88) considers the capacity to acquire things that have no owner as an exclusive privilege of the native citizen. According to his conception, such things are a common property of the natives that has been left in the original common stock unappropriated, and therefore no foreigner has any part in it. He will not, therefore, allow a foreigner the rights of the chase in countries where these are free; and maintains that a foreigner who finds a treasure does not acquire any property in it, although a citizen in the same circumstances would do so. But the conception of a thing that has no owner excludes any special right in any one, and excludes, therefore, a common right in all citizens. Accordingly, unless foreigners are expressly excluded from acquiring anything at all by occupation, the acquisition of things that have no owners must also be granted to them. But if, as is generally the case with sporting rights, there is in any particular privileged person—be this the body of citizens or not—an exclusive right of occupation, the foreigner cannot make any use of the right, which he undoubtedly has, of acquiring property in a thing that has no owner by occupation, a circumstance which may explain Vattel's notion. So long, however, as foreigners are not excluded either by statute or by custom, the right of occupation may be as competently exercised by foreigners as by citizens.

³³ See judgment of the Court of Dijon, of 13th July 1885, Jour. xii. p. 301, and Laurent, iii. § 355.

³⁴ See judgment of the Court of Dijon (last note), and judgment of the Court of Cassation of 5th Jan. 1861 there cited.

³⁵ Clunet (Jour. v. p. 379) is of a different opinion. In the judgment of the Tribunal of the Seine of 9th Jan. 1878 there criticised, the decision of this question of law, the party having appealed to a competent use of the name by him in North America, is evaded by an appeal to grounds of fact.

Every State, however, is entitled to declare that fishings on its coasts, and the right of navigation round these coasts, is an exclusive right of its own subjects.³⁶ In modern times, many treaties have been concluded with a view to settle the boundaries of such exclusive rights of fishing in the subjects of different countries. We may, however, commit the subject to public law in the proper sense rather than to private international law. We have only this further remark to make, that even those legal systems which allow foreigners in other matters full legal rights as regards private law, exclude them from the acquisition of national ships, or at least allow foreigners to have only partial rights of property in their sea-going ships.³⁷ This exception, however, is only one in appearance. The acquisition of the property, in so far as it is not merely the acquisition of a share in the ship,³⁸ and is not at once followed by a re-transmission to some subject of the country, is not for all that a nullity. All that is lost is the right to carry the national flag, and to carry the national flag without proper authority involves penalties, so that in many systems of law it becomes necessary that any share in a ship, which by succession, or in any other way, has fallen to one who does not belong to the nation, should be disposed of to some subject of that nation.³⁹ The matter simply stands thus: A ship of a particular national character is to some extent a part of the State itself—it is so certainly on the high seas—and the State must take care of its own, and has a certain responsibility for a ship sailing under its flag. The owner, again, has to represent the ship in matters of private law. In this way, there is a necessity that the nationalities of the ship and its owners should be the same.

After what has been said, we may describe the rule which the Institute

³⁶ Cf. v. Martens, i. p. 378; ii. p. 234. In the international treaty of 6th May 1882, concluded among the North Sea powers, *i.e.* Germany, Belgium, Denmark, England, France, and the Netherlands, the 2nd article provides that "the fishermen of each country shall enjoy the exclusive right of fishing within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks." [For the full text of this convention, see 46 and 47 Vict. c. 22, The Sea Fisheries Act, 1883, to which it is appended as a schedule.]

³⁷ Cf. Perels, *Internationales Scerecht*, p. 55; and R. Wagner, *Handbuch des Scerechts*, i. § 19. [The Merchant Shipping Act of 1854, 17 and 18 Vict. c. 104, provides (§§ 62-64) that if any one who is not qualified to own a British ship, *i.e.* (§ 18) who is not either a natural-born British subject, or who has obtained letters of denization or naturalisation, or a body corporate subject to the laws of and having its principal place of business in the United Kingdom or in some British possession, succeeds, in the event of death or marriage, to a title to a British ship, application may be made to the Court for an order to sell the ship or the shares in her, and if the application is not made within the time, the property thus transmitted is forfeited to the Crown. § 103, subsec. 3, provides that if any unqualified person acquires as owner in any other way any interest, either legal or beneficial, in a ship using a British flag, and assuming the British character, such interest or property shall be forfeited to Her Majesty. See MacLachlan on Shipping, p. 70.]

³⁸ For instance, the simple explanation of art. 470 of the German Code of Commerce, whereby the alienation of shares in a ship to a foreigner without consent of the co-owners is null, is that this alienation, just because it would take away the right to carry the flag, is prejudicial to the rights of the other co-owners, and offends against one of the conditions of joint-ownership.

³⁹ See, on this case, especially Wagner, i. p. 158.

of International Law⁴⁰ adopted in 1880 as practically worthy of recommendation, and even already adapted to the legal systems of most civilised States. It is, "*L'étranger quelle que soit sa nationalité ou sa religion jouit des mêmes droits civils que le régnicole, sauf les exceptions formellement établies par la législation actuelle.*"⁴¹

RIGHT OF RESIDENCE IN THE COUNTRY. EXPULSION OF FOREIGNERS.⁴²

§ 100. Lastly, it is obvious that the capacity and the rights of foreigners must be different from those of the native subject, in the respect in which foreigners are distinguished from subjects: it is only the subject who has a complete right to live and reside in the State (see § 54 *supra*), whereas foreigners may be expelled or refused admission.⁴³ By that statement, of course, we do not mean that foreigners may be expelled⁴⁴ on purely arbitrary grounds.⁴⁵ It is very soundly said in a dispatch of Mr Everett, a Secretary of State in the United States in 1852, that "this Government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States." But a statement of Mr Secretary Evarts in 1879 is just as sound, viz.: "... yet the manner of carrying out such asserted right may be highly objectionable. You would be fully justified in making earnest remonstrance should a citizen of the United States be expelled without just steps to assure the grounds of such expulsion" (Wharton, Dig. 2, § 206, pp. 516 and 518). In an absolute sense, no doubt, the State

⁴⁰ *Annuaire*, v. p. 56.

⁴¹ But no State is denied the right of making exceptions for some particular nationalities, e.g. from excluding coloured races from the acquisition of certain rights.

⁴² As a rule, this doctrine of expulsion, a doctrine which upon the whole is much neglected, is only dealt with in treatises on public law: an arbitrary expulsion is simply regarded as an insult to the State to which the expelled person belongs. But such an expulsion affects very deeply the private legal interests of that person. It belongs, therefore, on the one hand, to the sphere of private international law, and an injustice so inflicted is not removed by the failure of the State to which the injured person belongs, from weakness or from connivance, to raise any objections. No doubt the person unjustly expelled has no right of action, or right to damages, if his own State does not obtain the latter for him.

⁴³ Even in Italy, in spite of the equal legal capacity of foreigners of which so much is said as a principle, there is no doubt that they may be expelled for special reasons. See Gianzana, i. § 79.

⁴⁴ V. Mohl (*Völkerr. u. Politik*) i. p. 627, speaks very strongly against the arbitrary exclusion of foreigners from any State. He recognises as a principle that, as a rule, every human creature has a right to follow out the future objects of his life wherever he thinks he can find the proper means of doing so, and for that end to set foot on foreign States and to reside there. He holds that, if need be, force may for this reason be used against a State that shuts itself completely off from others, and thus shows itself to be an enemy of mankind: he thinks that the course taken by the powers of Europe against China was therefore conditionally justified.

⁴⁵ See the author's paper in Jour. xiii. p. 1, on "*l'expulsion des étrangers.*"

See, too, Bluntschli, *Völkerr.* §§ 381-383; v. Bulmerincq in Marquardsen's Handb. ii. 2, p. 240; and Heffter, *Völkerr.* § 33, No. vi.

can close its territory to foreigners.⁴⁶ But if it opens its frontiers to them, and gives them an implied invitation to reside in its territory, either itself keeping up all sorts of means of communication with foreign countries, or allowing others to establish such means, if it permits them to carry on trades there, to acquire property, and to make costly improvements on it, it would be nothing short of a violation of the *bona fides* which must be observed in international intercourse,⁴⁷ if it was then suddenly and arbitrarily to expel all foreigners, and in fact compel them to sell, perhaps at great loss, their property, and to break up the commercial and family connection which they had formed. We cannot, therefore, approve of an absolute, unrestrained, and arbitrary power of expulsion.

§ 101. We must, then, require that there should be some grounds for the expulsion. As a rule, these can only be found, *1st*, in the poverty of the person expelled; *2nd*, in some crime which he has committed, or contemplated, *i.e.* for which he has made preparations, inasmuch as this will show that he is dangerous to the public safety;⁴⁸ *3rd*, in disobedience to the law; *4th*, in the fact that he remains in the country, although he has expatriated himself and has acquired a foreign nationality, or has exercised an option in favour of another nationality in order to evade the law, and to avoid the burdens which the State imposes on its subjects; and *5th*, in the fact that the individual cannot show any particular nationality, but yet refuses to acquire nationality in the State where he is, in order to withdraw himself from the duties of a subject, especially the obligation of military service. It is also a sixth ground, and one that has long been recognised, that a State has a right to exclude the subjects of another State with which it is at war. It cannot be disputed that possibly the security of the State, and even the security of the subjects of the hostile State themselves, may require some such measure; but very frequently it will be a mere useless piece of harshness, which may injure in very many ways the State which adopts it.⁴⁹ It is obvious that, where the reason for

⁴⁶ *E.g.* can forbid criminals or persons in need of support from the poor law to be introduced. See Wharton, Dig. ii. § 206, on the attempts by the United States to adopt justifiable means of protection of this kind. The statute of the United States of 26th February 1885 (given by Wharton at p. 526) against the immigration and importation of persons who are already under contracts of service, is, as a matter of public law, unobjectionable. [See this right of exclusion affirmed by the Privy Council in the case of *Musgrove v. Chun Teong Toy*, A. C. [1891] 272, at least to the effect of refusing an alien a right of action to compel admission.]

⁴⁷ Vattel, iii. 8, § 104, very rightly remarks: "*Le souverain ne peut accorder l'entrée de ses états pour faire tomber les étrangers dans un piège.*" Alex. Braun, in the issue of the Berlin weekly publication *Die Nation* of 30th May 1885, has called attention to this interesting passage. Braun's paper criticises the numerous expulsions of foreigners of Polish nationality from the eastern provinces of Prussia, by the Prussian Government, in the period from 1884 to 1886.

⁴⁸ It would be wrong, except for grave crimes, to hold a past offence to be by itself a reason for expulsion. The true ground is the dangerous character of the individual. Thus the presumption arising from a conviction may lose its force by the circumstances, the subsequent good conduct of the convict. To this effect a circular of the French Minister of the Interior, of 15th December 1885 (*Jour. xiii. p. 497*).

⁴⁹ V. Mohl, who at the outset is a strenuous upholder of the right of foreigners to reside, proposes to allow the expulsion of foreigners, putting aside a power of exclusion, on account of

the expulsion is some crime that was committed before the person entered the State, or some crime that has been committed within that territory, it must be a more serious one if it is to justify the expulsion of a person who is domiciled, than it need be in the case of a person who has only a passing residence within the territory.⁵⁰

To supplement the material reasons for expulsion, we shall require also certain formal guarantees which are still wanting in the legislation and the practice of most of the States of the Continent of Europe. In the first place, the person who is to be expelled must receive intimation of the reasons for his expulsion.⁵¹ If a State refuses to assign reasons for it, this important measure is made to wear at least the appearance of an act of arbitrary administration. Again, in every case in which the expulsion is based upon the individual conduct of the particular person, and there is no general regulation in question, as there would be where war was threatening or had broken out, there must be a right of appeal, either to a higher court, an administrative court,⁵² or to another cognate official body, which would be in a position to take proof on the facts which may have been assigned as conditions for the expulsion. If there is a threatened outbreak of disturbances, the Government must for convenience be allowed

any unreasonable or unlawful purposes, if there is good ground for supposing that they will disturb the public peace, or *interfere with the pursuit by the State of its own objects*. The clause which we have italicised is, however, either superfluous, if the objects of the State are expressed in its legislation or can be reached by means of it, or the effect of it is to justify any arbitrary acts. For, in a case of expulsion, there is always some object that can be cited to support it.

⁵⁰ We must on this subject remember that, according to the older view, no domiciled persons were looked upon as foreigners, and consequently such persons were not liable to expulsion as foreigners. Fiore, *Diritto intern. pubblico*, i. p. 528, calls attention to a Danish law of 15th May 1875, which makes the distinction between foreigners who are and foreigners who are not domiciled, which we have noticed in the text. The Belgian statute of 6th February 1885, art. 2, excludes from liability to expulsion "*celui qui a été autorisé à établir son domicile dans le royaume, celui qui s'est marié avec une femme Belge, dont il a un ou plusieurs enfants nés en Belgique pendant sa résidence, celui qui, marié avec une femme Belge a fixé sa résidence en Belgique depuis plus de cinq ans et a continué à résider, d'une manière permanente.*"

On the distinction between the power of expulsion as regards domiciled and non-domiciled foreigners, see Suliotis, Jour. xiv. pp. 431, 432, who, in this connection, says of the Roumanian law of 7th April 1881: "*L'abus qu'on a fait de cette loi exceptionnelle rappelle les temps de l'ostracisme Athénien et la xénelasié Lacédémonienne.*"

⁵¹ France has concluded a series of treaties in which it is made a condition that the subjects of the contracting parties shall not be expelled except for weighty reasons, and that these reasons shall be communicated to the consul or other diplomatic representative of the State as well as to the person himself, that, if possible, they may be met: e.g. a treaty with Bavaria of 30th May 1868, with Bolivia, etc. (cf. Durand, p. 515). This provision is also in force for the German Empire, by reason of the most favoured nation clause of the treaty of Frankfort, art. 11. The 11th article of the police regulations of 17th April 1885, for Bosnia and Herzegovina, provides similarly that written intimation of the reasons of expulsion shall always be given to the person who is expelled.

⁵² On this, see Fiore, *Diritto intern. pubbl.* i. p. 526. The Dutch statute on this head, of 19th August 1849, which is still in force, gives in certain circumstances an appeal to the supreme court. The recent Belgian statute of 6th February 1885 (given in the Jour. xii. p. 342) requires for expulsion an "*arrête royal délibéré en conseil des ministres.*" Thus no one minister can decree expulsion, and, besides, the 7th article provides that an annual report shall be made to the chambers as to the execution of the statute.

to expel all foreigners, from whom they have any reason to fear a breach of the public peace, without allowing in that case any right of appeal.

The question of the right to expel foreigners from the territory (upon which Rolin-Jacquemyns' paper in *Rev.* xx. p. 498 may be consulted) was in 1888 taken up as a subject of discussion by the Institute of International Law, but has not as yet been fully disposed of. At the same time, proceeding upon the view that while no State could altogether renounce its right of expelling foreigners, this measure, which of course presses very severely on individuals, should not be employed capriciously, or without certain protective guarantees both in form and substance, the meeting, adopting the report of a Committee,⁵³ were at one in approving of some preliminary resolutions, the sense of which is as follows.

Certain distinctions must be made. *A.* We have first to deal with expulsion in pressing cases, where despatch is urgent, *i.e.* expulsion in time of war or of serious riots. A sentence of expulsion of this kind may go out against particular individuals and entire classes. It was thought that the Government or the Police must in such cases have a freer hand, just because the matter is one of immediate peril of a more general description than is usual. In such cases, therefore, the guarantees afforded by the necessity of convoking courts of law or administrative bodies are out of place. Just as little is there any possibility of having the character of individuals investigated by the court, to see if they be native subjects or foreigners, in case there be doubt about it. On the other hand, a measure of this kind, which is only intended to meet passing dangers, should have no more than a temporary operation, it being always possible to convert it into one of the other two kinds of expulsion, if the conditions necessary for doing so are present.

B. Extraordinary measures of expulsion directed exclusively against whole classes, and not against individuals. As is well known, it has been asserted in very recent times that, under certain circumstances, a State may find itself forced into the position of adopting a general measure of expulsion against foreign elements which are pressing in upon it, and threaten to swamp it. The Institute refrained from laying down any material limitations for such large measures as this, which can only receive final judgment from history, and which must be ruled by political constellations, and perhaps in certain circumstances by sentiment. It was thought, however, to be convenient for those States, which desire to take their part regularly in international intercourse, that they should submit themselves to certain formal limitations of that extreme prerogative. These limitations were intended to protect them against the influence of undesirable elements in the exercise of their rights, and to ensure the State itself, on the one hand, against momentary rashness, and to give the individual, on the other hand, protection against the same danger. This formal safeguard is to consist,

⁵³ The members of the Committee were: Rivier, Brusa, Lamasch, Pralier-Fodéré, Rolin-Jacquemyns, and the author.

according to the view of the Institute, in withdrawing the highly oppressive, and in many respects fatal, measure from the sphere of administration as far as possible, and in referring it to the more deliberate course of special legislation, which in itself affords better guarantees. If, however, owing to the frame of the constitution of any particular country, this course should be found to be impracticable, because *e.g.* there is no sharp line drawn between statute law and resolutions of the Government, as in States which are under an absolute system, then at least the ordinance should be published for a reasonable time before it acquires absolute force, so as to allow the individuals concerned time to set their affairs in order, so far as may be, without serious loss. Again, it shall not, it is proposed, be lawful to evade the necessity of such special legislation, or of such a general antecedent proclamation, which shall make the public aware of the measure, and inform public opinion and other critics, by issuing orders of expulsion against a multitude of individuals. For the same reason, in dealing with the third kind of expulsion which we have to enumerate (*expulsion ordinaire*), we require some such preliminary steps, and hold that without them it is unlawful to expel any individual.

C. The expulsion of individuals (*expulsion ordinaire*) should only take place by reason of special causes to be found in the individual character or circumstances of each person (want of means, commission of a crime, imperilment of the public safety, etc.), and these causes must be made known to the persons concerned. The Institute reserved the subject of this *expulsion ordinaire* for further deliberation, and merely adopted the resolution that foreigners, who are domiciled in the country, or have a place of business there, should be less exposed to such measures than those who have neither domicile nor place of business; the former class would of course be more severely injured. But even persons who are temporarily resident in the country, or even those who are simply travelling through it, should not be without some safeguard against sentimental measures of expulsion. The declaration which was adopted runs thus:—

“L'Institut de droit international considérant que l'expulsion comme l'admission des étrangers est une mesure de haute police à la quelle aucun Etat ne peut renoncer, mais qui, selon les circonstances, tombe parfois dans l'oubli et parfois s'impose subitement ;

“Considérant qu'il peut être utile de formuler d'une manière générale quelques principes constants qui, tout en laissant aux gouvernements les moyens de remplir leur tâche difficile, garantissent à la fois, dans la mesure du possible, la sécurité des Etats, le droit et la liberté des individus :

“Considérant que le vœu de voir reconnaître et consacrer ces principes ne saurait impliquer aucune appréciation critique d'actes d'expulsion qui auraient eu lieu dans le passé ;

“Estime que l'admission et l'expulsion des étrangers devraient être soumises à certaines règles et propose, en attendant un projet complet qui pourrait être ultérieurement discuté ;

“Art. 1. En principe tout l'Etat souverain peut régler l'admission et

l'expulsion des étrangers de la manière qu'il juge convenable; mais il est conforme à la foi publique que les étrangers soient avisés au préalable des règles générales que l'Etat entend suivre dans l'exercice de ce droit.

"Art. 2. En dehors de cas d'urgence, tels que ceux de guerre ou de troubles graves, il y a lieu de distinguer, entre l'expulsion ordinaire s'appliquant à des individus déterminés et l'extraordinaire, s'appliquant à des catégories d'individus.

"Art. 3. L'expulsion pour cause d'urgence ne sera que temporaire. Elle n'excèdera pas la guerre ou un délai déterminé d'avance, à l'expiration duquel elle pourra être convertie sans nouveau délai en expulsion ordinaire ou extraordinaire.

"Art. 4. L'expulsion extraordinaire se fera par loi spéciale ou tout au moins par ordonnance publiée préalablement. L'ordonnance générale devra, avant d'être mise à exécution, être publiée à l'avance dans un délai convenable.

"Art. 5. Pour l'expulsion ordinaire, il faut distinguer au point de vue des garanties, les individus domiciliés ou ayant un établissement de commerce de ceux qui ne se trouvent dans aucun de ces deux cas.

"Art. 6. La décision prononçant une expulsion ordinaire et indiquant les dispositions sur lesquelles elle se fonde devra être signifiée à l'intéressé avant d'être mise à exécution."

EXTRAORDINARY EXPULSIONS *en masse*.

§ 102. It is, lastly, possible that a State, and particularly one of the smaller States, should feel itself in a special degree imperilled by a continuous incursion of foreigners, and should, perhaps, look upon a measure of expulsion as a matter of necessity. No State, it is true, can in the abstract be denied this extraordinary privilege, which will press hardly upon an indefinite crowd of individuals. But, if we consider this privilege rationally, we shall find that it is not an affair that belongs to the regular administrative powers,⁵⁴ but, in so far as it may be possible to draw a line between the legislative and the executive powers, it belongs to the sphere of the former. By such a measure, the social and economical conditions of whole provinces may be most vitally affected. But, at the same time, there is in such cases a moral duty incumbent on the legislature to make the measure generally known, and in such good time that the persons affected by it may be able to set their affairs in order. Periods of weeks or of a few months are not sufficient for the purpose. The question whether there was in this or in that modern instance good ground for such measures, is a question of fact in the region of politics, and is

⁵⁴ The expulsion of foreigners of Polish descent, in 1885, was so treated by the Prussian Government. According to the way in which the law was expressed, the Government was right. It is quite another question whether the use to which the power given to the Government by the Prussian statute was put, in the case in question, was not at variance with the traditions of public law.

therefore beyond the limits of our subject. We need only, however, picture to ourselves what mischievous relations may arise between the different States concerned, what enmities and evils on both sides may grow up out of such measures, in order to admit that the question must necessarily be considered as one which deals with the application of what is a real and a very pressing danger.

The residence of foreigners in the territory of a State can never grow into an unassailable right. But just as little is it possible that the expulsion or extrusion of them should be an arbitrary or a secret proceeding, unless a State is willing to consent to be excluded from the blessings of an orderly and secure commerce with the rest of the world. It must, in such a subject, be the task of international law to set the proper bounds to the power on both sides, and to reconcile with each other as far as possible the legal security of the individual and the safety of the State.⁵⁵

Up to the present time there exists a very vital difference between England and the United States, on the one side, and the States of the Continent of Europe on the other, a difference which may possibly have its origin just as much in the diversity of their geographical positions as in the diversity of their respective views of the proper limits of police interference and of individual freedom of intercourse. The law of England as a matter of fact knows nothing of measures of expulsion except in times of war, and then only with the concurrence of the legislative authority,⁵⁶ and in the United States there is only an exclusion of persons arriving for the first time. On the other hand, in the great States of the Continent of Europe, the expulsion of foreigners is merely a matter for the exercise of the discretion of the administration, *i.e.* of a single minister,⁵⁷ and the Prussian legislature has lately gone so far as to take occasion expressly to refuse, in the case of the expulsion of persons who do not belong to

⁵⁵ It may be the case that some treaty expressly assures to the citizens of other States the privilege of residence in the territory, and this may be asserted to be the case, if the exercise of trade and commerce is assured, since any such privilege would be illusory unless accompanied by a right of residence. In such cases, we do not hold that the right of expulsion is absolutely renounced, but it must then be confined to individual cases, and the reasons for it must always be communicated to the Government of the person expelled as well as to himself. It would in such a case be a violation of the treaty if an expulsion *en masse*, or without special reasons founded on the general usages of public law, took place. And in our view, again, if a treaty has been concluded with a Government, which according to its well-known principles makes no distinction between the adherents of different religious denominations, that treaty is violated if the other contracting State subsequently refuses to allow the subjects of the first State to reside, if they belong to some particular confession, *e.g.* are Jews. On the differences between the Governments of Russia and the United States as to the treatment of the Jews in Russia, see Wharton, Dig. i. § 55.

⁵⁶ See Phillimore, i. § 220. The law of the United States against the immigration of Chinese is a measure of exclusion, not one of expulsion.

⁵⁷ This is the case in France and in Prussia. The Prussian statute as to the general administration of the country, of 30th June 1883, in its 130th section *ad fin.* expressly denies all appeal to the administrative courts to the foreigner (*i.e.* person who does not belong to the empire) who has been expelled. See, too, the older law of 26th July 1880. There is no

the empire, that legal protection which it affords against many other proceedings of the Executive, by concession of a right to demand a decision from the administrative courts. It may be that in the future there will be a greater agreement in the law, or in the practice of it, upon this point. It may be that, as intercourse increases, and in view of the fashion in which not unfrequently nowadays the masses of the people are incited to violence by foreign agitators, the necessity of expelling individual foreigners who are a source of danger may make itself felt even in England and the United States, while some other States will learn not to confuse really dangerous characters with persons who are politically distasteful to them, or who are suspected of being likely to be inconvenient or actively opposed to the ruling policy of the day.⁵⁸

RETALIATION.

§ 103. Let us, in conclusion, once again touch upon the subject of retaliation. Retaliation and reciprocity are in truth one and the same principle: the presumptions under which the one and the other respectively are worked, are, however, different. The State that starts upon the principle of reciprocity will not treat a foreigner on the same footing as one of its own subjects, unless it shall be positively proved, or at least shown not to be improbable, that the like treatment will be extended in that foreign State to its own subjects.

On the other hand, the State that desires to practise retaliation resolves upon an unequal treatment of foreigners only when it shall be positively assured that an unequal treatment is practised elsewhere upon its own subjects. Retaliation, therefore, is much more conducive to general intercourse than reciprocity. Again, in a question of retaliation the point is whether the foreign State set the citizens of our State, or foreigners in general, at a disadvantage to its own citizens in the matter in question, because they are citizens of our State, or foreigners generally. If it is merely a difference in the foreign law that gives rise to an accidental prejudice to the citizens of our country, and if in like case a subject of the foreign State itself would be treated in the same way, then there is no

corresponding law for the German Empire: thus the law of each State must still decide. But, on the ground of § 39, subsec. 2 of the German Criminal Code, a decree of expulsion pronounced by the officials of any one State operates all over the empire. But by art. 4, subsec. 1 of the Constitution of the empire, the empire has the power of passing a statute of expulsion from the whole of the empire. In Prussia, it would appear that the officials do not even think themselves under any obligation to communicate to the person expelled the reasons for his expulsion.

⁵⁸ The editors of the *Journal of Private International Law* have done good service in exerting themselves to produce a series of expositions of the legal capacity of foreigners, and their general treatment by the laws of different countries, from authors who knew the subject. On Peru, Pradier Fodéré, v. p. 577; on Italy, Esperson, vi. p. 329; on Sweden, Dareste, vii. p. 434; on Austria, Stoerk, vii. p. 329; on Servia, Paulovitch, xi. p. 5. On Germany, see Stobbe i. § 43.

ground for retaliation. Retaliation is only permitted in the view of avoiding injustice to the citizens of our country, and hindering it for time to come. Its object is not, as would be the result in the case we have put, to force the foreign State to apply our laws within its own territory.⁵⁹ In defining retaliation as the establishment of a rule of law that sets foreigners at a disadvantage, it is implied that the rule of law so set up shall not be applicable to rights which have been already acquired,⁶⁰ and that a legislative resolution by the authority of the State shall be necessary for the application of retaliation: the individual judge or a private person has no right to apply it.

APPENDIX.

THE LEGAL CAPACITY OF JURISTIC PERSONS.

THE PRINCIPLE.

§ 104. There may seem to be more difficulty about the recognition of the legal capacity of juristic persons¹ (foundations and incorporations) that belong to another country, than there is about the recognition of the legal capacity of foreigners. To a superficial observation, the former look like purely artificial creations of the law or of statute. Accordingly, the life of these artificial creations must cease at the point at which the power of the legislator ceases, *i.e.* at the frontier of his dominions; and the foreign legislator will require to reanimate this artificial creation by some special provisions for his own dominions. This is the opinion which Laurent² holds: he is filled with an extreme dislike of religious corporations, and undertakes to show that most other corporations are in the same way mischievous to the public security. The only corporations which he is ready at once to recognise as necessary and beneficial are the State itself, and such corporations as more or less serve objects

⁵⁹ Heffter-Geffeken, § 110; Unger, *Oesterr. Privatr.* i. pp. 304, 305.

⁶⁰ Klüber, *Europ. Völkerr.* § 234, note. Retaliation is a withdrawal, by way of reprisal, of incomplete rights. Even the new Swiss cantonal statute books, which have provided for retaliation, while they hold the principle of the legal equality of foreigners and native citizens, look upon retaliation as a measure for legislative, not judicial authority, although they give the little council (as, for instance, in Berne) power of putting it in force. See Huber, *Schweizer. Privatr.* (1886) i. p. 148.

¹ To juristic persons we can only attribute a domicile, but no proper nationality in the technical sense. (See the unanimous view of Laband, *Staatsrecht des Deutschen Reichs in Marquardsen's Handbuch des öffentlichen Rechtes*, ii. 1, p. 32; G. Mayer, *Deutsches Staatsrecht*, p. 638, and Karminski, p. 20. For the opposite view, *e.g.* the Austrian Reichsgericht in Karminski.) Nationality postulates as its basis (cf. Laband, *Staatsr. des Deutschen Reichs*, 2nd ed. i. § 14 *ad fin.*) a series of rights and duties, as to which a more careful investigation alone can show, whether they belong to juristic persons. The grant of citizenship has therefore, in general, no meaning for juristic persons, and is misleading. On the other hand, a juristic person may be spoken of as native in the sense that it has its seat in this country, or is a part of the organism of our State.

² *iv.* § 72.

of State, as provinces and communes. But so soon as civilisation has reached a certain pitch, juristic persons press forward on every side, compelling recognition even without special legislation;³ and to such an extent does the practical necessity for them go, that they are in fact recognised, even where legislation does its best to discourage them. As a consequence, they are further removed in such cases from the operation and oversight of the law than if their existence were legally recognised. It is a necessity of human nature, which will take no denial, to combine its resources, and particularly the resources of its wealth, to attain larger and more comprehensive ends: these ends it desires to ensure for a period of future time, by the device of allowing those persons who have the control of the wealth devoted to the attainment of these ends to have no power of action recognised by law, except within the limits necessary for attaining those ends; while, on the other hand, new persons are constantly summoned to the management of the common stock within the same limits, in room of those who retire or die. Therefore, although it would be a serious matter if these so-called juristic persons were to get the upper hand, and positive legislation has often had occasion to interfere with them, still these organisations of legal activity are not to be regarded by any means as artificial, but rather as natural products of an advanced stage of activity in law and in civilisation; if States and nations are to walk in legal community with each other, they will *de facto* be forced to a mutual recognition of the juristic persons that are constituted or that have grown up in the territory of their neighbours, as possible objects of legal consideration.

The practice of international law gives its sanction to this necessary recognition. It may be that it is only an international usage which exists on this point,⁴ although there is a sufficient chain of legal logic to prove the existence of a rule of law. Laurent denies this, and is of opinion that there is no proof of the assertion to this effect which I made in my former edition.

But let us remember that the legal capacity of juristic persons in their own country is by no mean absolutely the same as that of individuals. A juristic person, which has the power of taking by purchase or other onerous contract, does not necessarily possess a right of succession or a capacity of taking by way of gift, while it may well be denied all rights of acquiring real property, either absolutely or for a long period. The recognition of the legal capacity of foreign juridical persons in a general

³ See specially Gierke, *Die Genossenschaftslehre und die Deutsche Rechtsprechung*, Berlin 1887, pp. 1-141.

⁴ Cf. in this sense Asser-Rivier, No. 100, p. 198: "*Ainsi la société civile qui a la personnalité civile d'après la loi de son siège social, conservera ce caractère en tout autre pays; ceci découle d'un véritable droit coutumier concernant des personnes civiles que est admis dans une grande partie de l'Europe et que l'on ferait peut être bien de transformer en droit écrit.*" In the limited sense in which a law of custom is asserted in the text, it exists in England and the United States. Brocher, too, *Nouv. Tr.* p. 101, says rightly that in the interest of general commerce a company properly formed, according to the law of its *situs*, should be recognised in a foreign country *so far as possible* (?).

way does not by any means determine what the extent of this capacity is to be. It does not by any means establish, looking to the very various limitations by which the capacity of juristic persons may be hedged, that juristic persons of another country should be placed on an equality with similar juristic persons belonging to this country, as regards the range of their legal capacity. For it may be imagined that the legislator will desire to treat them differently from those of his own country, over which he can exercise a thorough supervision, and the prosperity of which tends indirectly to the benefit of the country and its subjects.^{5 6}

With regard to the capacity of juridical persons to enjoy legal rights, we may refer to the paper recently published by Danieli in. J. xv. p. 17 and p. 330, "*De la condition des sociétés étrangères en Italie.*" The result of it is—in agreement with the principles which we have already laid down—that foreign companies, and in particular companies constituted by shares, have an absolute right to make contracts in Italy, and to follow out their rights before Italian courts, and that they are only subject to the special provisions of the Italian code in so far as they have branch establishments in Italy. In this latter case, certain provisions of the Italian Commercial Code (art. 230 and art. 90), which ensure the publicity of the memorandum of association and rules of the company, must be observed on the personal responsibility of the managers of the branches. Besides this, all companies which have their seat in Italy and the bulk of their business there, although they may have been formed abroad, are subject to the provisions of the law of Italy, even as regards their memorandum of association. This last provision in Danieli's opinion goes too far, and may give rise to practical difficulties. Perhaps it would be more appropriate to have some penal provision to meet the case of the company being formed abroad *in fraudem legis*.

CAPACITY TO SUE AND TO BE SUED.

§ 105. It is, however, indispensable that juristic persons existing in a foreign country should be allowed the right of appearing in court, either in the character of pursuers or in that of defenders.⁷ If this is not con-

⁵ Gierke, *ut sup. cit.* p. 153, note 2, properly points out that the treatment of foreign juristic persons stands in many respects under different rules from the treatment of individual foreigners: "Thus the German juristic person has no right, guaranteed by imperial statute, to be allowed to enter every German State."

⁶ In support of the doctrine that in general—*i.e.* in so far as no special limits are assigned by statute—the legal capacity of foreign juristic persons is to be recognised. See Gunther, p. 279; Felix, p. 64; Wächter, ii. pp. 181, 182; Esperson, Jour. vi. p. 340; Gianzana, i. No. 68, with reference to Italy; Brocher, i. p. 186, and Weiss *ut cit.* They all are excellent in their adverse criticism of Laurent. See, too, Judgment of the Supreme Court at Berlin of 8th October 1849 (Entsch. xx. p. 326).

⁷ Accordingly, both the French Executive and French jurisprudence were, in earlier days, from their respective points of view right, the former in admitting, although by special licence, foreign limited companies to trade in France, the latter, on the other hand, in conceding to such foreign companies at once the right of suing and of being sued. Cf. Lyon-Caen et Renault, *Dr. c. i.* No. 538, where, however, the *ratio* of the difference in the form of determination in the two cases is not sharply enough brought out.

ceded, the great majority of such persons that exist in different countries would find that commerce with other countries was a perilous undertaking. By such a denial of capacity to sue and be sued, we do not merely refuse juristic persons, whose origin is in another country, all capacity to buy, sell, and acquire property here, but we refuse them the power of acquiring rights in their own country, in so far as such a power has in fact to be carried into effect through the intervention of our courts. For if we refuse them judicial protection—unless that be from caprice or for the sake of penalty, and of course we have no intention here of touching upon any question of penalties—the only ground upon which we can do so is that we shall refuse to recognise the right on which their judicial claim is founded. What would be the results of such a course? Simply that all and every form of intercourse with juristic persons belonging to foreign countries will be cut off, or the most exorbitant measures of precaution, arrestments, and rules as to caution, will be introduced in other countries to the prejudice of our citizens, not to mention the many possible forms of retaliation.⁸

Thus Foote⁹ notices that it can be shown that in England foreign corporations have been allowed to appear as parties, and particularly as pursuers, since the middle of the eighteenth century, in so far as they could show credentials of incorporation according to the law of their own country; and Wharton (§§ 105 *et seq.*) testifies more in detail to the practice of the United States, by which foreign corporations, by means of intermediaries, may carry on business in the different States, and, indeed, may on the same conditions as native corporations of the same kind acquire by testament, and even become owners of real property. Lyon-Caen, in a paper in the *Journal* (xii. p. 271), which is no doubt concerned merely with commercial and manufacturing companies, enunciates the rule that the right of appearing as parties before the courts of France should be conceded to foreign companies universally,¹⁰ without the necessity of any authorisation either legislative or *in concreto*, at least in suits connected with transactions which have been concluded in another country. Even a positive prohibition against carrying on business in our own country, could have no effect upon the competency of carrying before our courts transactions which were concluded abroad, and which were intended to

⁸ We must therefore protest most strongly against the French rule of practice (see Lyon-Caen and L. Renault, *Dr. c. ii.* No. 545), by which non-authorised companies cannot *de jure* either sue or be sued in France. If, then, on grounds of expediency it is recognised, but entirely *in odium* of these associations, that they may be sued in France, such a onesided system of jurisprudence must, as in the case of the application of the 14th article of her Code Civil by Italy, result in this, that no judgment pronounced in France against such a non-authorised company can receive any recognition in another country.

⁹ *Jour.* ix. p. 469. [The case referred to by Mr Foote is the *Dutch West India Co. v. Moses*, 1734, 1, Str. 612.]

¹⁰ On the other hand, Gerbaut, No. 13, takes up throughout the point of view of an anxious system of police. Because these foreign companies may possibly not offer the same guarantees as those which are subject to the law of France, they are not to be allowed to sue in France. I cannot see what the competency of suing has to do with guarantees for orderly trading.

take effect abroad, if they were on some other grounds within the jurisdiction of our courts; and in the same way a suit might competently arise out of transactions which were concluded in our own country, but, as it happened, before the date of the prohibition.¹¹

The Belgian Court of Cassation, in the year 1849, allowed itself to be once misled by Laurent's theory into declaring that foreign joint-stock companies have no right to sue or be sued in Belgium.¹² The legislature, however, subsequently found itself compelled to take the inexorable realities of the necessities of human life¹³ under its protection, as against an abstract and perverted logic, and a Belgian statute of 1855¹⁴ soon gave all commercial and manufacturing French companies legal capacity, and in particular the right of suing and being sued. A treaty with England, of 13th November 1862, has done the same for similar British companies. A Belgian statute of 18th May 1873, in its 128th article, categorically lays down, in direct contradiction to Laurent's theory, "*Les sociétés anonymes et les autres associations commerciales, industrielles ou financières constituées et ayant leur siège en pays étranger, pourront faire leurs opérations et ester en justice en Belgique.*"

Westlake, § 305,¹⁵ says, with reference to English procedure, "there is no technical objection to suit in England by a foreign corporation or other artifi-

¹¹ So, too, the very thorough and excellently reasoned judgment of the 2nd Senate of the Deutsches Reichs-Gericht of 14th April 1882 (Dec. ii. No. 34, p. 134). The Under-Secretary of State for Elsass-Lothringen had, by a proclamation of 11th March 1881, forbidden French insurance companies to carry on business in Elsass-Lothringen, on the ground of a French law of 30th May 1857. The Landgericht at Strasburg and the Appeal Court at Colmar had decided, in a suit brought by French companies to recover premiums payable on policies issued in 1873 and 1877, that in consequence of this prohibition those companies had lost the right to appear in court.

The judgment of the Imperial Court points out most sharply on what erroneous assumptions and deductions these startling judgments of the courts below are based. On this matter, see a memorial by Schneegans, Kauffmann and Leiber, published at Strasburg 1881.

¹² See, on this point, Laurent, iv. § 155.

¹³ Laurent, iv. § 155 *ad fin.* regards, in what we must describe as a most peculiar fashion, this intervention of the legislature as a recognition of the value of the legal doctrine which the statute was passed to remove. Legislatures have, however, often had to intervene against perverse judgments of supreme courts. Haus (par. 118) is also of opinion that this judgment, which asserts territorial sovereignty in a most perverse way, e.g. "*attendu que la puissance publique de Belgique est seule capable d'apprécier, au point de vue de l'ordre public et des intérêts belges, si une société anonyme est utile ou dangereuse,*" contains the only true principle. See, on an analogous dispute dealt with in Italy, and a judgment, corresponding to that Belgian judgment just quoted, pronounced by the Court of Cassation at Turin on 7th March 1884, Gianzana, i. par. 63; and the *Consultation pour la société Lyonnaise contre Ballero*, edited by Danieli and revised by Clunet, Lyon-Caens, etc., Paris 1886. Gianzana and the other authors of the opinion all pronounce the views of the court at Turin to be wrong. Now the principles for the decision of such questions are those of the Italian Code of Commerce of 1882. See below, § 106.

¹⁴ The French Procureur-General, with good reason, expressed himself bitterly against this entirely unexpected revolution in Belgian practice by the Belgian Court of Cassation. It was however not, as Dupin thinks, the requirements of any reciprocity guaranteed by statute that gave rise to the judgment: it was merely an abstract logic, clinging closely to verbal expression.

¹⁵ See to this effect also Foote, p. 71.

cial person. It may sue, subject to the question whether the local law of the transaction authorised it to act in its corporate or other artificial character."

The authority of the English judge, Mr Justice Lindley, is to the same effect,¹⁶ and Buchere's¹⁷ authority shows that up to the passing of the French statute of 30th May 1857,¹⁸ which was passed to meet the judgment of the Belgian Court of Cassation, French jurisprudence universally conceded to foreign companies a *persona standi in judicio*. An Austrian ordinance of 29th November 1865 is to this effect: "Every foreign joint-stock company and investment company with shares, excepting insurance companies, is recognised in Austria¹⁹ as legally constituted, and is allowed to conduct its commercial business under its firm name like similar companies belonging to this country, if," etc., etc.²⁰ This objection might no doubt be taken, that, whereas the law of this country requires, for the existence of juristic persons, the fulfilment of certain conditions—*e.g.* requires the special sanction of the Government—the same guarantee is not to be found in the case of foreign companies,²¹ and we thus run a risk, in recognising the legal capacity of foreign companies and corporations, of recognising some which may, by irregular methods of trading, do our State economical injury,²² and of giving foreign companies not

¹⁶ Lindley on Company Law, pp. 909 *et seq.*

¹⁷ Buchere, *Des actions judiciaires exercées en France par les sociétés anonymes étrangères*, in the Jour. ix. p. 37.

¹⁸ The words of this statute are: Art. i. "*Les sociétés anonymes et les autres associations commerciales, industrielles ou financières qui sont soumis à l'autorisation du gouvernement Belge et qui l'ont obtenue, peuvent exercer tous leurs droits et ester en justice en France en se conformant aux lois de l'Empire.*"

Art. ii. "*Un décret impérial rendu en conseil d'Etat peut appliquer à tout autre pays le bénéfice de l'article I.*"

As Buchere shows, this statute, an indirect result of Laurent's mistaken theory, produced a host of doubts and difficulties. (See, too, Gerbaut, § 162, who, however, defends its principle.) The decrees sanctioned by the second article have been promulgated in favour of many States. But still some States are left out, and companies belonging to them cannot be brought before the French courts. That would plainly, however, be to the prejudice of French creditors. The somewhat bold device, therefore, is adopted that the company, as being in fact a company (*association de fait*), may be sued, but cannot sue. Besides this, doubts have arisen from the circumstance that in France, and in a great number of other countries, no more special licenses are given for the establishment of joint-stock companies. This statute shows how a simple matter may be thrown into confusion by misapplied caution, and shows, also, that statutes are not always better than the rule given by practice.

¹⁹ It is doubtful whether foreign companies have in Russia the right of suing and being sued. A judgment of the Court of Cassation in 1883 proposes to give the right to those companies only, whose country has made an agreement to that effect with Russia. See Barkowski, Jour. xiv. p. 171.

²⁰ See the declaration with reference to the mutual recognition of joint-stock companies in the German Empire and Great Britain (*Zeitschr. für des gesammte Handelsrecht*, N.F. v. p. 182). Renaud, *Des recht der Actiengesellschaften*, 2nd ed. § 16, declares distinctly in favour of the legal capacity of foreign companies.

²¹ This is Laurent's simple conclusion, viz. because the law of Belgium recognises only such companies as have royal license, and foreign companies have no such license from the King of the Belgians, they therefore have no existence for the Belgian judge.

²² To this effect the ratio of the judgment of the Belgian Court of Cassation already mentioned, which is quoted and approved by Laurent.

unfrequently privileges²³ over those of our own country, which have to satisfy more stringent conditions when they are set on foot. This argument, however, proves nothing against the admission of foreign companies as parties to suits: in this case we have nothing to do with privileges of trade, but merely with the protection of rights already acquired and vested. Besides, it may very well be matter of dispute, which set of conditions is the more severe; and what are we to say if we shall find two States establishing contradictory conditions?^{24 25} Is a company, if by chance an opportunity presents itself of starting a business in some other country, with profit to that country, to be put to the trouble of fulfilling all the conditions which the law of that country requires of its own companies? If there is any apprehension as to reckless trading by foreign companies, it would in any event be more practical to give Government the power to forbid, in exceptional cases, the companies of a particular State to carry on trade, or to forbid particular companies to do so, rather than to adopt by legislation, or to read into the law, any such general preventive measures, the operation of which would be indefinite in extent.

CAPACITY TO CONTRACT.

§ 106. We must at once concede to every foreign juristic person and company the right of doing business by means of letters and telegrams, or by agents, with the citizens of this country,²⁶ under reservation of the right

²³ See judgment of the Court of Cassation at Turin, of 7th March 1884 (Jour. xii. 471), although this has in view not the capacity of suing, but the privilege of trading in Italy. But, on the other hand, see Clunet's note to it. The judgment of the Appeal Court at Genoa had been to a different effect (Jour. xi. p. 555).

²⁴ See, in this sense, Weiss, p. 877.

²⁵ As to the law which has been recognised in Germany since the statute of 18th July 1884, see Wolff (*De la condition des sociétés étrangères en Allemagne*, Jour. xiii. p. 134). According to it, such differences are of no importance as regards trading, and the establishment of branches in the German Empire. This must certainly be the true practical principle. Certain notices, however, are absolutely required to be given to the tribunal of commerce according to German law, when a branch is established in Germany. The proper penalty to be imposed upon the agents of the company in Germany, for neglect of that provision, will be determined by German law, without prejudice to the question whether another country would accord execution to the judgment imposing the penalty, or would not.

²⁶ Foote (Jour. ix. pp. 485, 486) assures us that it is assumed in the United States that a foreign company may contract in any of the States of the Union. The provisions of the Spanish Commercial Code of 1885-1886, art. 15, are to the same effect. In Canada, as a decision of the Privy Council on 29th July 1873 determines [*Chaudière Gold Mining Co. v. Desbarats*, etc., L.R. 5 P.C. 277], foreign trading companies enjoy the same rights as native companies. In Denmark, apart from Iceland, foreign trading companies have a direct right to sue, in which case their legality, *i.e.* their conformity to the law of their native State, is taken for granted, and they have also right to do business by agents, without the necessity of a license. They cannot, it is true, do business in Denmark directly, *i.e.* without appointing agents (statute of 29th December 1857). See Hindenburg (Jour. xi. p. 35). The draft of the new Portuguese Commercial Code of 1887, the work of Beirão, the minister of justice, in its 119th article concedes universally to trading companies, constituted according to foreign law, the capacity of contracting in Portugal.

of the State to make special prohibitions against the transaction of business of any particular kind (which may possibly cover the whole sphere of the operation of the company's undertaking), or, to put it more precisely, the right of forbidding the subjects of our State to enter into any such contracts, and of denying such contracts all effect in our country, and before our courts. This rule is favoured by the most distinct train of practice. We see every day that governments conclude financial contracts with foreign companies. How can we reconcile this fact with a denial of legal capacity to these companies?

It is plain that, if such companies set up permanent agencies and branches in this country, distinct regulations can be imposed upon them, and the new Italian Code of Commerce, in its 230th and 231st articles, contains very practical provisions for such cases. They rest upon the principle²⁷ that the rules, as to the publication of the articles of the company and of its prospectus, which obtain for native companies, must be observed by foreign companies also, whereas there is, very properly, no mention of making the articles of association fit the law of Italy.²⁸ If these publications, which are thought to be necessary for the protection of the public, are neglected, the correct result, which is to be inferred from the 231st article of the Italian Code of Commerce, is that the administrators and agents of the company, who have carried on its business in Italy, are declared to be personally responsible.²⁹ If, in addition, we do nothing to prevent the foreign companies being responsible to the full extent of the property belonging to them in this country, far better provision is made for the interests of the public, the creditors in this country, and generally a far better guarantee is taken for the observance of our law, than would be accomplished by forbidding foreign companies to enjoy any legal capacity at all in this country. If we were to proceed on this latter footing, we should not be able logically to make any claim against the property of

²⁷ See Guillery (Jour. x. p. 225) on the law of Belgium, since the statute of 18th May 1873, and the judgment of the Court of Ghent (8th December 1886, Jour. xiv. p. 95), reported by Dubois, on the most recent practice upon the Belgian statutes; also Beauchet (Jour. xiv. p. 171) on the provisions of the Hungarian law as to the admission of foreign trading companies.

²⁸ For this difference, see Vavasseur (*Des sociétés étrangères*), Jour. ii. p. 5; Lefevre, Jour. ix. p. 401; Lyon-Caen (*Des divers systèmes concernant la condition légale des sociétés étrangères*, Jour. xii. p. 265). As regards publication of these particulars, it would often, for want of the necessary State machinery, be impossible to observe the law of the place where the company has its principal seat; nor can a foreign joint-stock company be required to have a certain quota of its share capital paid up, in conformity with the law of our country on this point. This view is in accordance with two judgments of the Court of Paris, of 7th May 1850 and 8th November 1865 (Vavasseur, *ut cit.* p. 10), the latter having reference to the Anglo-French treaty of 1862, by which English companies are bound, "*de se conformer aux lois Françaises.*" Vavasseur, in the passage referred to, is, it is true, only discussing the question whether such shares are negotiable in France, but, if we answer this question in the affirmative, we shall be all the better able to answer the question as to carrying on business in the sense we have indicated, since the payment of capital has a much closer relation to traffic in shares than to the conduct of the ordinary business of the company.

²⁹ The Portuguese draft code (§§ 120, 121) is to the same effect.

these companies in this country, for in law they would not have any property. This difficulty is recognised by Laurent (iv. § 160), and has as matter of fact been dealt with by the French courts. Laurent remarks that the Appeal Court in Paris did, as a question of logic, come to a sound conclusion, in denying, in a judgment of 15th April 1863, the possibility of suing a foreign company in France.³⁰

But we shall have to recognise the legal capacity of foreign juristic persons—in so far as that consists in the capacity to sue and be sued, and in the legality of their doing business by means of letters, telegrams and agents—even if juristic persons and corporations of the same kind could have no legal existence with us. Why, for instance, shall a foreign monastery not sue in this country for the performance of the prestations of a lease of a piece of land situated in another country, or why should a religious brotherhood which makes liqueurs or laces, not be able to sell these wares in our country, and raise up corresponding claims for payment which our courts must recognise? In so far as the particular transaction in question has no object in view which our law disapproves,³¹ the general object of the foreign association cannot be matter for the consideration of our courts. The true meaning of the opposite opinion would simply be that we should sit in judgment upon the domestic arrangements of the foreign State: many things may find acceptance with it, which we reject. We might with as much justice bid our judges take into account, in an ordinary petitory action, the question whether the creditor was likely to use the sum for which he sues in a way that could be justified by moral rules. A proposal that from the point of view of international law we should in such matters draw distinctions, and treat ecclesiastical or charitable foundations differently from commercial associations, foreign States, cities, and communes, can hardly be called anything else than fanciful. It is, besides, not at all practical, for, on the one hand, entire States with their Governments may fall absolutely under the guidance and dominion of clerical authority, and, on the other hand, the foreign corporation may

³⁰ No doubt the Court of Cassation decided the opposite way, but rather because they laid stress on the practical necessities of the case, than upon the laws of logic (19th May 1863). What are we to say of a logic that reasons thus, viz.: "*Quand même la société défenderesse n'aurait pas d'existence légale en France, elle serait néanmoins responsable comme association de fait de ses engagements envers les Français . . . et par suite elle est nécessairement soumise . . . à la juridiction des tribunaux Français.*"

³¹ If in our State, for instance, it were illegal, at least for our citizens, to send children to educational or boarding establishments which are managed by particular religious corporations, it might no doubt be that an action by a foreign corporation of the kind against a citizen of this country, for a sum due for board for his children who had been sent there, might possibly have to be thrown out. The question would be whether the law had simply imposed a penalty as for a crime, or had pronounced that such contracts were as a matter of civil law invalid. [The Italian courts have, however, held that a "moral person" of foreign nationality, the *Congregation des dames du sacre Coeur*, cannot be recognised or allowed to plead in the courts of Italy. No sovereign can give any such body a legal existence beyond his own territory, and as their objects must be political, economical, moral or religious, they must always have a strong national character, and therefore have no claim to recognition out of their own land. C. de Cass. Rome, 1889. J. xvii. p. 739.]

attain its end by putting forward some confidential person, to whom it assigns its rights.³²

LIMITATIONS.

§ 107. As we have seen, it is impossible to avoid attributing to foreign juristic persons capacity to sue and to be sued, and recognising contracts³³ which they have concluded in their own country by letters or by means of agents, and which are intended to operate there: again, apart from special prohibitions, it is a general rule that they should be held capable of contracting in our country also. But all this does not imply that we must recognise the legal capacity of foreign juristic persons in all possible relations, *e.g.* attribute to them the capacity of holding real property or taking by succession.³⁴ In these cases, although legal presumptions may tend to assert equality in the eye of the law for all juristic persons,³⁵ which serve an object recognised by all mankind, or even a religious object, if it is one that is recognised in our country also, still the State has a free hand to exclude foreign companies, it may be on the ground that it cannot exercise the same superintendence over them as over native companies. International intercourse does not in general suffer any intolerable disturbance by the imposition of such restrictions upon foreign juristic persons. In particular, it seems desirable that foreign companies should not *de plano* have right to the permanent ownership of real property, and that general rules should be laid down for the establishment of branches and agencies. In this way sufficient precautions will be taken against the risks that might spring from a general recognition of the legal capacity of foreign juristic persons.³⁶

³² Cf. judgment of the tribunal of commerce of Brussels, 28th April 1881, discussed by Alexander Braun, in Jour. ix. p. 391. This judgment was given on the subject of the trademark of the liqueurs of the Grande Chartreuse at Grenoble.

³³ The rules as to the formation of a company required by the country in which the company does business, but has not its seat, cannot be applied to companies formed abroad. Judgment of the court of Lyons, 7th Jan. 1881 (Jour. viii. 159).

³⁴ Gianzana, i. § 73, and the ratio of a judgment of the Court of Cassation at Turin, of 18th Nov. 1882 cited by him (affirming the Court of Appeal at Genoa), lay down that foreign juristic persons must be held to have the capacity of taking by succession if native juristic persons of the same kind have that capacity, and that in particular the capacity of a foreign State which has been instituted as heir must be recognised.

³⁵ Cf. Wächter, ii. p. 182. In accordance with his note 305, the practice of the Supreme Court of Würtemberg gives foreign charitable institutions the privileges of the forty years' prescription. This would seem to correspond with the practice of the common law generally. As to the privilege of restitution, see in the same sense judgment of the Appeal Court at Dresden (Seuffert, i. No. 359). See, too, Gunther, p. 279.

In Prussia, at least within its territory governed by the *Preussisches Allgemeines Landrecht*, foreign and native corporations have the like capacity of taking legacies. But see note 38 *infra* as to a limitation in this respect, and generally Förster, *Theorie und Praxis des heutigen Preuss. Privatrechts*, iv. § 251, note 46.

³⁶ See the excellent grounds of judgment on this point given by the Court of Cassation in Turin, cited *supra*, note 34.

But, on the other hand, foreign establishments and associations cannot make good in our country privileges which are only accorded to them within their own: ³⁷ rights, too, which even our own juristic persons must acquire in some particular way, are not conceded to the foreign juristic person except by special license of the government of this country. ³⁸ Any other view would set our own establishments at a disadvantage with those of other countries. The concession of equal legal rights to foreign establishments and associations is of course also excluded if the rights in question, either by the special enactment of our own legislation or by implication from its provisions, are to be confined to juristic persons of this country. This latter is the case, for example, with the special privileges given to the Fisk. ³⁹ It is impossible to suppose that our own subjects should have been intended to be put at a disadvantage with the Fisk of another country.

An association, again, which has no validity in its own country, can never claim the rights of a juristic person in any other country. The only objects which a juristic person has in matters of private law, are, first, to make it possible to give certain individuals shares in an estate as a perpetuity on certain conditions previously arranged, or, secondly, to ensure to an indefinite number of persons the enjoyment and advantages to be

³⁷ Unger, p. 165.

³⁸ Savigny, p. 161, § 365, Guthrie, p. 167, describes these limitations upon juristic persons as limitations of capacity to contract. In truth, however, they are limitations of legal capacity or status. On the important distinction between these we shall have something to say later. Savigny takes the *lex domicilii* as the general rule for the regulation of the capacity to contract, and thus we should have this result—which undoubtedly would offend practical good sense—viz. that foreign ecclesiastical establishments and foundations would not be subject to the rules which we recognise against the accumulation of real property *in manu mortua*. Savigny's only escape from this result is effected by the proposition—entirely unsuited to this subject—that such prohibitions rest on politico-economical grounds.

Among limitations of this kind we must also reckon the requirement of a special State license, such as, for example, is laid down in the second section of the Prussian statute of 23rd February 1870, viz.: "Gifts and legacies to native or foreign corporations, or other juristic persons, require for their validity the approval to their full amount of the king or of the official nominated by a royal decree, if their value exceeds the sum of 1000 thalers."

In such a case, if the legacy is in favour of a foreign corporation or foundation, a double license may possibly be required, one from the State in which the corporation or foundation has its seat, and one from the State to which the donor or the legatee belonged: see § 3 of the Prussian statute which we have cited: "A fine not exceeding 300 thalers may be imposed on . . . 2nd, any person who makes over to a foreign corporation or other juristic person a gift or a legacy before the proper license for this purpose has been obtained." The necessary license may possibly be refused on account of the excessive accumulation of property *in manu mortua* or the extravagant endowment of a foundation, and also for behoof of the natural heirs of the testator or donor, e.g. if they appear to be in want. In the former point of view, what has to be considered is the interest of the State in which the corporation has its seat, in the latter the interest of the State to which the donor or testator belongs. Such a license is necessary even for a foreign State, if acquisition by succession, or the ownership of landed property by juristic persons, is associated with such a license. It is no offence against the sovereign powers of the foreign State that such a license should be required. Cf. Giansana, i. par. 77, and the decision of the Appeal Court at Genoa of 6th Aug. 1881, which he quotes.

³⁹ Wächter, ii. p. 181, Unger, *ut cit.*: he would, however, allow the churches of other countries the same privileges as ours.

derived from some particular thing or undertaking. As regards those of the former class, the division of the estate in the eye of the law takes place where the company has its seat; if, then, by the law which rules there, it turns out to be invalid, the object of the association cannot as a matter of law be attained. In the latter class of cases, it is just as plain that the object of the association can as a matter of fact never be attained if the State, in which the undertaking or establishment is to be set up, does not sanction it. A foreign State that treated as a juristic person an association that was not recognised in its own country, would be treating as valid businesses which were directed to objects that were impossible either legally or physically, a result which would be inconsistent with general principles of logic.^{40 41}

COMPANIES WHOSE OPERATION IS SUBSTANTIALLY CONFINED TO
FOREIGN COUNTRIES. *In fraudem legis?*

§ 108. One effect of the recognition of the legal capacity of foreign juristic persons may no doubt be, that the true business activity of a company shall for the most part belong to the territory of another State⁴² than that in which as a matter of form it has its seat. It is possible that in this way legislative provisions for the restraint of companies may be evaded. For instance, it may be that the business of a mining company is truly carried on in State A, while the company itself is formed in State B, because it desires to be free from the conditions which State A has imposed upon the formation of such companies.

Westlake (§ 306) raises this difficulty, but does not supply any solution of it. One must overlook it, unless one desires to interfere prejudicially with the beneficial expenditure of capital in other countries. A company may have very good reasons for being willing that the conduct of its business should be subject to the laws and the courts of another country, and, it may be, to the large discretionary powers of a foreign government, while it is not willing that the rights of its shareholders *inter se* and its whole capital should be. The weight of these reasons is, of course, specially felt where the business is carried on in countries which are uncivilised or

⁴⁰ Cf. Mohl, *Staatsrecht, Völkerrecht und Politik*, i. p. 621: "It is easy to prove that the position of the members of a company is in public law conditioned by the legislation of its own country, and the treatment there accorded to it. An association, which has no legal existence in its own country, has no existence for any foreign State. . . . Its circumstances in a foreign country cannot place it in any different rank from that which it really holds in its own country."

⁴¹ It follows from what has been said that the question, whether a foreign juristic person has ceased to exist, must be determined by the foreign law which prevails at the place where it has its seat (*e.g.* whether as a consequence of bankruptcy it is dissolved), R.G.I. 18th Feb. 1885 (Bolze, *Praxis*, par. 42, p. 10).

⁴² But the company cannot do any of the things that are proper to the seat of the company, outwith the State in which it is formed. A general meeting held in another country has been held null by the courts of the United States (Foote, *Jour.* ix. 485, 486).

only partly civilised. But it is impossible here to draw the line between two classes of cases, and the dangers are not so serious, when we remember that the trade or business itself is subject to the laws of the place in which it is carried on,⁴³ and that the publications required by that law must take place. Public traffic in the shares and obligations of foreign companies, the basis of which is unsatisfactory, may be prohibited.⁴⁴ Upon the whole, however, the necessary regulations for this purpose may be left to the exchanges and chambers of commerce. It would be contradictory of our theory, if we were only to allow the scrip and shares of those foreign companies, which had been formed in accordance with the requirements of our own law, to obtain a quotation on our exchanges. On the other hand, it is very difficult, unless we are prepared to have recourse to the discretion of the police authorities—a step which is in favour in many States on the Continent of Europe, but commands, perhaps, little sympathy in England and the United States—to prescribe, by legislative enactment,⁴⁵ the special conditions under which foreign companies, in contradistinction to native companies, are to be allowed to carry on their trade in this country.⁴⁶

NOTE C ON §§ 104-8. LAW AS TO FOREIGN CORPORATIONS AND COMPANIES.

["It is an established rule of private international law that a corporation duly created according to the laws of one State may sue and be sued in its corporate name in the courts of other States" (Lindley on Company Law, p. 909; Westlake, § 305). "There is no technical objection to suit in England by a foreign corporation or other artificial person." "We make no inquiry into the constitution of a foreign company any more than we should into the generation of an individual suing here" (*per* Erle, C. J. in *Branley v. S.E. Ry. Co.* 12 C.B.N.S. p. 70).

Lindley, however, goes on to say, "as regards procedure and parties to actions, the law of the country in which the action is brought prevails:" and from this he infers that a company which has been empowered by a

⁴³ The company therefore may be answerable to third parties, who have contracted with it at the place in which its business is carried on, in the same way as if it had been formed there. See the judgment of the tribunal of commerce of Antwerp, of 10th July 1877 (Jour. v. p. 526).

⁴⁴ No such prohibition, however, is understood if the requirements of our law, which regulate our companies, are not satisfied in the case of shares in a foreign company. *E.g.* French practice shows that the provision of the French statute of 24th July 1867, whereby shares are not negotiable unless they are paid up to the extent of one-fourth of their value, is not applicable to foreign stocks. See judgment of the Court of Lyons of 7th Jan. 1881 (Jour. viii. p. 159), and of the Court of Chambéry of 25th March 1883 (Jour. xi. p. 192), and the citations given in Jour. x. p. 521.

⁴⁵ Westlake (§ 306) seems to regard some such provisions as desirable in the law of England, to which they are unknown. In my view, however, the only practical method is the compulsory publication of the articles and the prospectus. Legislation can do nothing more without seriously interfering with international intercourse.

⁴⁶ A company of international carriers could not well be refused leave to set up places in which to sell tickets, etc. Cf. Westlake, *ut cit.*

foreign or colonial Government to sue through a public officer, cannot do so in England, the privilege given to it being a mere rule of procedure, applicable only in the country of its origin, and having no power to control the procedure that may be laid down by the *lex fori*.

The courts of England have, in the case of *Bullock v. Caird* (1875, L.R. 10, Q.B. 276), carried the application of the *lex fori* in questions affecting partnerships a step further. In that case, an action had been brought in the English courts against one member of a Scottish co-partnery, in respect of an obligation due by the co-partnery. It was pleaded for the defender that, by the law of Scotland, where a co-partnery is held to be in law a separate person, it was a condition precedent to individual liability being established, that the firm as such separate person, or the whole individual partners jointly, should have been sued, so as to constitute the debt in proper form. The court held that this raised a mere question of procedure, and that although the omission might have been a bar to action in the courts of Scotland, the English court, where no such rule of procedure was known, could not be bound to give effect to it. The plea was accordingly repelled.

With deference to the opinion of the English court, this case seems to have been badly decided: the plea raised much more than a mere point of procedure: it involved this, viz. that the proper debtor, *i.e.* the co-partnery, had not been called. It is thought that the English court, on the principle cited from *Erle, C. J. supra*, were bound to accept the legal person duly created by the law of Scotland, just as they would have accepted a joint-stock company properly registered, and therefore incorporated, as a separate person from any of the shareholders. In contradiction of this English decision, we find, in the case of *Muir v. Collett* (1862, Ct. of Sess. Reps. 2nd ser. xxiv. 1119), what appears to be the sound principle recognised by the Scottish courts, viz. that the law of the domicile of a partnership (in that case India), must determine the nature of its constitution, so as to settle whether it has a separate person in law, by which it shall sue and be sued.

On the other hand, the jurisdiction of the English courts over companies domiciled abroad depends on whether these companies, through their property or agents, are amenable to the process of the English court. The same rules as are applicable in the case of individuals will be applicable here.

"Places of business," says Lord Chancellor Lyndhurst (*Carron Co. v. Maclaren*, 1855, 5 Cl. H. of L. 449), "may, for the purposes of jurisdiction, properly be deemed the domicile," and for these purposes his Lordship thinks there may possibly be several domiciles. For the limited purpose of jurisdiction there seems to be no principle against a multiplicity of domiciles. The possession of an agency in Scotland will give the Scottish courts jurisdiction over a foreign company. Mackay, *Practice of the Court of Session*, vol. i. p. 182.

Again, it has been held that a company, although foreign in the sense that it was constituted abroad under a foreign law, and its shares are held

by foreigners, may yet be wound up in England, if its principal place of business be in England (*Princess Reuss v. Bos*, etc., 1871, L. R. 5, E. and I. App. 176). If, however, it has merely carried on business in England through agents, without having any office there, the court will not push its jurisdiction so far (*Lloyd Generale Italiano*, 1885, L. R. 29, Ch. Div. 219).

The liabilities of members of joint-stock companies will, in England, be determined by the law of the land under which they were formed. Thus, for instance, if by the law of France the corporation, and not the shareholders who make up that corporation, are liable in damages for delicts, or *quasi* delicts, committed in the course of carrying on the business of the corporation, the English courts will protect a shareholder against whom, as an individual, proceedings are being taken in England (*General Steam Navigation Co. v. Guillou*, 1843, 11, M. and W. 877).

It was at one time thought (*Westlake*, § 306) that a company incorporated in one country could not carry on business in another country, so as to acquire a right to sue on contracts entered into there: it was said that such a company was trading beyond the limits under which it had been constituted, and that a company belonging to a country where the conditions of incorporation were less rigid might have advantages over others constituted in countries where the law requires certain formalities and conditions to be observed, so as to ensure fair trading, or, it may be, for fiscal purposes. The Canadian courts countenanced this view; but the English courts have assumed the contrary. The high authority of Mr Justice Lindley (p. 910) is to this effect: "It is conceived that a foreign corporation can sue in this country on all contracts entered into with it in this country, provided such contracts are warranted by the constitution of the corporation, and are not illegal by English law." This may be taken to be the law of England and of Scotland. In the Circuit Court of the United States, it has been held that a company, validly constituted by the law of one State, may carry on business in another without being required to fulfil the particular conditions which the law of that other State requires of its own companies. (*Att. Gen. of N.Y. Albany Law Jour.* xxxvii. 371, *Jour.* xvii. 372.)

If the law were otherwise, every company desiring to trade in a foreign country would require to be incorporated anew, and it might be on a totally new footing. The author points out how inconvenient and cumbrous it would be to require this of a foreign trading company: the recognition of the incorporation of a company which has been validly formed under the provisions of a foreign law is demanded by the first principles of international law, which assume that in all civilised countries safeguards of the same kind, although differing infinitely in detail, will be adopted to ensure honest dealing and the administration of justice; and finally, the language of the conventions concluded between different powers seems at once to coincide with the theories expressed in the text, and to show what the common experience of nations has found necessary and advantageous. If the doubts of the Canadian courts were well founded,

the recognition of foreign corporations and their rights would be so limited as to be illusory.

The powers of the corporation, the limits of its legal capacity—*e.g.* its capacity to hold land—must be determined by reference to a double canon, first, its powers as defined by its constitution, and second, by reference to the law of the country where it proposes to exercise its powers; the law of its domicile will determine whether it has been validly incorporated, and what are the limits of its capacity, but it will not be allowed in another country to trade at the expense and to the disadvantage of corporations belonging to that country, because, in the country of its own domicile, legal persons are free from the restraints which the law of the country in which they propose to trade imposes upon them. The extent of the mutual recognition of foreign companies in modern times is expressed in the conventions concluded between England and France, 15th May 1862; England and Belgium, 8th December 1862; England and Italy, 26th November 1867; and England and Germany, 27th March 1874. The operative clauses in these conventions, which are valid in Ireland and Scotland, as well as in England, are in nearly the same terms. The most recent runs thus: "Joint-stock companies and other associations, commercial, industrial, and financial, constituted and authorised in conformity with the laws in force in either of the two countries, may freely exercise in the dominions of the other all their rights, including that of appearing before tribunals, whether for the purpose of bringing an action or for defending themselves, in conformity, however, with the laws and customs in force in the said countries. . . . Such companies or associations, authorised in either of the two countries, shall only be admitted to the exercise of their business or trade in the dominions of the other country, if found to be in compliance with the conditions prescribed by the laws of that country."

In Germany, following out the same principle as the law of England, that the legal capacity of a legal person is, like that of individuals, to be determined by the law of the domicile, the German courts have recognised and allowed to a foreign company, validly formed according to foreign law, a right of action against German subjects, although the principles of its constitution are forbidden in Germany, and companies so constituted are declared null (*Holthausen & Cie v. Comptoir d'escompte de Paris*, App. Ct. cf. Cöln. 28th April 1877, *Jour. v.* 629). The grounds of this decision are precisely the same as those on which Mr Justice Lindley defends his doctrine, as stated above. A foreign company may have to find caution for expenses, unless in exceptional circumstances the court allows it to sue without doing so. In order, however, legally to establish an agency in Germany, a foreign company must obtain leave from the State in which its branch is to be established, and publish in the required form a summary of its memorandum of association, etc. Certain kinds of business, *e.g.* life insurance, cannot be carried on in Germany by foreign companies, except on the same conditions as those on which German companies are authorised to carry them on. A decision of the Imperial Tribunal of 14th April 1882

(Jour. x. p. 317) has determined that an insurance company, which has been interdicted from carrying on business in one of the States of the empire, may nevertheless sue in the German courts for premiums which fall due subsequently to the date of the interdict, but under a policy which had been taken out before it.

In France the constitution of a foreign company will be recognised just as the majority of an individual would be, and no French shareholder will appeal successfully to the courts of his own country to protect him against resolutions passed by the shareholders of a foreign company, to which he belongs, in conformity with the requirements of the law of the country to which the company belongs (*Buisson v. Ch. de Fer Seville-Xeres-Cadiz*, Trib. de comm. de la Seine, 25th June 1875, Jour. iii. 363); just as no French creditor can appeal to the courts of his own country to give him redress against a resolution passed in the course of the liquidation of a foreign company abroad by the statutory majority of creditors (*Dubois de Luchet v. Cie de Chemin de Fer du Nord de l'Espagne*, C. de Cass. Paris, 18th January 1876, Jour. iv. 237). So, too, a foreign company need not conform to the requirements of French law as to the subscription of capital, or as to the payment of any specified proportion of the value of each share (Trib. corr. de la Seine, 20th June 1883, Jour. x. 521). Disputes between Frenchmen, who are shareholders in a foreign company, and that company as to calls upon shares, or as to the legality of forfeiture of shares, must go for their determination to the courts of the country in which the company has its seat (*Aragon v. Société de Tharsis*, 28th April 1884, Jour. xi. 520, and *Banque Européenne v. Rumpier*, 28th July 1884, Jour. xi. 403).

A foreign company, however, in order to sue, carry on business or establish branches in France, must be authorised generally to do so by the French Government; *i.e.* the French Government must have approved the conditions under which, in the country to which the company belongs, such companies are constituted. Unless such a general authority has been given, foreign companies cannot sue in France, even on contracts concluded in their own country.

It may, of course, happen that a company, which has its principal office abroad, may have established it there with the express purpose of engaging in some trade not permitted in the country to which it truly belongs, and of escaping some restrictions upon the constitution of companies which are imposed by the law of the country to which it truly belongs—*i.e.* where its directors or managers reside, where its trade truly lies, and where its shares are held; such an illusory establishment will certainly not be recognised so as to oust the penal jurisdiction of the country to which the directors belong, or to dispense with the formalities required by its law (*Compagnie de Chemin de Fer du Nord et de Catalogne*, C. de Paris, 2nd July 1877, Jour. v. 274). But a mere agency or a subsidiary establishment in France, coupled with the fact that the shares are to a large extent held by Frenchmen, will not make a company amenable to French law, so that any neglect in its constitution of the requirements of French law, which in the

case of a French company would involve its directors in criminal responsibility, can be charged against them in a French court, if the meetings of shareholders have always been held abroad, the capital largely employed abroad, and the chief office situated abroad, the company having been originated and incorporated abroad (*Chandora v. Banque Européenne*, 10th February 1881, Trib. corr. de la Seine, Jour. viii. p. 158). Nor will the establishment of an agency in France give a company the same status as an individual acquires by residence, accompanied by Government license to reside—viz. a title to bring actions against a foreigner in a French court (*Rubattino v. Kuntz & Werder*, 25th Feb. 1878, Trib. comm. de Marseilles, Jour. v. 372). This latter decision is not in conflict with what has been above taken to be the law of England; a company is treated like an individual, and its right to sue is regulated according to its true nationality, and not according to its domicile. It is a principle of French law that the right to sue being a "*droit civil*," does not belong to foreigners; hence a mere trading domicile does not give a right to sue in France, where the defender is also a foreigner, but a foreign company with a general authorisation, just like a foreign individual, may sue a French debtor in France. Again, just as an individual, residing or trading in France, may be sued there by a French creditor, although he is not by birth or naturalisation a French subject, because it is, according to the French law, the first object of the legislator to protect his own citizens, so a foreign company which has an agent in France may be sued there upon contracts made in France by their agent (*Duché et Fils v. Raymond et Cie.*, C. de Cass. Paris, 10th August 1875, Jour. iii. 459; *Crédit Industriel v. Quesnel, &c.*, 1881, Jour. ix. p. 424). The domicile of the foreigner will be held to be at the place in which his agency exists (*Racine v. Banque Ottomane*, C. de Cass. 4th March 1885, Jour. xii. 304). In matters of title to sue and defend there is, as French jurisprudence expresses it, no distinction taken between an individual and a moral (*i.e.* a legal) person.

The regulations as to the quotation of shares on the Bourse, and the sale and purchase of them there, which are applicable to French companies are not applicable to the shares of foreign companies (*Roges v. Soc. Générale*, 25th May 1883, Jour. xi. p. 192, and other cases there cited).

In Italy, the position of foreign companies is regulated by the provisions of the new Code of Commerce, which came into force on 1st January 1883. Foreign companies are allowed to exercise all the powers which belong to them by their constitution, and to plead in the Italian courts, on condition of publishing the conditions of their association and certain other particulars as to their constitution, and provided that the interests of Italian shareholders are sufficiently protected (Ct. of Milan, 19th September 1882, Jour. xi. 555). Their constitution is governed by the law of their place of origin.

In Austria foreign companies, in order to enjoy a title to sue and defend, and to carry on their business in Austria, must obtain in each case authority from the Government, and must submit to the Government

reports of their general meetings, and two balance-sheets, one of their general business and one of the business they have done in Austria. If they desire to open branch establishments in Austria, they must appoint as their agents domiciled Austrians, approved by the Austrian Government.

In Hungary, a foreign company will not be allowed to carry on business by means of a branch establishment without a license from the tribunal having jurisdiction in the place where it is to be established. No such license will be given to a company belonging to a country which does not give like privileges to Hungarian companies; and, after the branch is established, it must submit balance-sheets, etc., as in Austria.

In Belgium and Switzerland, foreign companies need no license to carry on business, or to plead in courts of law. If, however, they desire to establish branches, they must observe the same requirements as to publication of their constitution, etc., as are required of native companies. In Belgium, their articles of association and other credentials must be published in full: an abstract or summary is not accepted.

In Russia, special sanction must be obtained, before any foreign company can plead, unless it is a company belonging to a country with which Russia has concluded treaties on the subject (Imperial Court of Cassation, 1883, Jour. xiv. 171).

In Turkey, by a decree of 25th November 1887 (Jour. xv. 438), foreign companies can only establish agencies and branches under the sanction of an Imperial irade. To obtain this sanction, the articles of the company must be produced, and when the sanction is obtained, the company must choose a legal domicile for itself. Penalties are provided for the event of any company carrying on business without having previously obtained this sanction.]

APPENDIX II.

LIABILITY TO TAXATION IN INTERNATIONAL INTERCOURSE.

NECESSITY OF DEFINITE AND EQUITABLE PRINCIPLES.

§ 109. The proper international limits of the right of taxation must be viewed as an important subject for the consideration of international law, when we consider the constant increase in the demands, which the revenue laws of different States are making upon the property and the income of individuals. But up to the present time we find only a few equitable principles timidly venturing to put themselves forward. It is very often the case that the simple principle of extending the tax to all persons and things, which it seems in any way possible to reach, is allowed to prevail, without

any attention being paid to the question whether so wide an extension of the liability to taxation is in accordance either with the principle of the impost itself, or with the circumstance that some other State, on the same ground, makes a like claim upon the same individual. To the complications and the frequent caprices of legislative enactments, we often find added the circumstance that the authorities of the State, in matters of this kind, do their best to limit or obstruct legal processes, and that the reasons for which administrative officers decide in this or that way are only to a small extent or with difficulty accessible to the public.

The case of double taxation, be it avowed, or be it concealed in so far as the same tax goes under different names in different States, will in the present condition of revenue legislation very frequently occur, whatever pains may be taken to avoid a double impost. Such a double taxation does not, it is certain, give the individual any right to protest against one of the two. From a legal point of view, every State may follow out its rights, *i.e.* its rights within the meaning of its own legislation, so far as the limits of its jurisdiction extend.¹ The only remedy that can be devised is a system of treaties, or the enactment of clauses of reciprocity in our legislation. To a certain extent, we may on equitable grounds allow taxation which has been imposed by another country upon our citizens, and to which on principle we hold that they should not have been subjected, to serve as a ground for exemption in this country.²

A tax may be intended to fall upon a person, a thing,³ or a transaction. It is obvious that, where a tax is intended to fall upon a person, that person must have some permanent relation to the State which is raising the tax. We may in the meantime refrain from determining whether that relation is to be constituted by nationality or domicile, or lastly, merely by residence for a considerable time within the State. Persons who remain only temporarily for quite a short time in the State cannot be touched by such a tax.⁴ If taxes are meant to satisfy the necessities of the State, it cannot be asserted of persons who are only temporarily present in the State, that

¹ See a judgment of the Swiss federal tribunal of 24th April 1882, *Revue*, xvi. p. 488.

² Cf., for instance, the Prussian statute as to succession duty of 1873, § 9.

³ The rule which is so often enunciated on this subject, that, in raising a tax, as a matter of principle the right belongs to the State within whose dominions the thing happens to be, without regard to the fact whether it is moveable or immoveable—see on this subject Laurent, vii. § 251—is a mere *petitio principii*, and is not at all well suited to the circumstances of modern commerce and intercourse. In Wharton (*Dig.* i. § 10, p. 36) we find the true rule, which is taken from the judgment of an United States court [*Kirtland v. Hotchkiss*, 100, U.S. 491], viz.: “For the purposes of taxation, a debt has its *situs* at the residence of the creditor, and may there be taxed.”

⁴ “Taxation may no doubt be imposed, in conformity with the law of nations, by a sovereign on the property within his jurisdiction of a person who is domiciled in and owes allegiance to a foreign country. It is otherwise, however, as to a tax imposed, not on the property, but on the person of the party taxed, when elsewhere domiciled, and elsewhere a citizen. Such a decree is internationally void and . . . gives a right to appeal for diplomatic intervention. Despatch of the Secretary of State for the United States of 1883, Wharton, *Dig.* ii. § 204, p. 514.

they derive any benefit worth mentioning from its arrangements. In any case, the benefit may be regarded as sufficiently balanced by the indirect duties levied upon necessities, which will affect even persons who spend but a short time in the country. In addition, there are very great practical difficulties in the way of levying any considerable revenue directly from foreigners in such circumstances.

PERSONAL TAXES. (NATIONALITY OR DOMICILE?)

§ 110. Taxes, which fall directly on persons as such, will in the present day be more or less of the nature of income tax, and the first question that must be considered is whether in this matter the domicile or the nationality of the person is to rule. On principles of public law, no objection can be taken to the State taxing its citizens, who are living in a foreign country, at its own discretion. But natives who are domiciled abroad as a matter of fact derive but little benefit, so long as this domicile lasts, from the arrangements of their native country; while, on the other hand, it must seem a peculiar privilege that foreigners who for a considerable time have lived in this country should go free from taxation. It seems desirable, therefore, to take the principle of domicile to regulate income tax.⁵ This is certainly the rule in most systems,⁶ and that it should be so is perhaps to some extent accounted for by the fact that attempts to lay on and to collect income tax in a foreign country would very frequently encounter insurmountable difficulties. It might perhaps be possible for a State, with good practical results, to levy from its citizens in foreign parts a certain tax as an equivalent for the protection which it extends to its subjects abroad, and sometimes at great expense. On the other hand, in order to meet the frequent attempts which are made to evade the law in this respect, a stay of a certain duration in the country, or in some particular place, as the case may be, may be held equivalent to the acquisition of a true domicile.⁷ Of course, there is no justification in principle for the application by the legislature of the principles of domicile

⁵ See, too, Bluntschli, *Völkerr.* § 376.

⁶ The law, formerly of the North German Federation, now of the German Empire, dated 13th May 1870, in order to put an end to double taxation, adopted the principle of domicile for direct Government taxes. § 4, however, provides: "All pay, pension, or provisional allowances which German soldiers, or civil servants, or their wives or families, draw from the treasury of one of the federated States, are only to be taxed within the State which has to make the payment." § 3 appoints the *lex rei sitæ* for landed property, and the exercise of trade or manufacture. The statute only gets rid of double taxation in the relations of the German Federated States to each other.

⁷ See Wharton, Dig. ii. § 204, on the point, that, in so far as public law is concerned, there is no objection to the taxation of foreigners who have resided a considerable time in the country, or who carry on business there, etc. But forced loans for the purpose of carrying on war against a foreign power must not be raised from foreigners. In general, however, the object of the taxation, *e.g.* the upkeep of schools, is of no importance. See despatch of the Secretary of State for the United States, of 1885, Wharton, Dig. ii. p. 515.

and of nationality as well, as we find, for instance, in the Prussian statute of 1st May 1851, § 16, which, to a certain extent, is still in force.

RETURNS FROM LAND.

§ 111. We must however recognise that, in the system of taxation generally, the person is not so much in view as his property. Although, therefore, as a matter of form, it is the person who is taxed, in truth it is always his property which has to bear it, which in a certain way has concentrated itself in him, and in this concentrated form, for instance, in the hands of a rich man, is seen to be an object which is particularly well able to give a good return. When we look at the matter in this way, we see, however, that one person may unite in himself several centres or masses of property. In so far as the personal enjoyment of them is concerned, the returns from these various masses of property are united in the same person, but their external appearance is that of complete independence one of the other. This happens, for instance, when a man owns lands, manufactories, or commercial establishments, in different countries. It seems in such a case fair that the revenue regulations should deal with these various masses of property as independent properties, and all the more so that, to a certain extent, the tax may be regarded as an equivalent for the protection which the State affords to the property, and that there is always a possibility that foreigners may possess in any one State a large number of landed estates, and masses of property of various kinds. In the latter case, if these were not each regarded as an independent whole, the State would have to go without a considerable share of the income tax arising from something produced on its own soil, and protected by its own laws and polity. We may also maintain, that in the domain of the law of taxation, we should be justified in assuming the possibility of a plurality of domiciles, or rather of a partial domicile, and all the more because the State, in freely conceding to foreigners the power of acquiring property in this country, has the better reason for securing absolutely for itself some share in the income that comes from the property that belongs to this country, as a fund for taxation. The State in the territory of which these masses of property are situated has, therefore, primarily the right of levying an income tax upon them. The State in which the person is really domiciled must give way, and can only raise an income tax from him, in so far as the income tax, at the rate at which it levies it generally, would exceed what has been paid to the foreign Government, if the person in question had his whole property in the State of the true domicile. On the other hand, however, the State in which a person has landed estate, etc., can only levy from him income tax upon the property which is in its own territory, and not upon his whole property. There may be, of course, something to say, as a matter of practical convenience, for leaving a trifling property in this country belonging to a foreigner free from taxation unless

it exceeds a specified value, and for disregarding absolutely insignificant differences between the income taxes of the two countries.⁸

TAXES ON REAL PROPERTY.

§ 112. The so-called land tax (*Grund-Steuer*), and in general all taxation of landed property, houses, mines, etc., may in the same way be conceived as a method of taxing the income of a person. But in their legal form these imposts are seen to be taxes laid upon actually existing things. In this matter we have no concern with the nationality or the domicile of the person, and as these taxes, on account of the difficulties in the details of their imposition, generally assume a more or less stable character, their capitalised value is generally found to form in economics a deduction from the price at which real property is sold or bought, although that value may be no better than an approximation. It is right, therefore, that the amount of a land tax raised abroad, provided it has anything of a stable character, should not be taken into account as if it were so much income tax already paid to another country. This is the case *e.g.* in Prussia, even as regards land tax and buildings tax in Prussia itself.

It is also probably the case with other taxes on specified objects, *e.g.* articles of luxury, or to speak accurately, on the possession of such articles, that there is in the background an intention of affecting by that means the higher incomes of individuals: and it is even possible, by the multiplication of such special taxes on specified objects, to find a substitute for a general income tax. But the question cannot be decided by reference to any such remote intention. The tax hits native and foreign persons alike, so soon as their property within the territory takes the shape described in the statute.⁹ We can pay no heed to the plea that, viewed in the light of absolute justice, persons who are domiciled in State A, but own a number of taxable subjects in State B, may be oppressed, if State B taxes income by this means, while State A levies its tax upon income in the shape of a general income tax. If a system of taxation, which shall satisfy all the demands of ideal justice, must even within one and the same State be described as a pious aspiration, still less can we look for an international treatment of liability to taxation which shall completely answer our ideas of justice. All the remedy we can attain is one that will alleviate the broader forms of unequal and double taxation.

Taxes which affect transmissions of property as such, and the conduct of

⁸ See the Prussian statute of 1st May 1851, § 18: "Foreigners who own landed property in this country are, in so far as it collectively yields an income of more than 1000 thalers, bound in respect of this sum in payment of the scheduled income tax. The same rule applies to foreigners who own manufacturing or trading establishments in this country, or have a share in such establishments." . . . § 67. "Prussian citizens are to be free of income tax in respect of income from landed property belonging to them in another country, if they show that they are liable to a taxation of a similar nature in respect of that property in the foreign country."

⁹ Cf. art. ii. (13) of the Italian statute of 24th Aug. 1877, and the comments of Esperson, Jour. vi. p. 346.

business,¹⁰ afford little material for questions of international law, except perhaps as regards certain equitable considerations, principally in intercourse upon the frontier, in which the principle of reciprocity ought to prevail.

STAMP DUTIES.

§ 113. In the matter of stamp duties,¹¹ a distinction must in truth be taken between cases in which the object is to affect the transmission of an asset of property from one hand to another, and those in which the conclusion of the bargain is the thing which it is intended to touch. In the former cases, the *lex rei sitæ* would necessarily be applied to immoveables, and the State in which the immoveable thing is situated would be entitled to levy the duty.¹² In the case of bargains, the object of which is the payment of a specified sum of money or, generally, the delivery of fungibles, that State in which the stipulated place of payment or delivery is situated would seem to be entitled to the duty.¹³ In the latter class of cases, the State in which the conclusion of the bargain took place, would raise the duty according to its own laws: as regards moveables, this may as a rule be assumed to be the real state of the law, even although as a matter of principle the duty may have been intended to fall upon the actual transmission of the property, because moveables have not as a rule such a clearly defined *situs*, that the revenue laws can with certainty attach themselves to it. But exceptions may occur, *e.g.* in reference to goods under official custody, and the example of the statute of the German Empire, of 29th May 1885, as to the levying of stamp duties, shows, in the 6th section, that in such matters regard may even be had to the place of residence of the contracting parties.¹⁴ If the legisla-

¹⁰ See a judgment of the Belgian Court of Jan. 1885 (Jour. xiv. p. 220), as to the taxation of foreign insurance companies in Belgium, according to the statutes of 30th July 1881 and 14th March 1885.

¹¹ As to English practice, see Foote, pp. 283-287.

¹² The parties will, no doubt, if the duty is at all serious, try to conclude their bargains in the State in which the immoveable thing is situated, and so render the question of no practical importance.

¹³ § 1 of the German statute, of 10th June 1869, on the stamp duty on bills, follows this principle: "These are exempted from the stamp duty: first, bills drawn abroad upon some one who is abroad, and payable abroad; second, those which are drawn in this country upon some one abroad, and are payable only abroad on sight, or within ten days after date at the latest, provided that they are remitted abroad directly by the drawer.

¹⁴ "The regular duty must be paid upon all transactions of the kind which are concluded in this country."

"Transactions concluded abroad are liable to the duty if both parties reside in this country: if only one of them does so, only one-half of the amount of the duty has to be paid. In the case of mercantile firms, the question of residence is determined by the *situs* of the trading establishment which has concluded the transaction."

Transactions, too, which have taken place by means of correspondence, either by letter or by telegram, between a place in this country and a place abroad, are held to have been concluded abroad, cf. § 9: "The obligation to pay the duty falls primarily, (1) if the transaction is concluded through an agent who lives in this country, on the agent; otherwise, (2) if only one of the parties lives in this country, upon him."

These provisions appear to be sound in international relations, and to comply with equitable conditions in so far as taxes laid upon transactions on exchange are concerned.

ture¹⁵ in this matter frequently attempts to bring both the formal conclusion of the bargain and its actual performance in fact alike within the sweep of the tax, and so makes what is truly the leading idea of the impost give place to its formal expression—the object being to proceed with as much safety as possible, and not to be set at a disadvantage with foreign countries,—individuals have in such a case full right to adhere to the formal expression of the statute. To do violence to the meaning of the legislature which is at the bottom of the statute that has been enacted, is by no means such a transgression of the statute as can involve a penalty. For instance, if the parties, to avoid the heavy duty which State A has laid upon the conclusion of transactions, betake themselves to State B, and conclude their bargain there, that is not in truth an act *in fraudem legis*. It may be that the intention which lies at the root of the statute is to tax transactions which are to come into operation in the country which passed the statute. But what the legislator has done is to take, for some collateral reason or other, the conclusion of the bargain in his own country as the determinant fact.¹⁶ To speak of defrauding the law would, therefore, be quite wrong. If that were to be so, we should have to sanction a more liberal interpretation of such revenue statutes in favour of the public (which would perhaps be more correct), and, in consequence, refrain from taxing any transactions, which were by accident concluded in this country, but were intended to have their operation or to be carried out in another country.¹⁷

It would, besides, be quite right to take a distinction between stamps for the taxation of trade and the much smaller stamps necessary for sanctioning the production of papers before some official. A contract concluded abroad must be exempt from the former, unless in its nature it is intended to have its primary operation in this country. The latter kind of stamp, however, from which a contract, concluded in this country and already stamped, would be free, will affect foreign contracts which are produced in this country.¹⁸

¹⁵ Legal systems on this matter remind us not uncommonly, as regards international intercourse, to some degree of the usages of the Middle Ages as to tolls, in which there was no idea of any economic or equitable principles, but all that was thought of was as extensive a system of robbery and exaction as possible, against which commerce struggled with all conceivable resources of evasion.

¹⁶ A judgment of the Appeal Court at Milan, of 19th March 1885 (Jour. xiv. 241), subjects to the graduated tax on registration, contracts of copartnery or association concluded abroad, if they are to be founded on in Italy.

¹⁷ See judgment of the 3rd Senate (Civil) of the German Imperial Court of 22nd Feb. 1881 (Dec. iv. p. 246): "As the question relates to a deed stamp, and a deed becomes liable to stamp duty, according to the stamp laws of Prussia, when it is completed by the subscription of both parties, and not till then, the law which decides as to the liability for stamp duty is the law of the place where the last subscription took place, where, in short, the deed as a stampable deed came into being." The provisions of the new Imperial Stamp Statute, cited in note 14, are substantially more sound and just. [But see Jour. xvi. p. 827, for a report of a decision by the Court of Cassation that the *lex rei sitæ* will determine whether an asset of property (in this case a concession for mineral workings) is or is not moveable, in a question as to the duty to be imposed upon a transmission of that asset carried out in France.]

¹⁸ The law may, no doubt, by express enactment, affect bargains which are intended to operate in this country or to be founded on here in some particular way (*e.g.* by being produced

SUCCESSION DUTIES.

§ 114. The subject of succession duty, which at the present day is often a matter of great importance, deserves separate treatment.¹⁹ It may be figured as an equivalent for the protection extended by the State to the transmission of the right of the predecessor to his heirs or legatees.²⁰ But this conception, the result of which would be to find that State, in whose territory each asset of the succession was situated, entitled to the duty, would be satisfied by a comparatively trifling payment. It could never justify a payment of a high percentage, and indeed not even of a percentage at all, in the case of a large succession; and again, it would never be reconciled with the graduated scale of duty that is exacted, according as the heir or legatee is closely or distantly related to the deceased. Another possible way of looking at the duty is to regard it as a recompense for the trouble of the officials who have to regulate the succession. In that case the *lex fori* would rule, and that State would be entitled to the duty, whose officials undertook the regulation of the succession. But this conception, too, fails if the duty is considerable, or if it is graduated. The only thing left is that any considerable succession duty should be regarded as being either an accumulated income tax, or as a joint right of succession belonging to the commonwealth, which presses especially heavily upon distant relations of the deceased, or upon persons who are not related to him at all. It is not at all inconsistent with the notion of an accumulated income tax, that at the same time a yearly income tax is being raised from the property of the living, for formidable difficulties may be urged against an unduly heavy tax of the latter description, whereas the postponed levy of it on the occasion of the opening of a succession, and in the guise of a succession

to public officers or to notaries). Cf. judgment of the Court at Pontoise, of 13th March 1879 (Jour. vi. p. 391). The Prussian stamp law of 7th May 1882, § 12, subsec. 2 *ad fin.*, provides: "If natives of this country have concluded abroad a bargain relating to an object that is in this country which is liable to stamp duty, they must, within fourteen days after their return, take out and pay for the appropriate stamped documents." On this latter provision, see the judgment of the 3rd Senate of the Imperial Tribunal of 21st Feb. 1884 (Dec. xi. No. 54).

But it is too large a step to declare, as a judgment of the French Court of Cassation of 8th May 1882 (Jour. ix. p. 524) does, that a legal document executed abroad is liable to stamp duty, if it is only to be used as a voucher for the accounts of a joint-stock company, and is thus concerned with nothing beyond the internal management of that company. By a decision of the Court of Cassation, of 5th Feb. 1884 (Jour. xi. p. 180), the French duty on insurance policies must be paid upon policies entered into by French companies abroad.

¹⁹ What is true of succession duty must hold for duties upon large donations. Otherwise, by means of donations, a man might evade payment of all duties on succession (see the Prussian statute of 30th May 1873, § 4).

²⁰ The English system makes a very sound distinction between the different points of view. "Probate Duty" is the duty paid for the legal protection which the Government gives to the executor. In this matter, the domicile of the deceased is of no consequence, but it is the local situation of the estate in question which has to be ingathered under judicial authority that decides. Accordingly, the duty is levied on the whole corporeal moveables of the succession which, at the date of death, were in England, including documents of debt payable to bearer, and on all claims which must be prosecuted in England. See Westlake, §§ 111 *et seq.*

duty, will be less felt, and is more easily managed. If it is regarded as a postponed income tax, the State in whose dominions the deceased was domiciled will be entitled to levy it, putting aside those items of property which, in a question of income tax, also follow the *lex rei sitæ*.^{21 22} If we adopt the notion of a joint right of succession belonging to the fisk, it will be more natural to look upon the State to which the deceased belonged by nationality in the technical sense, as entitled to levy the tax, and it would also be the law of this State that would determine the rate of duty. But these two conceptions cannot be sharply separated from each other. Even in the case of the annual income tax, this point of view may be recognised as having some influence, viz. the view that the commonwealth thereby to a certain extent proclaims that it is entitled to share the enjoyment of the fruits of the incomes of private citizens, although it does not claim the right within the meaning of many of our modern economists, "*corriger les fortunes*," i.e. to regulate the amount of the incomes of private individuals. That descendants of the deceased should be free of all duty, or that his near relations should be more lightly taxed, might then be looked upon as an apparently equitable modification in the increased severity of the imposition of postponed income tax in the shape of succession duty. Perhaps, then, the best course for international law to take, is an intermediate course which can, it is true, only be adopted under the authority of treaties.²³ Let that State to which the deceased belonged by nationality,

²¹ Thus the Prussian law of 30th May 1873, § 9, quite soundly enacts: "Landed estates and superiorities situated beyond the territory do not belong to the estate that is liable to duty." § 10. "Succession duty is to be levied upon the succession to landed estate, superiorities, or beneficial interests in lands situated in this country, without distinction as to whether the deceased is a native or a foreigner, or whether he had his residence in this country or not. Other estate in this country belonging to a person deceased, who at the date of his death was a foreigner, is not liable to duty, if the State to which it falls to be sent takes a similar course with regard to estate left by citizens of this country." See, too, O. Bacher, *Die deutschen Erbschafts- u. Schenkungssteuern*, Leipzig 1886, p. 202.

In the year 1882, the French Government was successful in resisting the claim of the Canton Waadt, to take into computation for the purposes of their succession duty, in the case of a person who had died in the canton, immoveable property situated in France. (See the report of the French *Direction générale de l'enregistrement* given in Jour. ix. p. 607.)

In Louisiana, for the purposes of succession duty, estates which are situated in different States are regarded as separate properties (Jour. iii. pp. 131, 132). According to a decision of the Civil Court of Mexico, of 20th September 1875 (Jour. iii. p. 225), securities over foreign estates are not reckoned for the purposes of the Mexican succession duty.

²² If the fisk of the country where the assets are situated is held to be entitled to levy succession duty on immoveables, as a consequence the *lex rei sitæ* must be the sole judge of whether a relationship by adoption is a ground for total or partial exemption; and if the *lex rei sitæ* knows nothing of the institute of adoption, then in a question of exemption adoption cannot be placed on a parity with natural relationship, although by the personal law of the deceased, or his heirs, they stand on an equal footing. So, too, Lehr, Jour. ix. p. 291, and judgment of the Swiss Federal Tribunal, of 16th January 1866, Jour. xiv. p. 376.

²³ The conflict of laws, as a matter of fact, not unfrequently results in double duty being paid. Martin (Jour. vi. pp. 126, 127) points out this hardship, and decides for the principle of domicile. In Prussia, Saxony, and Baden, nationality is the rule, domicile in Hamburg and Mecklenburg-Schwerin. See Bacher, p. 89, on the different German States (Prussian statute of 30th May 1873, §§ 9 and 10).

be, as a matter of principle, declared to be entitled to levy the succession duty, but let the State of the deceased's domicile²⁴ have a preferable right if the deceased has lived a considerable time, say five years, continuously there, reserving, of course, the competency of the State in which immoveable property is situated. That moveables situated in a foreign country should be exempt from the tax which is imposed by the law of the domicile, is unreasonable. It is a mistake to discover, in the taxation of these moveables, an invasion of the sovereign rights of the State in which they happen to be. We are not here dealing with a tax, which affects the objects as such, but rather with a tax which is laid upon an imaginary unity of property according to its value. Although legal systems used to pay more attention to the accidental *situs* of the assets, in recent times the opposite, and in our opinion the correct, theory is making itself more and more felt, viz. that moveables which are in a foreign country should be reckoned as part of the taxable estate.²⁵ The French statute of 1871 takes up this position in reference to claims of debt belonging to the succession, while the Italian statute of 1866 directs its attention to the place where the claim is payable.²⁶ But the French law is plainly a onesided law in favour of the fisk, in respect that it holds moveable property subject to the French succession

²⁴ In France, by the statute of 23rd August 1871, § 4, the actual domicile rules; the French fisk will draw its "*droits de mutation*" from the succession of a foreigner deceased, even if the foreigner has not had formal authority for establishing his domicile in France. In this case, the duty is leviable from all foreign assets, and even upon simple debts that are payable abroad, which belong to the succession; it is not, however, leviable upon corporeal articles that are in a foreign country. Before the statute of 1871, the foreign assets were in such a case not liable to the French duty, in accordance with the maxim, "*En matière d'impôt la loi n'a d'empire que sur le territoire qu'elle régit.*" (See Jour. v. p. 374, vi. p. 305, vi. p. 476, and xi. pp. 72, 73.) The question whether a claim of debt belongs to this country or to some other, is not an easy one to solve, and in our opinion cannot be solved except arbitrarily. (See on this subject the sketch by a French financial officer in Jour. iii. p. 258.) See, too, Lehr in Jour. x. p. 13, who rightly criticises the French system as illogical. One must choose, according to him, between the German system (the home of the deceased, or of the creditor, as the case may be), and the system which makes the *situs* of the asset, the residence of the debtor, the rule. A combination of the two systems, he thinks, would be unjust, and would necessarily involve double taxation. He himself declares in favour of the *lex rei sitæ*. But in no case should a mere residence, as distinguished from domicile, furnish a ground for levying succession duty. The French "*droits de succession*" have, since a decision of the administration of 1883, been levied upon policies of life assurance, paid by French companies upon contracts made abroad, notwithstanding that the company may have subjected itself to the jurisdiction of the foreign court in the matter, because the real security for the transaction is in France (Jour. xi. p. 276).

²⁵ See Jour. iii. p. 258. The German States, perhaps universally, recognise that moveable property situated in them, but belonging to a foreigner, is exempt from duty, on condition always of reciprocity. (Cf. Bacher, p. 90.) To levy duty on moveable property of domiciled foreigners situated abroad will *de facto*, as a rule, prove illusory.

²⁶ On the Italian statute, see Jour. vi. p. 302, and the Court of Cassation at Rome of 22nd Jan. 1877, there reported. A legacy laid upon the whole estate of the deceased must, according to the sound view, pay duty to the fisk of the country where the assets are situated in proportion to the value of these assets as compared with the whole estate. (Cf. decision of the Court of Cassation at Rome, 25th Sept. 1886, Jour. xiv. p. 291, and Clunet at the same place.)

duty, provided that it can be considered as situated in France,²⁷ although the succession itself is not subject to the law of France. The English system²⁸ levies legacy duty upon the whole moveable estate left by a person domiciled in England, wherever it is situated, but, on the other hand, does not levy it upon the moveable estate in England of a domiciled foreigner. Succession duty, again, is an impost upon property settled by means of a trust, and this affects property which is in England without reference to the domicile of the settler, the temporary owner or the successor.

TAXATION OF JURISTIC PERSONS.

§ 115. One special question, which in the present day is of great importance, is the taxation of juristic persons. It cannot admit of doubt that these persons must as much as ordinary individuals pay property taxes, taxes on manufactures, and stamp duties, on account of their different transactions. On the other hand, juristic persons have no real income for their own enjoyment. Their income does not in truth benefit themselves, but the individuals of which they are made up. The juristic persons are so far mere conduit pipes. The reasonable course, therefore, would be not to subject them to an income tax, or rather to take the income of juristic persons into account only in so far as it appears in the income of different individuals as part of their income, or to credit the individual in his income tax account with the amount which he has already paid as a partner of the juristic person, *i.e.* to leave alone the income which he draws as such partner.²⁹ In fact, what difference can it make to this question whether twenty people carry on a trade as simple *socii* or as shareholders?³⁰ It

²⁷ As to the way in which this is worked out in France, see Jour. vi. p. 476.

²⁸ Cf. Phillimore, iv. § 879, Wharton, §§ 80 and 643, and the accurate exposition in Westlake, §§ 114 *et seq.* [The last-named author makes the character of the settlement as a British settlement, and not the situation of the property, the test for succession duty, §§ 107, 108.]

²⁹ Ad. Wagner in Schönberg's *Handbuch d. polit. Oekonomie*, 2nd ed. ii. p. 307, recognises that the simple extension of income tax to juristic persons, and in particular to joint-stock companies, results in a double taxation. It was particularly on this ground that a bill, which aimed at the extension of income tax to joint-stock and investment companies, was in 1884 thrown out by the Prussian Abgeordnetenhaus.

³⁰ In spite of the words of the third section of the German Imperial Statute to do away with double taxation (13th May 1870), the German Imperial Court (Sen. i.) on 11th Feb. 1885 (Seuffert, 40, No. 210, see, too, to the same effect, the criminal Senate, iii. 26th Feb. 1883, *Entsch. in Strafsachen*, viii. p. 132) held that the income of a person consisting of dividends might be taken into account for income tax at his domicile, although the income of the juristic person had already been subjected to income tax at the place at which it had its seat or carried on its trade. The words of the statute are: "Landed property or a going business, and the income resulting from such sources, can only be taxed by that State in which the property is situated, or the business carried on." The judgment does not overlook the fact that in truth there will be a double taxation; on the one hand, however, it takes up the technical view that in the eye of the law the juristic person and the shareholder are distinct legal personalities, and, in the second place, it proceeds upon the object which the statute was aimed at, and the preliminary proceedings before it was passed. *Result*: a rich man, who is the sole owner of a manufactory

will not be right to affect juristic persons by an income tax except in so far as the *lex rei sitæ* is taken as a basis for its imposition. The taxation of juristic persons is on principle only defensible in so far as the taxation is regarded as an impost on production, or on particular objects, or on trade. But then taxation of that kind is no proper income tax. If, however, we find that many legal systems, even when they are dealing with the concerns of their own country alone, frequently impose a double tax on income, in so far as it comes to the individual through the medium of a juristic person,³¹ we need not wonder that, when international affairs are in question, individuals are often forced to pay twice over, that the fisk may not be prejudiced.³²

DUTIES ON COUPONS.

§ 116. Seeing that in practice so much confusion prevails between taxes on production or returns, and taxes on income, there is some justification for holding juristic persons liable in income tax, or, as the case may be, holders of shares liable to income tax under the head of a tax upon their coupons, without heed to the question whether the person who draws the income from coupons is liable himself in income tax in respect of this. The shareholder does, however, own indirectly an asset in the country which yields a return. On the other hand, it is a plain injustice to exact a coupon tax upon debentures, however much in vogue that mode of taxation may be at the present time. For by such a tax persons are affected, who seem strictly not to be liable to income tax in this country, either on the ground of nationality or of domicile. There is

in the German State A, will pay no tax upon his income from it in the German State B, in which he is domiciled: a poor widow, who owns a couple of shares in a joint-stock undertaking in State B, must pay over again in State B, in which she resides. (The judgment of the old Supreme Court of Appeal at Lübeck, on 31st Oct. 1874, was to the opposite effect, and in my opinion sounder. See Seuffert, 37, No. 33.)

³¹ For instance, in Prussia there is a double tax of the kind in regard to the net returns of all railways used for public traffic. (Cf. statute of 16th March 1867.) No doubt this tax may also be regarded as a tax upon trade.

³² The English income tax is in truth a kind of produce tax, which attaches to the income at its very source, being levied on the product itself. The person who receives the income which has thus paid the tax at its source has not to pay again. Therefore it is entirely right that the income of juristic persons which are domiciled abroad should be subject to income tax in England, but only in so far as the income has been made in England. (On this subject, and on the method of computation, see Foote, Jour. ix. p. 481.) On the other hand, the Queen's Bench Division decided (Jour. x. p. 199; *Erichsen v. Last*, 23rd March 1881, L.R. 8, Q. B. Div. 414) that a company domiciled abroad must pay income tax for telegraphic dues, raised in England, although these dues were received for submarine cables, and not for cables actually situated in England, and a company domiciled in England must pay the tax upon income made abroad (see *Cesena Sulphur Co. v. Nicholson*, 1876, L.R. 1 Ex. D. 428; *Westlake*, Rev. viii. p. 481). Such an impost goes altogether beyond the limits of a produce tax. Lately the Queen's Bench has found that foreign public trading companies are liable to income tax, in so far as they carry on business in England by means of agents domiciled there [*Gilbertson v. Fergusson*, 1881, L.R. 7, Q. B. Div. 562. *Werle & Co. v. Colquhoun*, 1888, L. R. 20, Q. B. D. 753]. See the communication by Thomas Barclay to the *Economiste Français*, of 2nd June 1888.

a certain semblance of the creditor having in his debtor a profit-yielding subject. But this is a mere semblance. The true profit-yielding subject is that which the debtor has constructed out of the borrowed capital, be it a railway, a manufactory, or the orderly and secure constitution of the State itself, in so far as the money may have been borrowed by the State to meet its own general requirements. But this actual subject is already liable to taxation, and is taxed. To tax the creditor, without considering whether he is in any true sense personally liable to income tax, and is therefore in a position to credit himself in his income tax account with the amount already paid upon his debenture, is an arbitrary proceeding,³³ which had its origin in the practice of States, which under pressure of financial difficulties sought in this way to be rid of a part of their indebtedness. Its material unfairness betrays itself in the express undertaking now so often given to State creditors, as well as to creditors of companies, that the payment of interest shall be free from all such duties. The taxation of coupons of joint-stock undertakings³⁴ does not stand altogether in the same position, because one who holds a share in an undertaking, which has its *situs* abroad, may expect higher returns some day, if the circumstances of the country improve, while the creditor can never look for more than the guaranteed interest. Those States, however, which have had recourse to such coupon taxes will have, as matter of fact, to make good the tax in the case of future loans, which are not expressly declared to be free from the tax, by giving their creditors some other more favourable conditions.

The State, besides, should not tax foreign creditors of debtors of its own country, *e.g.* corporations, and in particular railway companies, any more than it should tax its own foreign creditors.

It is an entirely different question whether the creditor has action against his debtor for the full amount of his coupons, if the State in which the latter—a railway or other joint-stock company—is domiciled, lays a duty upon the coupons of the company, draws the duty directly from the company, giving it a right, all of course in a way authorised by statute, to deduct the amount of the tax in settling with its creditors. As a practical matter, this question can only be raised if it be possible for the creditor to

³³ Ad. Wagner in Schönberg's *Handbuch d. politischen Oekonomie*, 2nd ed. ii. p. 267, maintains that there is no injustice in raising taxation upon coupons from foreign State creditors, because the payment of interest rests upon considerations of private law, the taxation upon a title of public law, the right of the State to tax. But we cannot make distinctions of this kind. All State credit rests upon the faith that the State will not unfairly make use of its rights of legislation as against the title which private law gives to the creditors in the contract of loan, and as against a foreign creditor even the State has no supereminent right. Wagner is not, however, blind to the serious considerations of political economy which may be urged against a coupon tax which shall affect foreign creditors. A considerable tax of that kind is simply a partial repudiation of the State debt. That, under certain circumstances, a "commercial transaction" may be made out of such a thing, proves of course nothing as to the justice of the rule we have stated.

³⁴ Railway preference shares with a fixed rate of interest are debentures; preferential stocks, on the other hand, are shares which to a certain extent enjoy an advantage in the division of the net drawings.

find a competent court in another State, *e.g.* where the company has promised to cash the coupons, *i.e.* specially undertaken to pay. It does not follow that, although the creditor has suffered a material injustice, he may not be obliged formally to acquiesce in it. The question rather is, By what law is the obligation to be tested? In a judgment of the 6th Civil Chamber of the Landgericht at Berlin, on 25th September 1887,³⁵ in the matter of Ottermann against the Russian Naphtha Company, Nobel Brothers, this was the point that was made prominent. In our view it is certain that, by fixing a place of payment in some other country, it was not meant to be inferred that the debtor submitted himself in each and every respect to the law of the place of payment. The judgment referred to is to the opposite effect, and it notes that in such cases foreign capitalists are expressly enticed to take part in the loan, by the exclusion of the operation of the law of the debtor's country, implied in the selection of a place of payment or performance within the legal domain of the creditor. It is not, however, practicable to withdraw at will an obligation, which really belongs to a particular territory, from that territory for all effects and purposes, and to save it from the operation of the legal system which prevails there. A judgment of condemnation, pronounced by the court of the country where payment is to be made, will in many cases be a *brutum fulmen*.

On this subject, we may notice the interesting judgment of the Ger. Imp. Ct. (i.), of 21st June 1888 (Dec. xxii. No. 4, p. 19), in the case of Ottermann against the Russian Naphtha Production Company. The grounds of decision, in conformity with the principles which we have just expounded, proceed on the consideration that a duty on coupons cannot be justified as against foreign creditors upon the footing of an income tax. But the judges lay down, at the same time, what I think a dangerous doctrine, *viz.* they make the legal possibility of imposing a tax substantially dependent on whether or not the State possesses the power of levying it. I hold that it is inadmissible so to identify right and might: it would justify any caprice you like to imagine. The inference which they draw from that doctrine in the particular case is, that, as the place of payment was within the jurisdiction of the German Empire, the Russian Government ceased to have the power, and the defenders' company must be found liable in full payment, as indeed it was. I should have more favour for a ground of judgment of which there are glimpses or indications in the exposition of the grounds on which the court proceeded, *viz.* that duties of this kind subsequently imposed on the creditor must be regarded as inconsistent with *bona fides*, and unworthy of international recognition. But, see a previous judgment of the same court, on 4th October 1882 (Dec. ix. No. 2, p. 3), in which, following the foreign law (Austrian) which was there in question, the deduction in question was declared unlawful in relation to the foreign creditors of a private company. (See below, the discussion of the subject of payment in connection with the law of obligations.)

³⁵ Affirmed recently on an appeal by the Kammer Gericht.

NOTE D. ON §§ 109-116.

LIABILITY OF FOREIGNERS AND FOREIGN COMPANIES TO TAXATION.

[The imposition of income tax in Great Britain is regulated by the Property and Income Tax Act of 1853 (16 and 17 Vict. c. 34). By § 2, schedule D, of that Act, duty is payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere;" and again, in the same schedule, "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom.]

The two conditions, therefore, either of which will warrant the imposition of the duty are, (1) residence in the United Kingdom, in which case the person resident is liable to be taxed on his whole income, wherever it takes its rise; and (2) the carrying on of business in the United Kingdom, in which case the profits of the business are liable to the tax, although the person drawing the profits be no subject of Her Majesty, and be resident abroad. What is true of persons is true of legal persons, and, among them, of trading companies.

As regards the question of residence, the courts have held that a sailor, who is himself absent for the whole year, may yet be liable, if he has a dwelling-house in Great Britain, in which his wife and family live (*Rogers v. Sol. of Inland Revenue*, June 28, 1879, Ct. of Sess. Reps. 4th ser. vi. 1109). Again, a British subject who had his only place of business and two houses, a town house and a country house, in Italy, was owner of an estate in Scotland, where he lived for nearly four months in the year. The court held that a man might have several residences, and that this person had a residence in Scotland, and so was liable in income tax. As a person carrying on business in Italy and resident there, he had paid taxes to the Italian Government, including a tax on the profits of his business. In spite of this, no deduction was allowed to him in Great Britain (*Lloyd v. Sol. of Inland Revenue*, March 12, 1884, Ct. of Sess. Reps. 4th ser. xi. 687). The principle followed in this case had been determined in 1817 in England, in the case of *Att. Gen. v. Coote* (4, Price, 183), on the terms of an older statute, similarly worded.

Under the second head, viz. the carrying on of business in England, several cases have been decided in the English courts, some of which have already been cited in notes appended to the text. Foreign firms, *i.e.* firms with foreign domiciles, or consisting entirely of foreigners, with their head offices in a foreign country, have been held liable to pay income tax if they did business in Great Britain by means of agents there, who made

contracts with British subjects. The amount assessable is estimated on the transactions concluded by these agents. The principle is stated by Jessel, M.R., in the case of *Erichsen v. Last* (Telegraph Company of Copenhagen), 1881, L.R. 8, Q.B. Div. 414. The company there had stations in Great Britain, at which telegrams were handed in and money taken from British subjects, but none of their lines were on British territory. The Master of the Rolls says that contracts with British subjects made in England are sufficient to raise the liability to the tax, and illustrates the case by putting the instance of foreign carriers, whose services to their customers were performed entirely out of this country. Still, if they took orders in Great Britain they would be liable. This principle is adopted in the subsequent cases of *Pommery v. Apthorpe*, 1886 (56, L.J. Q.B. Div. 155), and *Werle v. Colquhoun*, 1888 (L.R. 20, Q.B. Div. 753), which were both cases of foreign wine merchants, who made sales in this country through agents. On the other hand, a firm established at New York, where it had its principal seat, with a branch establishment in England, at which, however, no sales were made, but only purchases of goods for exportation to America, where they were sold, and where all the profits were made, was held not to be liable to the tax (*Sulley v. Att. Gen.* 1860, 5, Hurl. and N. 111). If such a company were to be liable, any customer of an English trader would be liable, a result which the Chief Justice (Cockburn) said would be most serious for English trade.

As regards death duties, there is not much to be added to the observations of Mr Westlake (pp. 121 *et seq.*). The distinctions there drawn between probate duty, *i.e.* the tax on the whole estate which passes to the executor or administrator appointed in Great Britain, who takes up the estate of a dead man; legacy duty, the tax levied in the case of persons domiciled in Great Britain upon the entire amount of their legacies and residue, whether these are or are not received under a British grant of administration or confirmation; and succession duty, or the tax upon the transmission of property in consequence of the death of some person, who was not the absolute owner, and from whom the person now taking the property does not derive his title, that title being conferred by some British settlement—these distinctions are well marked and illustrated by decisions.

That legacy duty is not exigible in the case of persons domiciled abroad is certain (*Att. Gen. v. Thomson*, 1845, 4, Bell's app. 1, and *Wallace v. Att. Gen.* 1865, L.R. 1, Ch. App. 1). But, on the other hand, where the estate is placed in trust under a British settlement, *i.e.* where it stands in the names of trustees in consols or other property which has a *quasi* local settlement, then succession duty is exigible upon it (*Att. Gen. v. Campbell*, 1872, 5, E. & J. App. 524). The same principle was applied in the court of Scotland in the recent case of *Duncan's Trs. v. McCracken*, March 20, 1888 (Ct. of Sess. Reps. xv. 638), where an estate settled by a domiciled foreigner in a Scots trust, *i.e.* in Scotsmen as trustees, who invested it in the public funds, for life rent to one and fee

to another person named, was held liable to succession duty on the death of the liferenter. So, too, in the case of *Littledale's Trs. v. Ld. Advocate*, Nov. 24, 1882 (Ct. of Sess. Reps. 4th ser. x. 224), an estate which had been conveyed by a trust *inter vivos* to trustees, the majority of whom were domiciled in Scotland, and had by these trustees been invested in heritable security in Scotland, for the liferent of the truster, and on his death for his children in fee, was held liable to succession duty on the death of the truster.]

Third Book.

THE FORMS OF LEGAL TRANSACTIONS.

THE RULE "*locus regit actum.*" ORIGIN OF THIS RULE *a priori*?

§ 117. It is a rule admitted by almost every authority,¹ since the times of the Middle Ages, that the form² of a legal transaction must be recognised as good all the world over, if it is in harmony with the laws of the place in which it was entered into.³ But yet there are disputes as to the extension of this rule to all forms, or its restriction to certain specified forms, and also as to whether the observance of the *lex loci actus* is to be exclusive or only permissive.

Just as little unanimity is there as to the grounds on which this rule can be justified. According to some, a distinction must be drawn between the laws relating to persons, to things, and to acts, and no other law can be applied to the last class than that which obtains at the place where the transaction is entered into. This is the old statute theory.⁴ According to the theory of others, all persons, in so far as the transactions into which they enter are concerned, are necessarily subject to the authority of the State in whose territory these transactions take place, and the rule in

¹ L. Duguit's work, "*Des conflits de législations relatifs à la forme des actes civils*," Paris 1882, is a recent monograph which has been worked out with much diligence, and contains many interesting observations on the forms of legal transactions in private international law. We must, however, hold that by far the greater part of the results at which the author arrives, whether *de lege lata* in French law, or *de lege ferenda* as regards the rules which are desirable in a system of international law, are mistaken: indeed, the *communis opinio* has long since decided against the most important of his rules.

² This rule is extended to the substance of the legal transaction. In this paragraph we have not as yet anything to do with that matter.

³ Thöl recognises the rule only in a small sphere, § 83, in reference only to those legal transactions which have been entered into with the assistance of public functionaries, or drawn solely by such persons: and Haus, pp. 45, 60, limits its operation still more strictly.

⁴ Vinnius, Comm. in Instit. ii. § 14; Phillips, *D. Privatr.* i. p. 192; Matthæus, *de auctionibus*, i. 21, No. 38; (v. Grolmann) *Ueber Holographische Testamente*, p. 14.

question immediately follows from this consideration.⁵ Many derive the rule, not from any forced subjection of the parties to the laws of the country where the transaction takes place, but from a voluntary submission on their part (Autonomy).⁶ Finally, there are others who refer the rule to a general customary law.^{7 8} This view, to which most modern authors have given their adherence, is the only true one.

The first ground assigned proves too much, and, therefore, nothing. Since all legal relations are truly determined by acts of some kind, the law of the place in which that act is done must be the only one that can be applied in international law—a position which the adherents of this view do not adopt.

The second rests, in the first place, upon a false assumption, and if this assumption be conceded, upon an erroneous conclusion, as Wächter has shown.

The assumption that the State desires to subject all acts that take place in its territory to its own laws is incorrect; for it does not follow that it desires to do this in every relation because it has the power to do it; and, if it did desire it, the question would still remain why this determination should be respected by another State in which the transaction may be put forward for recognition.⁹

But it is just as difficult to acknowledge the soundness of the third ground. The laws which prescribe the forms of legal transactions do not leave anything to the will of the parties. If the law requires a particular form, the parties cannot agree to contract without it; and, in the same way, they cannot agree to contract according to the forms of any foreign country they please.¹⁰

Before, however, we go to prove that this rule of law owes its origin

⁵ Glück, *Pandecten*, i. p. 291; Ricci, *Entwurf von Stadtgesetzen*, pp. 528, 529; Danz, *Privatr.* i. § 53; Ziegler, *Dicastice Cond.* 15, § 7; Witzendorf, *de Stat.* xx. No. 8; Kori, iii. p. 4; *Archiv. für die Civ. Praxis*, vol. xxvii. p. 309. Those also are to be reckoned among this class who treat the settlement of the question by the *lex loci actus* as something natural, e.g. Phillips, i. p. 192.

⁶ Mevius in *Jus. Lub.* qu. 4, § 14; P. Voet, 9, 2, No. 11; Petr. Peck, *de Test. Conjug.* L. iv. c. 30, No. 1; Colerus, *de Proc. Execut.* i. c. 3, No. 182; Haus, in so far as he recognises the rule at all; Pardessus, v. No. 1485; Eichhorn, *D. Privatrecht*, § 37.

⁷ Gaill, iii. 123; Mynsinger, *Observ. Cent.* v. obs. 20, Nos. 4, 5, says, "*Vulgo receptum est*," and certifies that as the practice of the privy-council of the empire; Kierulf, *Civilr.* p. 81; Hartogh, p. 69; Wächter, ii. p. 368; Mittermaier, i. § 31; Savigny, § 381, Guthrie, p. 319; Gerber, § 32; Beseler, i. p. 155; Schöffner, p. 98; Fœlix, i. p. 164, especially 172; those, too, who like Storey, § 261, appeal to the *Comitas gentium*, may be counted here. Cf. also Alef, No. 44; Wheaton, § 90, p. 121; Burge, i. p. 29.

⁸ That this rule is not derived from the Roman law, an assumption made in earlier times (e.g. by Pütter, *Rechtsfälle*, iii. pt. i. No. 248), we have already sufficiently shown (cf. § 12).

⁹ Duguit (e.g. p. 205) proceeds upon the assumption, for which he has adduced no proof, that *a priori* all States, except the State to which the parties belong, or in which the thing in question is situated, are compelled to recognise a legal transaction which has been concluded in the form of the *lex loci actus*.

¹⁰ Wächter, ii. p. 406.

solely to an universal law of custom, which has won its way to the front by reason of its convenience, it will be necessary to take Laurent's theory (ii. § 233) into consideration. He has undertaken to demonstrate in quite a peculiar way *a priori* the absolute validity of the rule "*locus regit actum*," and he has in some quarters found disciples. He argues that, as the forms of legal transactions are intended to serve as a proof of a free and genuine declaration of the consent of the parties being given to the transactions, it is natural and obvious that the legal system of the country, in which this declaration of will or consent takes place, should prescribe the forms and securities necessary for the attainment of this object. This conclusion, however, which moves Laurent to give to the rule "*locus regit actum*" an imperative or coercitive force—although he must needs set it aside in some matters, *e.g.* in the transmission of real rights, and in order to set it aside must make the most artificial distinctions¹¹—is after all a fallacy. No legal system has any interest in the proof of a legal transaction except that one in the territories of which it is sought to put it in force. The law of the country in which it was made¹² has no interest in it, and, if we are to speak of what is natural, every court would test the proof by its own legal system, *i.e.* the *lex fori*. Is it to be supposed that the proof of a transaction between Germans, concluded in Africa, can possibly be tested in Germany by African usages? Can any one believe that the Romans would ever have recognised the testament of a Roman citizen if made in any but the Roman form?

THE RULE "*locus regit actum*" RESTS SOLELY ON CUSTOM.

§ 118. It is in fact impossible, it is a vain endeavour, to trace the origin of the rule "*locus regit actum*" *a priori*, or to show that it follows as a conclusion from any first principles of law. The form of a legal transaction is one of the necessary conditions of that transaction itself, and must therefore be judged by the same law as that to which the particular legal transaction itself is subject.¹³ All that it is possible, then, for us to do is to refer the rule "*locus regit actum*" to a general law of custom.¹⁴

¹¹ Cf. § 240 and also § 255, in which the act of recognition of an *enfant naturel* is treated, as regards form, as being dependent on the *Statut personnel*. How that is to be reconciled with the recognition of the sovereignty of the country in which the act is done, is a riddle the solution of which Laurent has not as yet given us.

¹² Laurent's recourse in this matter to the territorial sovereignty—"Le souverain de chaque pays seul a la capacité de régler les formes"—is wrong, and is not supported by any proof. The conclusion of legal contracts cannot be put on a par with the management of the police and of the criminal law.

¹³ To this effect, see v. Wyss, *Zeitschr. f. schweiz. R.* ii. p. 97; Haus, § 84; Muheim, pp. 89, 90; Phillimore, § 625; Judgment of the Supreme Court of Wolfenbüttel, 8th March 1858 (Seuffert, 20, No. 1).

¹⁴ Laurent, ii. § 236, takes the view that this is a desperate and unlaywerlike account of its origin: Stephano Napolitani describes the maxim "*locus regit actum*" as a degradation of the scientific level (Palermo 1883, p. 22). I cannot appreciate such an argument as this.

The existence of such a law has already been demonstrated by Wächter by means of numerous quotations, and we have the less hesitation in accepting the fact of its existence, since there are such weighty considerations of convenience to explain the origin of such custom. The origin of it, however, did come about in the following way.

There are some passages in the law of Rome which at first sight seem to imply it; and we may believe that there happened here, what happened with so many other passages which were employed in the Middle Ages and later to establish quite arbitrarily rules of law that have a very recent origin. However, in the present case we have not to deal with a rule of Germanic law, which required to be strengthened and saved from destruction by an appeal to the law of Rome; this new rule was rather in plain contradiction to earlier legal theories, for according to them the forms of legal acts were determined by the personal law of the contracting parties, and that so absolutely, that if these parties were subject to different personal laws, the forms of both had to be observed. It is therefore highly improbable that this rule was in this way read into the Roman law, as no doubt did happen in other cases.

It is often laid down, that this proposition of law took its origin in the sixteenth century, or not much earlier. In reality, however, it is considerably older. As early as the days of Cinus of Pistorium, for instance, it is spoken of as *communis opinio*¹⁵ that the *lex loci contractus* is to determine the *litis decisoria* (in contradistinction to the *litis ordinatoria*, i.e. the rules for the form and course of procedure); that author hesitates only in the case of the form of a testament, and remarks that opinions are divided on that question, some being inclined to respect the law that prevails at the place where it was drawn up, some the law of the place where the thing conveyed is situated. The same deliverances may be found in Albericus de Rosate (de Stat. p. ii. qu. 8), Petr. de Bellapertica,¹⁶ Paulus de Castr.,¹⁷ Ralph Fulgosius,¹⁸ and Petr. de Ravenna.^{19 20}

It is a fundamental principle of all these older writers, as we have already noticed, that a *Statutum* binds none but subjects, and accordingly the legal transactions concluded by foreigners in this country are not in themselves subject to the laws of this country. But they looked upon the rule "*locus regit actum*" as an exception, and for the most part justified it by the remark that the *sollennitates actus* belongs to *jurisdictio voluntaria*, and by a generally recognised axiom that the transactions attested before one court must be held by all other courts as well attested. (Cf. Cinus de

¹⁵ Ad Leg. 1, C. de S. Trin.

¹⁶ Ad Leg. 1, C. de S. Trin.

¹⁷ Ad Leg. 1, C. de S. Trin. No. 11.

¹⁸ Ad Leg. 1, C. de S. Trin. No. 21, 18.

¹⁹ Sect. 4, § 75, in the Tractatus Ill.; J.Ct. de Stat. fol. 388, p. 2.

²⁰ Durandus, too, Spec. Jur. L. ii. p. 2, de testamentorum edit, § 12, No. 16, discusses the forms of testaments. Bartholus de Salic in L. 1, C. de S. Trin. No. 12; Bald Ubald, ad L. 2, C. de S. Trin. No. 83; Bartholus, ad L. 1, C. de S. Trin. No. 14, proposes that the *lex loci contractus* should alone determine the *sollennitates actus*.

Pist., Petr. de Ravenna, Bald de Ubald, Durand.) Nothing, therefore, is more likely than that the rule "*locus regit actum*" arose in this way. No other form of concluding legal transactions was in use in the Middle Ages than a judicial completion of them;²¹ where private documents are found, the form of the transaction is not determined by the document; all that is thereby effected is the preservation of proof of the transaction. These lawyers had no occasion, therefore, in discussing this rule, to take any notice of private documents.²²

Now, as far as regards the conclusion of contracts before a court, it is plain that the object of this form, by which a legal transaction was either concluded in open court, or, by being recorded in the books of the court, was placed within the reach of every man's knowledge, was either to give in the particular case a special attestation to the transaction which was held to be necessary, or at the same time to give it a special publicity. This end, which the prescribed judicial forms had in view, taken along with the theory that prevailed in the Middle Ages, that the emperor was the true superior of all Christendom, and all judges derived their jurisdiction, at least indirectly, from him, necessarily caused the attestation of a legal transaction before any judge in Christendom to be recognised as valid by any other tribunal. An appeal might also be made to the well-known axiom of Roman law: "*Acta facta coram uno iudice fidem faciunt apud alium.*" It was, however, natural that every judge should, in attesting any such transaction, proceed according to the laws and rules of process recognised in his own country, and if there had been any attempt to recognise the variety of particular usages and customs, the benefit of these public instruments would have been very much restricted, so endlessly various, at least in detail, were the forms of judicial procedure.

To these considerations we may add this fact. The forms which were used in the judicial completion of a contract were, as a rule, formed upon the model of the forms of process; a striking example of these is the introduction of the *instrumenta quarentigiata*, by which the creditor was empowered to recover his debt forthwith from the debtor, who was by anticipation formally adjudged to be due the debt, by means of a *parata executio* (Briegleb, i. p. 67). Now, no one has ever doubted that the forms of a suit must be determined by the laws of the place where the court is situated. Nothing was more natural than to extend this rule to processes

²¹ It is not meant that the course of procedure to be followed by the courts of different countries was determined by the same forms; the inference that is drawn rather assumes a variety of forms.

²² Briegleb, *Ueber execut. Urkunde*, pt. i. p. 30. "The use of private instruments was in the lowest credit, and in consequence a notarial instrument was attached to every transaction that was of the slightest importance.

According to Baumeister (*Hamburgisches Privatr.* i. § 10, p. 64), private instruments were first used as articles of evidence in Hamburg at the end of the fifteenth century.

where voluntary jurisdiction was conferred, if these processes were conducted according to the forms of litigious jurisdiction.²³

What was true for judicial transactions would easily be extended to deeds or transactions before witnesses, in the confused state of legal conceptions in the Middle Ages.²⁴ The tribunal here really consisted of a number of credible persons who were members of the community and could bear testimony to all that passed, while the presiding judge had no duty save to attend to the formal conduct of the business.

THE RULE NOT APPLICABLE TO THE CONSTITUTION OR DISCHARGE OF
REAL RIGHTS IN IMMOVEABLE OR IN MOVEABLE PROPERTY.

§ 119. This explanation is confirmed by the exception, which all writers of the Middle Ages make, that in conferring real rights to landed property the laws of the place where the property is situated alone decide.²⁵

Considerations of expediency, which we can certainly adduce for this exception, could not very easily have produced a *communis opinio* on this point. But in accordance with the theory of development which we have assumed, the matter is very simply explained by the fact that in the later Middle Ages, in litigious suits and processes of voluntary jurisdiction about real property, the tribunal of the place where the thing was, was alone competent, and therefore the forms in use before another court could never enter the question at all. We shall see that where the heir was held to be an universal successor, and in that character to represent the person of his predecessor in all questions of property, and where, therefore, the right of succession did not substantially depend upon the nature of the particular assets of the estate, the forms of testaments were subject to the general rule "*locus regit actum*;" but where, on the contrary, the law of succession did no more than supply a particular means of acquiring articles that belonged to the dead man, the forms of testaments were determined by the *lex rei sitæ*.

The acquisition of real rights in moveables and the loss of these necessarily constitute, as we shall hereafter see, a second exception. That these are but seldom mentioned by authors of the Middle Ages and of a later date is, however, explained by the fact that, on the one hand, in the Middle Ages there were many actual and legal obstacles²⁶ in the way of

²³ Cf. the discussion in Cinus de Pistorio in L. un C. *de confessis*; Bartholus, in L. 15, D. *de re judicata*, 42, 1, § 1, No. 8.

²⁴ Savigny gives an instance, History of Roman Law, i. § 27, p. 128. As a general rule, however, the imperfect organisation of the machinery of States in the Middle Ages makes the distinction between witnesses and an official a very doubtful one. If, for instance, it is provided by statute that transactions of a particular kind shall take place before two members of council, who may be chosen at will by the parties, are these persons witnesses, or do they constitute an official board?

²⁵ Cf. *infra*, the discussion of real rights.

²⁶ We may remember the axiom: "Hand must guard hand."

following out by process real rights to particular pieces of moveable property, and such questions therefore were not likely to be brought before foreign courts; on the other hand, there were not many instances of forms to hamper the transference of real rights to moveables. In the single case that is pertinent in this connection, if the heir is not held to be an universal successor, and where therefore we may consider what right can be acquired by testament in the moveable assets of a succession, the fiction, which all writers of the Middle Ages who have discussed the conflict of statutes of succession have adopted, comes into play—viz. that moveables follow the person, and therefore are held to be present on the spot where the testator declares his last will, at the moment when he draws up his testament.²⁷

OTHER LIMITATIONS? LIMITATION TO INSTRUMENTS OF OFFICIALS OR NOTARIES? CAN THE RULE BE MAINTAINED IN ANY COMPREHENSIVE SENSE?

§ 120. The expressions used by the oldest authors on this subject make it quite plain that they do not confine the rule to the form of judicial or even notarial instruments. Any such limitation, in view of the impossibility of distinguishing between the character of a witness and that of an official person, would in reality have been inconsistent.²⁸ Almost all the authorities lay down the rule in that wider sense, in which it extends to extra-judicial forms, and we can have no hesitation in affirming a customary law in this sense also.²⁹

²⁷ On this question see *infra*, discussion on the law of succession.

²⁸ Cf. citations *supra*, and Alb. Brun. *de stat.* x. § 56; Alb. de Rosate, sect. ix. qu. 46, § 1 *et seq.*

²⁹ Cf., besides the former citations, Alexandr. Imol. Cons. L. v. cons. 44, Nos. 20, 21; Jason Mayn, Cons. vol. iii. cons. 59, Nos. 1-3; Christian, Decis. vol. i. dec. 283, No. 1, decis. 200, Nos. 35, 37; Huber, § 15; Hert, iv. § 10; Rodenburg, iii. p. 2, c. 2, §§ 5-7; J. Voet, *de stat.* § 13; Burgundus, iv. 7; Christianæus, in *leg municip. Mechl.* tit. 17, art. 1, No. 11; Everhardus, Cons. vol. ii. cons. 28, No. 80; Hartogh, p. 1 *et seq.*; Henr. de Cocceii, viii. § 7; Hofeeker, *de efficacia*, § 28; Ant. Matthæus *de auctionibus*, i. 21, No. 38; Molinæus, in L. 1, C. de S. Trin. p. 6; Alderan Mascardus, Concl. 6, No. 22; Dassel ad Consuetudines Luneburgenses, c. 8, No. 7; Seuffert, Commentar. i. p. 248; Wening-Ingenheim, § 22; Günther in Weiske's *Rechtslex.* iv. p. 737; Reinhardt, Supplement to Glück's *Pandects*, i. 1, pp. 31, 32; Mühlenbruch, § 73; Casarejis, *disc. de commercio*, 43, No. 19; Stryck, *de jure principis in territorio alieno*, c. 3, Nos. 18, 30; Malblanc, *Princ. Jur. Rom.* § 66; Cochin, *Œuvres*, v. p. 697; Holzschuher, *Civilr.* i. p. 67; Mittermaier, *D. Privatr.* § 31. Cf., too, Burge and Story; Casanova, p. 403; Wharton, § 676; Westlake, p. 39, who speak to the English, Scottish, and American practice. Unger, *Oesterr. Privatr.* i. p. 205; Code Civil, arts. 47, 48 (as to *Actes de l'état civil*), art. 999 (as to the forms of testaments); Klüber, *International Law*, § 55; Weiss, p. 521; *Allgemeines Preuss. Land Recht*, i. 5, § 111: "The form of a contract is to be determined by the law of the place where it was executed." A judgment of the Supreme Court at Berlin, of 3rd April 1857 (Striethorst, xxiii. 352), remarks that it must not be supposed that the Allgem. Preuss. Land Recht intended to do away with the rule of common law—viz.: "the form of every legal transaction is to be determined by the laws of the place where it is made"—because it did not set out an universal rule to the same effect. Cf. judgment of the Supreme Court of Berlin, of 13th June 1857 (Striethorst, 24, p. 370). Blunt-

The limitation which some authors (*e.g.* Thöl) impose upon this rule, by confining it to instruments executed before foreign officials,³⁰ must be rejected as irreconcilable with actual existing usage. It would, besides, do much to lessen the benefits of the rule, which are universally admitted; legal transactions could in that state of matters only be entered into in a foreign country before an official, according to the forms in use there. No doubt it may be objected (Thöl) that the object of many of the laws dealing with the forms of legal instruments, in so far as expediency is concerned, is to be explained on the footing that their intention is to prescribe the form of legal transactions for all natives, without making any distinction as to the place where the legal act took place. But this reasoning, if it were universally applicable, would make even the transactions entered into before foreign magistrates invalid, if it should happen that these officials did not make use of the same formalities as ourselves. The forms which our laws require to be observed in instruments executed by our magistrates, are held to be as essential for the attestation and legality of these acts as those which they prescribe for the validity of private transactions. What is true of one class must therefore apply to the other also. *Quid juris*, if native law does not permit some particular legal transaction except before a court, while it is impossible in the foreign country to complete it

schli, *D. Privatr.*, i. p. 12, iii. 1; Renaud, *D. Privatr.* i. § 42, iii.; Oppenheim, *Völkerrecht*, p. 402; Treaty between Prussia and Lippe, of 18th March 1857, art. 32 (Prussian Collection of Statutes, 1857, p. 289); Civil Code for the Kingdom of Saxony, § 9: "The forms to be observed in a legal transaction, are determined by the laws of the place where it was entered upon, but it will be sufficient to observe the law of the place in which the transaction is to come into operation." Hanoverian Statute of 29th October 1822 (G. S. 1822, i. p. 381), § 3: "Parties may also enter upon legal transactions of purely voluntary jurisdiction" (*i.e.* by the 1st and 2nd sections of this statute, transactions which do not require any previous *causæ cognitio*, and do not belong to what is called mixed voluntary jurisdiction), "before a foreign court as well as a court of this country, always, of course, provided that they observe the formalities prescribed there." The statute includes, in acts of purely voluntary jurisdiction, all those that depend solely on the free-will of the parties, and to this class, by special enactment, testaments and other instruments *mortis causa*, are declared to belong.

³⁰ Duguit's view is peculiar. He attempts to show (p. 32) that in regard to the rule "*locus regit actum*" French law is in sharp opposition to that of Italy; in French law, he says, the rule has simply the force of a personal statute, and is only applicable to the judge or notary who draws up the instrument: and therefore the *lex domicilii* of the party was always applied, except in cases in which the acts of foreign officials were to be regulated by the *lex loci actus*, in so far as form was concerned. He adduces, however, no proof for this proposition, which certainly must have a presumption against it. That some authors attempt to put all rules of law under the category either of *statuts personnels* or *réels*, does nothing to support his proposition. Nor does the fact, that the application of the rule "*locus regit actum*," by which the law of the domicile can now and then be evaded, causes much difficulty to the older authors in view of many of the specific directions of the so-called personal statute. The doctrine ascribed by Duguit to the older French jurisprudence is also, he says (p. 22), the rule of the Code Civil, while the recognitions of the rule "*locus regit actum*," which we find in the code in connection with the important matters of marriage and testaments, are to be looked upon as singular and exceptional cases. As Duguit himself shows, this leads to results that are very dangerous to commerce. According to him, it looks almost as if we must assume, in cases of doubt, that the legislator intended to enact what would be, from a practical point of view, a failure.

judicially, because the courts there do not possess the voluntary jurisdiction, which is necessary to enable them to deal with the case in question? In conformity with this reasoning, we should have to deny validity to all transactions entered into before the foreign officials, who did not possess the special qualifications which native law requires of the officials who are entitled in this country to give validity to the execution of such transactions.

The observation which is also made on this point (Thöl), to the effect that by means of our maxim we are claiming conventional recognition for a very considerable body of legal rules, the application of every one of which to international questions must be separately tested and analysed, is not to the point, seeing that it is this conventional recognition that constitutes the maxim itself. Whenever we have to do with a legal rule, which either expressly or impliedly refuses to be applied in an international sense, then conventional recognition has nothing to do with it, and cannot have. For instance, if by statute certain contracts are only recognised as valid if they are executed before a judge, qualified either in respect of the persons or of the subjects involved to superintend them, validity is denied to any transaction concluded in any other way,³¹ and the like holds if it is prescribed by special enactment that a transaction shall only be valid under certain forms prescribed by native law, and the transaction is concluded abroad under other forms. Legislators have had no difficulty in recognising the rule to the extent we demand in comprehensive enactments pervading entire codes and treaties, and applicable to future as well as to existing laws.³²

LIMITATION TO FORMS WHICH ARE USEFUL MERELY *in modum probationis*?
LIMITATION TO EXTRINSIC FORMS?

§ 121. According to another view, the rule is to be recognised in so far only as it deals with forms which exist *probationis causa*.³³ We must, however, reject this limitation also. Of course, if it is provided by statute that a particular transaction can only be entered upon in a particular form, such a transaction in any other form than that so prescribed cannot be received in evidence; but this provision, besides providing means of proof, necessarily protects the parties from hastily concluding their transaction, bound up as it is with circumstantial and striking solemnities. Otherwise we should have to conclude that, if the consent of the parties to the conclusion of any

³¹ Cf. note 2, Law of Hanover of 29th October 1822 (§§ 1-3), whereby transactions to which are limited, by reason either of the persons or of the subjects concerned, to some particular court, cannot be entered upon before foreign courts.

³² See Fœlix, i. p. 176, and again, as to the numerous statutory provisions, pp. 186 *et seq.*

³³ Gand, No. 350-358, Bouhier, cap. 28, No. 1. The reasoning on which he proceeds is peculiar. He thinks that, as the notary or judicial person who executes the instrument is personally bound to observe the forms prescribed by his own law, that form constitutes a personal statute which must be recognised everywhere. See Boullenois, i. pp. 497, 498.

contract were proved by some means other than those provided by the statute even more clearly than the statutory means could ensure, the contract must be recognised as binding. But every statute which prescribes the forms of a legal transaction has some end beyond that of insuring means of proof; the limitation proposed to be put upon the rule will therefore disappear of itself.

Further, there seems to be no appositeness in distinguishing between the intrinsic and extrinsic form of a legal transaction.³⁴ The form of such a transaction consists in that which the contracting parties must do in order to give expression to their will in the way required by law, and in nothing else: from this definition of form, as that in which the pleasure of the contracting parties must find its expression—a notion which entirely excludes any dependence on the will of any third party—it follows that any essentials of such a transaction, the observance of which is not dependent on the will of the contracting parties, cannot be dealt with as forms.³⁵

When the consent of a third party is required by law, that is to be considered as much part of the matter of the contract as the consent of the original contracting parties. There is an apparent exception in the case where, by law, the consent of a third person cannot be refused, but in such a case that person has no free will, and his consent serves merely to facilitate proof, and to guard the contracting parties from hasty procedure. We have nothing to do, therefore, in this connection with what are often described in French law as "*formes habilitantes*."

But if, on the other hand, we were to understand, like some authors, the forms of legal transactions or acts to mean all that a legal act requires in order to give it force and validity, then, since all questions of law arise from some legal transaction, the whole system of law would require to be treated of under the title of the form of legal transactions, as, for instance, may be seen in Fœlix's work (p. 162). But it is impossible to apply the rule "*locus regit actum*" to the forms or solemnities of legal transactions in that wider sense; the course adopted is to limit the forms to which this rule is to apply to that class that serve to prove the will of the parties. But, since every form serves this purpose, this limitation is either unimportant, or, if it is thought to indicate those which do nothing more than serve for proof, misleading. As forms in this sense do not, strictly speaking, exist at all, arbitrary and unjustifiable exceptions to our rule will be made.

For instance, by common law the provisions of the *Senatus Consultum*

³⁴ So Merlin Répertoire, v. *Loi*, § 6th, No. 7. Boullenois, i. 446. Fœlix, i. p. 161. Massé, ii. pp. 121-126. On the other hand, a distinction may very well be taken between the intrinsic and extrinsic element of a legal transaction (Weiss, p. 521), and under the latter forms may be comprehended.

³⁵ It may be, no doubt, that the legislature sets up troublesome forms and solemnities for many kinds of legal transactions, with the view of rendering such transactions void in many instances, e.g., to protect its subjects from entering on donations without full deliberation. But parties, if they seriously desire to overcome the difficulties connected with form, can always do so.

Velleianum are merely provisions to limit the form of undertaking suretyship in the case of a woman, since it needed, in order to make the surety valid, that the woman should previously have been informed as to its meaning by a lawyer, or should ratify it by the form of an oath. But no one can say that these provisions exist merely as means of proof, for by them the female sex is protected against hasty acts. Our opponents, then, go on to pronounce these to be no mere external forms of legal transactions, and hold, therefore, that the rule "*locus regit actum*" is not applicable.³⁶ But the same thing may be said of all forms—*e.g.* of the necessity of writing.

LEGAL TRANSACTIONS CONCLUDED IN ANOTHER COUNTRY *in fraudem legis.*

§ 122. The restriction, too, which many authors adopt, to the effect that a legal transaction, valid by the *lex loci contractus*, is not to be recognised if it has been entered into in a foreign country *in fraudem legis domesticæ*—*i.e.* in order to withdraw it from the operation of some law that prevails in the native country of the parties—is, as Wächter has shown, *ii. p. 413*, without foundation.³⁷ It is lawful to enter into legal transactions in a foreign country under the forms that are valid there, and it is impossible that any fraud can be found in the case of this legalised privilege. An act is held to be *in fraudem legis* only if the rule of law is incorrectly expounded, or the state of facts to which it is to be applied is suppressed or misrepresented. Neither can be asserted of the case we have put.³⁸

Still less can anything depend upon whether it was possible for the parties to observe any other law than that which prevailed at the place

³⁶ The decision of the Royal Court of Paris, of 15th March 1831, which is assailed by Fœlix, *i. pp. 219, 220*, explains itself on this ground, if not on the grounds assigned by the court. The question was as to a surety undertaken by a Spanish woman in France, and it was disputed by the woman on the ground of the provisions of the Roman law still valid in Spain. The court held that, as the real property pledged by the guarantor was situated in France, the capacity of the woman to pledge it must be determined by French law, and generally, that contracts concluded in France, which were sought to be enforced in France, must be interpreted by French law. An appeal was dismissed without a decision on the real question of law, on the ground that the judge had not gone against any law of the land.

³⁷ P. Voet, *cap. 2, § 9, No. 9*. Weber, *Naturl. Verbindlichkeit*, § 62. Thibaut, § 38. Mühlénbruch, § 63.

³⁸ Thol, § 65: "On the other hand, one does not evade a rule of law by avoiding the act for which it makes a regulation, and thus excluding the possibility of its application. The same end can often be reached by different ways, the one of which causes more, the other less expense, trouble, delay, and other disadvantages. If we for that reason avoid the one and follow the other, we do not evade the application of a rule of law, but make it impossible to apply it." The question is very well and thoroughly discussed in a judgment of the Appeal Court at Oldenberg, 4th Jan. 1859 (Seuffert, *xix. No. 6*). It is certainly conceivable that the law, which in other respects regulates the transaction, should only allow it to be entered on in a foreign country in case of necessity. If that be so, then it is *in fraudem legis* to pretend that such a necessity has arisen. But that is not a thing that will be easily assumed, and an intention to save expense by depriving the fish of this country of dues is not an act *in fraudem legis*. Laurent, *viii. § 213*, comes to erroneous conclusions on the subject of acts *in fraudem legis*: for the correct view, see Wharton, § 695.

where the transaction was entered into: such a limitation is quite arbitrary and unpractical, and is at variance with that which must be recognised as the prevailing theory.³⁹

Laurent (ii. §§ 240 *et seq.*)⁴⁰ has recently, in criticising Duranton (Code Civ. i. par. 91), laid down a peculiar limitation for the application of the rule "*locus regit actum*." He proposes that it shall have no application in cases in which an "*acte solennel*" is in question. That is to say, in all cases where the non-observance of the prescribed solemnities involves a nullity, such solemnity cannot be dispensed with even where the transaction is concluded in a foreign country, although the particular details of this solemn form (*e.g.* in a marriage ceremony) may be left to the determination of the foreign law. Apart, however, from this last-mentioned piece of illogicality, the whole theory is simply an arbitrary invention of Laurent's. Its sole object is, on the one hand, to get rid of the difficulties in which his mistaken view of the origin of our rule has involved him in regard to the law of real securities, and, on the other, to lay a foundation for his peculiar theories of the treatment of marriage in private international law, according to which the form of marriage before a civil official, first introduced by French legislation, is held to be a kind of primitive law of all mankind, requiring an entirely exceptional treatment. To this last question we shall return later. Let it suffice to say here that Laurent, by his own confession (§§ 243, 244), has almost the whole jurisprudence of France and Belgium against him (see, too, Weiss, p. 523). The benefits of the rule "*locus regit actum*," for which the whole world is grateful, would by any such limitation be reduced almost to zero, and a general uncertainty in the law would be the only result of Laurent's principles. His theory has been adopted, no doubt, with reference merely to the forms of holograph deeds and deeds executed at the sight of some public authority, or perhaps, to speak more correctly, has been retained in a somewhat modified edition of Laurent's own "*avant projet der Code civil belge*," art. 20, *i.e.* the new draft for the revision of the Belgian Code (art. 10), in these terms: "*Lorsque la loi qui régit une disposition exige, comme condition substantielle que l'acte ait forme authentique ou la forme olographe, les parties ne peuvent suivre une autre forme, celle ci fût-elle autorisée par la loi du lieu ou l'acte est fait*" (Revue, xvi. p. 486). The "motives," or explanatory introduction to the new Belgian draft, afford an extremely weak basis on which to set up this new exception to the old rule, which has done so much service to the intercourse of nations. It is altogether new, for even Belgian jurisprudence had up to this date entirely condemned it, as Haus (par. 84) shows. (See, too, Asser Rivier, § 27 *ad fin.*) The authors of this explan-

³⁹ See to the contrary, Wächter, ii. p. 416. Haus makes some important remarks, which are to some extent contradictory, p. 45 and p. 60. On the other side, Felix, i. p. 173. Kieler Juristenfacultät bei Brinckmann, *Wissenschaftlich Rechtskunde*, i. p. 10. Judgment of the Supreme Court at Stuttgart, July 1, 1852 (Seuffert, 6, p. 1). Judgments of Supreme Court of Appeal at Lübeck, 14th and 30th September 1850 (Romer, 2, pp. 410-422).

⁴⁰ Fiore, *Effetti internazionali delle sentenze e delle atti*, i. § 181, has adopted this theory; against it, see Lomonaco's discussion of the subject, cap. vii. § 2, p. 182.

atory introduction forget that the rule "*locus regit actum*" is itself a benevolent and wholesome infraction of legal logic. Accordingly, their new discovery that the rule of their 10th article is "*juridique*," i.e. a piece of legal logic, is of no avail. It is also unavailing to demonstrate that the prescriptions of Belgian law as to testaments, donations, etc., will in this way be better maintained. For any one can understand that the law of a State will be all the better maintained in any given subject, the more blindly and indiscriminately it is applied. The only question is whether the interests of Belgian subjects, and with them those of the Belgian State, will not suffer all the more in other ways.

If Laurent's rule were generally adopted, it would involve a calamity for international intercourse and commerce.

But it is possible that the territorial law, which rules the legal transaction in itself, may either expressly or by implication forbid the use of forms, which are held sufficient in foreign countries, either entirely or to a certain extent. Thus the Prussian Senate in 1875⁴¹ decided that a verbal testament made by a Russian in Austria was invalid, because the Prussian statute book, while recognising, generally speaking, the rule "*locus regit actum*," nevertheless requires all testaments to be recorded, a requirement which of course could not be satisfied in the case of an oral testament. In the same way, by an express enactment of the 992nd article of the Code of the Netherlands, a testament executed abroad by a subject of that State, in a form which is not sanctioned by some public authority (*authentique*), must be held invalid.⁴²

IS THE RULE PERMISSIVE OR COMPULSORY ?

§ 123. If we understand our rule to have its origin in usage, which is rested on reasons of convenience for the promotion of commerce, it must be regarded as a facility afforded to the contracting parties, and not as a compulsory form. These parties, therefore, have it in their power either to observe the form which is recognised in the country where the transaction takes place, or that which is provided by the laws to which the transaction is subject. The rule "*locus regit actum*" imports a mere faculty, it does not involve any compulsion or restriction upon the parties. This view has an overwhelming majority of text writers and of legal precedents on its side.⁴³

⁴¹ See Sérébrianny in Jour. xi. p. 363.

⁴² To the same effect in its results is the judgement of the Court of Liège of 18th June 1874; see, too, Dubois, Rev. viii. p. 495. The French decisions reported in Jour. xi. p. 408, are the other way.

⁴³ Rodenburg, Tit. ii. c. 3, §§ 2 and 3; Fœlix, i. § 83; Wächter, ii. pp. 377-380; Savigny, § 382; Guthrie, p. 325; Phillimore, § 628; Haus, § 90; Brusa on Casanova, p. 410; Fiore, § 320; Picard, Jour. viii. p. 468; Esperson, *ibid.* ix. p. 157; Durand, § 223; Brocher, i. pp. 134, 135; Norsa, Rev. vii. p. 195; Aubry et Rau, i. § 31, note 78; v. Wyss, *Zeits. f. Schweiz. Recht.* ii. p. 97; Wharton, § 690; Westlake, p. 35; v. Martens, ii. § 78; Supreme Court of Appeal at Rostock, 12th June 1854 (Seuffert, xvi. No. 89); Supreme Court at Mannheim, 24th

In this connection it is well to remember that, in the case of mutual contracts, there would actually need to be a consideration of the laws of the domiciles of both parties if the *lex loci contractus* were not to rule. This we have hitherto assumed as self-evident, and later, in the subject of the law of obligations, we shall recur to it. If these laws in a case of the kind were different, and both parties had not observed the forms required by both, then the contract, unless it is voluntarily fulfilled, is simply null, unless the provisions of the law of the place of execution are to be respected. No preference can be given to either system of law, since all arguments are as much in favour of the one as of the other.⁴⁴ Mutual contracts, therefore, if they are not in conformity with the forms of the *lex loci contractus*, can only be recognised as valid if they are in conformity with the forms which are recognised at the domicile of both of the contracting parties.⁴⁵ In cases in which there are several joint obligants or subsidiary obligants involved, the question we are now discussing is open to the same considerations for every one of them. It is possible—and this is a necessary result of the nature of joint or subsidiary liability in general—that a joint or subsidiary obligant should avail himself of the invalidity in the obligation of some of the other obligants, *e.g.* the principal debtor.

It must at the same time be remarked that the observance of the forms prescribed for any contract constitutes the best proof of the expression of the will of the parties to enter upon it. If, therefore, the forms prescribed by the law of the place of the contract are not followed, it will often be doubtful whether the negotiations of parties are or are not to be considered as mere preliminaries. The will of the parties to undertake the contract must in that case be demonstrated by some other special proof. Even if the forms which are required by the native laws of both contracting parties happen to be observed, this doubt must still be removed; and as a general rule it cannot be dispelled if the native laws of the contracting parties prescribe no particular form for the transaction in

May 1862 and 23rd April 1863, (Seuffert, xviii. No. 204); at Rostock, 1854 and 1866 (Buchka and Budde (Dec. iv. p. 67 and vi. p. 48); German Imperial Court (i.) 27th April 1881 (Seuffert, xxxvii. No. 1); 18th Feb. 1880 (Dec. i. p. 328). The judgments of the German Imperial Court are most distinctly expressed upon this point. To the same effect *Codice Civ. Ital. disposiz. prelim.* art. 9, and the provisions of the Swiss codes (Huber, *Schweizer. Privatr.* i. pp. 95, 96). Dudley Field, art. 614, is of another opinion, but gives no reason for it; so, too, Renaud, *Rechtliche Gutachten* (1886), i. p. 456. Laurent, § 245 (who proceeds logically enough after he has settled his premisses); Stefano Napolitani, p. 24 (who uses this peculiar argument, that the foreigner is admitted to the enjoyment of civil rights); Asser Rivier is doubtful, but certainly inclines to be of Laurent's opinion; Bohlau's discussions are unintelligible (p. 437). See, also, in the sense of the text, the civil statute book for Saxony, § 9, and the Hannoverian statute of 29th Oct. 1822, §§ 1-3 *supra*, § 120, note 30. Roth, § 51, note 126 *et seq.*

⁴⁴ The rule, "*Commodissimum est id accipi, quo res de qua agitur magis valeat*," relates to the interpretation of the meaning, and not to the form of the transaction; and it is with the form alone that we are at present concerned. The forms of contracts are entirely beyond the control of the parties.

⁴⁵ To the same effect the detailed exposition given by Fiore, § 321.

question. The validity of a contract concluded according to the domestic law of both of the parties will then, as a general rule,⁴⁶ only fall to be affirmed in cases in which subjects of the same State make a contract in a foreign country, or some one in a foreign country executes a unilateral deed, such as a testament. But in the former case a transaction in a form which is valid by the laws of the parties' native country cannot, as a matter of course, be treated as binding. There is, as a general rule, a want of proof of the will to enter upon a binding engagement if the parties do not know each other to be fellow-countrymen, or if the transaction is one which has no reference to the domicile of the contracting parties, or has no connection with the personal intimacy of the parties (*e.g.* if the contract, according to the meaning of parties, is to be carried out on the spot, or if it is concluded on the exchange or in the market, and falls under the laws that prevail there, in which case parties may very well suppose that, for the sake of commerce, one common law should bind all who resort to it).

It is different if the contract is really meant to be carried out in another country; or if there is some consideration of personal intimacy to be taken into account, as is the case in the contract of marriage, to be dealt with hereafter.

The determination of this question depends therefore upon an accurate estimate⁴⁷ of the particular circumstances, which is often a matter of great difficulty. These difficulties have given many text writers a lever for maintaining that no legal transactions should be recognised unless they are in the form sanctioned by the law of the place in which they are executed. This lever will not, however, bear to be put to the test. If there be really a serious doubt of the sincerity of the intentions of the parties to bind themselves, which is incapable of solution, then, even according to our theory, the transaction must be regarded as not proven, and therefore non-existent. So far, therefore, there is no practical difference between our theory and its opponent. But why should we be forced to regard a legal transaction as non-existent in other cases, where there is no doubt about the intention of parties? Such cases, for instance, as those in which the place of the conclusion of the contract—one concluded, it may be, in the course of a journey—cannot be certainly ascertained, or where the place of conclusion is in an uncivilised country: in both such classes of cases the rule "*locus regit actum*" is necessarily inapplicable.⁴⁸

In the case of unilateral acts these doubts do not occur so frequently, and are to be treated as settled if the particular forms prescribed by the

⁴⁶ It is, however, too much of a limitation that is provided by art. 9, subsec. 1 of the dispos. prelim. of the Codice Civ. Ital. in perfectly general terms, viz.: "*E pero in facoltà dei disponenti o contraenti di seguire le forme della loro legge nazionale, purchè questa sia comune a tutte le parti.*" Esperson, Jour. ix. p. 159. The nationality of the other contracting party cannot always be ascertained with certainty; on the other hand, the native laws of both parties may be the same or similar.

⁴⁷ In agreement with this view, Wharton, § 680.

⁴⁸ Wharton, § 678.

native laws of the party executing them are observed. The will to execute a valid act is in this case proved by the observance of the forms. Since the laws of nearly every country prescribe particular forms for last wills, it is most natural that instances of the application of the personal laws should be presented in this connection; and it is this question which is chiefly dealt with by authors on the subject, while they do not concern themselves with what is, as a matter of fact, not a very frequent occurrence—viz. the neglect of the *lex loci actus* in the case of bilateral contracts. We have no right, therefore, to hold those persons who apparently take no heed of anything but the *lex loci contractus* to be opponents of our theory, unless they expressly reject the validity of the *lex domicilii* in every case such as we are now dealing with. We may, indeed, safely assume that they agree with our theory, if they propose to recognise the validity of a testament executed in a foreign country in cases in which it is in conformity with no other law than that of the domicile of the testator.⁴⁹

But just as we require special proof of the intention of parties to enter upon a legal act according to the laws that prevail in their domicile, that intention may be left doubtful even in cases where the form is according to the *lex loci actus*, especially in cases of unilateral acts, if it should happen that such acts require fewer forms, according to the rules of law in force on the spot where they are executed, than they do according to the laws of the domicile of the person who executes them;⁵⁰ and the same doubt

⁴⁹ Hert, iv. 23, 25; Rodenburg, ii. c. 3, §§ 1, 2; Hofeker, *De Effic.* § 28; Seger, p. 24; Ziegler, *Concl.* 15, § 16; Witzendorff, xxvii. No. 7; Dionysius Gothofredus, *Ad Leg.* 20, D. *de Juris Dict.* 2, 1; Bouhier, *cap.* 28, No. 20; Vattel, ii. c. viii. § 111; Mittermaier, *D. Privatr.* § 32, p. 121; Gand, No. 579; Burge, iv. p. 588. Boullenois is quite illogical (i. p. 422, and ii. p. 15) in allowing the *lex loci actus* alone to rule, while he still gives inhabitants of provinces, where holograph wills are recognised, the privilege of availing themselves of this simple form in a foreign country. Cf. this reasoning, in which the form of a holograph will is treated as a personal privilege, with the judgment of the Appeal Court at Paris, reported by Sirey, v. 1, p. 357. Some of the authorities quoted above limit the validity of a testament which has been executed according to the laws of the testator's domicile, but is not in conformity with the form of the *lex loci actus*, to the property which is situated at that domicile; but under the rule, "*Mobilia ossibus inhaerent*," they include in this all moveable property. It is only by a very few authors that we find it expressly remarked—a remark for which they give no justification—that a testament, valid according to the laws of the testator's domicile in its form, is null if it does not in form answer to the requirements of the laws of the place where it is executed (Riccius, p. 533; Holzschuher, i. p. 81. Cf. also the citations given by Fœlix, i. pp. 162-164). The kernel of this theory lies in the erroneous assumption that the law desires to apply its authority to all and every act that takes place in its territory—a notion we have already combated. Cf., too, the judgment of the Court of Appeal at Paris, of 9th March 1853, reported by Demangeat in his note to Fœlix, i. p. 184.

⁵⁰ Cf. Mittermaier's note, § 31.

In this sense we must, in judging of the form of a legal transaction, make reference to the intention of the contracting parties—not, however, meaning thereby that we should test in this way the validity of the form, but merely estimate its import upon the binding force of the act. Perhaps it is from this fact, which is undoubtedly entitled to much respect, that the theory by which the rule "*locus regit actum*" is founded upon a voluntary submission to foreign law (autonomy) has sprung.

may arise in the case of bilateral contracts, if, for instance, the contract is made while the parties are travelling by rail or mail-coach.⁵¹ In the latter case, there may even be some doubt as to where the contract was concluded. Then there is nothing at all to show, if different laws prevail at the different stages of the journey, which of them is to prevail as the *lex loci contractus*, and if we were to adopt the theory which makes the *lex loci contractus* the sole rule as to the form of every legal act, we should have no principle of determination to guide us. But, according to the view we have maintained, the act is valid if in its form it accords with the laws of the domiciles of both contracting parties.⁵²

LEGAL TRANSACTIONS, CONCLUDED BEFORE AMBASSADORS AND CONSULS.

§ 124. Nothing but the fact that the rule "*locus regit actum*" is a permissive rule, will explain a regulation which is recognised as existing in practice by the most modern codes and treaties, and which has attained a

⁵¹ The judgment of the Supreme Court of Appeal at Jena in 1832 goes too far in restricting the rule "*locus regit actum*." It remarks: "As a rule subjects are answerable only to the law of their native country, *i.e.* of their domicile. The exception '*locus regit actum*' implies that the obligations undertaken by them in a foreign country were intended to receive effect in that country; for it is only in this case that the foreign territory has any legal interest for the contracting parties. Without such an implication, it seems to be pure chance whether these subjects have concluded their contracts on their own or on native soil, and chance can never avail to deprive their native laws of their jurisdiction. But if any act has to be carried out, or may come before the courts of the foreign country where it is executed, there can be no question whether the parties desired to bind themselves by the laws of that place or not, nor can there be any question as to whether they knew these laws or not, since ignorance of the law is an excuse that will not avail even in the case of temporary subjects" (Seuffert, 2, p. 162). On the other hand, see a judgment of the Supreme Court at Berlin of 3rd April 1856, Striethorst, 30, p. 303.

⁵² Acts of public officers, however, are only valid if the forms prescribed for the place of their execution are respected. This case does not fall under the rule "*locus regit actum*." The Government can only give a public authentication to the acts of its officers on condition that all prescribed forms are respected. The neglect of these forms leads to the result that the defective acts are not recognised as of official weight, and they cannot acquire a public authentication from the accidental circumstance that in another country these forms are not necessary. If, for instance, the laws of the place where any deed was executed required the register to be subscribed by the parties on pain of nullity, or the official to add the official seal to his signature, then if either of these requisites were wanting, it would follow that the deed was void, not only in that country, but could not enjoy public recognition anywhere (cf. Story, § 260, and especially the Prussian-Lippian Treaty of 18th March 1857, art. 32: "If by the constitution of either State, the validity of an act depends upon its being undertaken before a particular officer, that is hereby continued"). It is, however, quite consistent with this, that the public officers of a State should, along with the forms therein required to give *publica fides* to any act, observe those forms also, in the case of an act which naturally belongs to another State, which give validity to such an act by the laws of that foreign State, in so far as these foreign laws do not recognise the rule "*locus regit actum*." Hannov. Regulations of 28th Dec. 1821, § 2. "If documents are to be drawn up for foreign transactions, in which, according to the forms of foreign law, a sworn attestation before a notary and witnesses is required, this may be done on the spot." (This regulation forbids generally all oaths before a notary and witnesses.)

very considerable importance.⁵³ It is becoming more and more common to invest ambassadors and consuls with power to superintend the execution of deeds which deal with legal transactions between citizens of the State which they represent, and also, as officials charged with the care of questions of status, to conduct marriages between such persons, in the form, of course, which is prescribed by the law of their State. The explanation of the validity and universal recognition of this kind of procedure is not to be found in any fiction that the acts of the ambassador or consul are to be regarded as having taken place within the territory of the State which the functionary represents. Any such assumption would be unsound. All are now agreed that even the ambassador's residence cannot be said in such matters to be exempt from the operation of the authority of the State in which it is situated, or be regarded as a part of the native territory of the ambassador. Still less can there be any such assumption made with regard to the acts of a consul, who need not enjoy in any respect the privileges of extra-territoriality. But just as the State, to the laws and jurisdiction of which a legal transaction is subject, may enact that it may be concluded or executed without any particular form, it has also the power of enacting that the legal steps taken by its subjects, in presence of its consuls or ambassadors, shall be held to be well taken.⁵⁴ This does not involve any invasion of the sovereignty of any other State, and accordingly, if we go strictly to work, the consent of the State within whose territory the act is done is not necessary. On the contrary, this voluntary jurisdiction, to the limited extent which we have described, can only be exercised with the permission of the law⁵⁵ of the State which the ambassador or consul represents. The recognition of the privilege in international treaties imports nothing more than a ratification by the other State.⁵⁶ Any further extension of the voluntary jurisdiction of ambassadors

⁵³ Code Civil, § 48: "*Tout acte de l'état civil des Français en pays étranger, sera recevable s'il a été reçu conformément aux lois françaises par les agents diplomatiques ou par les consuls.*" See, too, e.g. § 10 of the German-Italian consular treaty of 21st December 1868 (*Nordd. Bundesgesetzblatt*, 1869, p. 117). Consular treaty between the German Empire and Servia, 6th January 1883, § 9 (*Gesetzbl. d. deutschen Reichs*, 1882, p. 865). Treaty between France and St Salvador, 5th June 1877, § 10 (*Jour. vi.* p. 581). Consular treaties of Austria and Italy with Servia (*Jour. xi.* p. 152). V. Martens, § 78, p. 333.

⁵⁴ In agreement with this, Weiss, p. 573, and the judgment of the French Court of Cassation of 10th August 1819, which he quotes, viz.: "*Nos lois et nos agents n'ayant de pouvoir à l'étranger que sur les nationaux.*"

⁵⁵ See, for example, the German Imperial statute as to the authentication of *status* and of marriages, of 6th February 1875, § 85 *ad fin.* (*Reichsgesetzblatt*, 1875, p. 39). Belgian statute of 24th May 1884, § 3 (*Jour. xii.* p. 49). We shall recur to these enactments in dealing with the subject of marriage.

⁵⁶ Cf. Renault (*Jour. viii.* p. 85), and the judgment of the Tribunal of Antwerp of 4th August 1877, to the same effect. See, too, the German-Servian treaty (cited above), § 9, subsec. 4: "Consuls are entitled to receive and authenticate legal documents, or certify legal proceedings, in which none but inhabitants of the State in which they have their official residence, or subjects of third States are concerned, in conformity with the law of the State by which they have been nominated, if these documents or proceedings have to do with moveables which are situated in that State, or with immoveable property, or with affairs which are intended to be carried on there."

or consuls could make no claim to general recognition unless it proceeded upon the authority of a treaty.

In the Levant, and in those States in which the subjects of European Christian Powers enjoy extra-territoriality, it seems that, in so far as these persons are concerned, the rule "*locus regit actum*" has no application. Their obligations will be in the form sanctioned by the native law of the obligant.⁵⁷

LEGAL TRANSACTIONS BETWEEN PERSONS WHO DO NOT MEET, (CONCLUDED BY MEANS OF LETTERS AND TELEGRAMS).

§ 125. The question as to what law is to determine the form of a contract concluded by letter, between persons who do not meet, can only be answered on the assumption that the rule "*locus regit actum*" has simply the force of a permission, and is not imperative. It might be fancied that the only point for consideration is, at what place the contract is to be held to have been concluded, whether at the domicile of the offerer or at that of the acceptor, and, as a matter of fact, well-known authorities take pains to show that the one or the other of these two places must be recognised as regulating these matters.⁵⁸ But positive law and the practice of different nations cannot be held to such *a priori* deductions. The law of one State may enact that the transaction is to be regarded as having come into existence in State A, the domicile of the offerer, while the law of another enacts that the domicile of the acceptor is to be held to be the place. How could any decision be reached, if it were absolutely necessary to determine which is truly the place of the execution of the contract?

At the same time, we must notice, in accordance with what has gone before, that the intention of the correspondents to enter on a binding contract, remains doubtful if the form of the contract is faulty. The contract is therefore only good if it is in conformity with the laws that prevail at the domicile of both of the parties.⁵⁹ If, however, the person

⁵⁷ Cf. Weiss, p. 568. Certain customary laws seem to have grown up for Christians in these countries; in such cases, the rule of "*locus regit actum*" comes into play again. Cf. Svoequant, Rev. xx. p. 270, and Court of Aix, 17th June 1862; French Court of Cassation, 15th April 1865 (cited in the Review).

⁵⁸ For these different views, see the exposition by Fiore, § 247, who himself pronounces in favour of the view that regards the contract as concluded at the place at which the acceptor's answer is given. Wharton, § 423, on the other hand, remarks that in many cases it cannot be assumed that the party who contracts by correspondence, intends to subject himself to a foreign law. The only thing left is to split up this doublesided obligation into two unilateral obligations, and to hold each of the two parties to the law of his own domicile.

⁵⁹ In agreement with this view is the *ratio* of an interesting judgment of the Oberlandes-Gericht at Celle, of 7th November 1879 (Seuffert, xxxv. No. 89), also Stobbe, § 33, note 11; Roth, *D. Privatr.* § 51, note 128; Muheim, p. 90. The enactment of the Prussian *Allgemeines Landrecht*, i. 5, §§ 113, 114, is peculiar but illogical. According to it, the law of that place is to rule which will best promote the validity of the transaction. This provision is intended to apply even where there is no question as to different domiciles of the parties, but where the point is as to the document having been dated at different places. Cf. Förster-Eccius, i. § 11, note 28.

who receives a letter deals merely as a mandatary, and concludes a bargain in this character, which binds him according to the law of his domicile, but does not bind the mandant according to the law of his domicile, he may have a claim for recompense against the mandatary, founded on the mandate, although the bargain itself will not bind the mandatary; provided always that the mandatary has *bona fide* regarded the mandant's offer as legally binding, and that the mandate did not require any special form according to the law of the mandant's domicile.

Further, it is obvious that in a bargain which implies merely an unilateral obligation, *e.g.* in a donation, only the form prescribed by the law of the obligant need be observed. The object of the existence of these forms is merely to protect the obligant from rashness, and from dishonest claims being made upon him: they have no application to the person who desires to acquire a right. A donation, therefore, may be constituted as between persons who never meet without any special form, if the personal law of the donor does not require any special form.⁶⁰

FORMS PRESCRIBED IN THE INTEREST OF THE FISK.

§ 126. If, moreover, a transaction is invalid, because the forms prescribed by the law of the place where it is negotiated have not been observed, it can make no difference in the result that these forms are required, not in the interest of the parties, but in that of the fisk,⁶¹ or public revenue. Accordingly, if neglect of the stamp laws, which are in force at the place in which the transaction is concluded, draws with it the penalty of nullity, the same effect must be attributed to that neglect in a foreign country also, and it is no good objection⁶² that the fiscal or revenue laws of foreign States have no force for us. The question in such cases is not one of the exaction of foreign stamp duties; it is one as to the form of the legal transaction. We might quite as justly ignore a provision of a foreign law, which required certain transactions to be concluded before a court as an essential form, if this form was required for no other end, save to secure to the State a revenue out of the dues exacted on such occasions.

⁶⁰ See the judgment cited in the last note.

⁶¹ One cannot see why a transaction which is void from the beginning—if the law of the place of execution is to be allowed to have any voice at all in regulating its form—should acquire validity by being pleaded in the courts of another country. (See the words of the Chief Justice of the Common Pleas (Eyre), in *Melan v. Fitzjames*, 1797, 1, Bos. and Pull, 138, in Burge, iii. p. 767. See also Foote, p. 285.)

⁶² This objection we find *e.g.* in Wharton, i. p. 147. The result which we have accepted is found also in Burge, ii. p. 870; Story, § 260; Wharton, § 685, and in an interesting judgment of the Supreme Court at Berlin of 19th May 1857 (Striethorst, xxvi. p. 45). No doubt we must enquire whether the law truly regards the want of a stamp as inferring a nullity. If an unstamped document is rejected as a means of proof in a process, this is a statute merely regulative of the mode of proof, and as such has no force beyond its own territory. In doubt it is not to be presumed that nullity of the document is the penalty. See, too, Wharton, §§ 686-688.

But if there has been any ratification, although merely by implication, in a foreign country—and an omission to advance the plea of nullity in a lawsuit falls under this head—this operates to validate the transaction from the beginning, so that an invalidity of this kind can never be liable to be noticed *ex parte judicis*.

EFFECT OF A CHANGE IN THE PERSONAL LAW, IF THE TRANSACTION HAS NOT BEEN CONCLUDED ACCORDING TO THE FORMS OF THE *lex loci actus*.

§ 127. There is still another question to be discussed. Is it possible that a legal transaction, which is not fully in accordance with the legal forms observed at the place where it has been concluded, but is in conformity with the personal law of the party, should become null through some change taking place in the personal law of that party?

This question is identical with the other, viz. whether we are to test the transaction itself by the personal law at the time of execution, or that which the party last had; for the form prescribed by the personal law can only be applied in cases in which the transaction itself is, speaking generally, subject to the law of the party's home or domicile.

Accordingly, obligatory contracts do not become ineffectual by an alteration in the nationality or domicile of one of the contracting parties. This does, however, take place in the case of testaments, *e.g.* if a person in whose domicile holograph wills are effectual executes one in a foreign country, where testaments must be concluded in judicial form, and then acquires a domicile or nationality in a country where holograph wills are unknown.⁶³

The point seems to be doubtful in the case of contracts as to succession. Such contracts settle the right of succession, and, if that must necessarily be determined by the last personal law of the deceased, it seems to follow that these contracts must be determined likewise by that law; and that in this way, if they are not executed according to the forms of the place of execution, they may, for want of formalities,⁶⁴ lose all validity⁶⁵ owing to a

⁶³ So, too, Wächter, ii, p. 380, as to testaments. Wächter's conception of the *ratio* of the matter is not sufficiently sharply defined. He says that, in respect the deceased's domicile is the sole ground on which the application of this or that law can depend, as the domicile alters so must the law which is to be applied, for, as the grounds alter, so must the results that are based upon them. But this would lead us to the conclusion that even obligatory contracts may become invalid in form if a change takes place in the domicile of one of the parties.

⁶⁴ These remarks have no reference to any grounds other than defects of form: and the narrower definition of form given above must be observed in this connection also. The omission to institute an "*heres necessarius*" does not fall under that definition. The right of such an heir, either to be instituted as heir or to be expressly disinherited, cannot be regarded merely as a necessary condition for the expression of the intention of the testator.

⁶⁵ In accordance with what has been said, it is plain that the execution of the legal transaction in conformity with the forms of the *lex loci actus* affords the better security (Unger, p. 210).

change of the nationality or domicile of one of the stipulating parties. But then these contracts give rise at once to *de praesenti* rights in the parties; whereas a testament has no effect at all till the death of the testator, a contract as to succession sets a limit on his power of disposal at once. This limitation of the *jus disponendi*, for the benefit of the heirs who are to take under the contract, has already an effect *de praesenti*, and is therefore subject to the law of the domicile which the contracting testator has at the date of his contract, and its operation cannot be defeated by the law of the place of his domicile at death, unless upon conditions which forbid the performance of existing contracts: it cannot be assailed by means of the enactments which are directed to the regulation of the execution or inception of legal transactions, among which regulations we must undoubtedly reckon directions as to form. Any other view would give the parties to a contract of succession power to alter their contract as they pleased by changing their personal law, and would thus give full play to infringements of honesty and confidence.⁶⁶

It is thus only such legal transactions as have no present operation, and admit of alterations at the will of one person, that can be rendered inoperative by a change in the domicile of a party. Bilateral contracts cannot.

It is obvious that bilateral contracts which have been executed in such a form as to be invalid, can never, by a subsequent change in the domicile of one of the parties, become valid. In the case of unilateral contracts, it may be possible to conceive that the expression of intention which has once been made may be presumed to continue to subsist.⁶⁷ But the same reasons may be urged against this presumption as are used against the application of new laws, by which the forms of unilateral legal transactions are simplified and facilitated, to such transactions as were invalidly executed in the days of the older law. Neglected forms may, as Savigny⁶⁸ says of the rule *tempus regit actum*, proceed simply from ignorance of law, while there may all the time be a serious intention of entering on the transaction. But it may just as well be that the forms are neglected in full knowledge of the rule of law which applies to them, so that the document was only intended to serve as a preliminary for a deed which

⁶⁶ We have assumed, in the foregoing discussion, that the law of succession, as is the case according to the principles of the common law recognised in Germany, is ruled by the last personal law of the deceased. If, as is the case in the law of England [and Scotland], the *lex rei sitæ* rules in the case of real property, then, in so far as real property is concerned, contracts as to succession and testaments cannot be validly executed, except in the forms of the *lex rei sitæ*. See below, on the law of succession.

⁶⁷ This was adopted, *e.g.* in the draft of a civil statute book for Saxony, in which, § 10, subsec. 2, provided, with regard to foreigners who should acquire a domicile in Saxony, viz.: "Antecedent declarations of intention, which they are in a position to alter at their own hand, are valid, in so far as the mere question of form goes, if they can be sustained either by the law of Saxony or by the law of the place where the declaration was made." This passage is quite properly deleted in the statute itself.

⁶⁸ Savigny, § 386; Guthrie, pp. 355-357.

should be really effectual. In taking up such questions, we should simply entangle ourselves in an attempt to judge of accidental circumstances depending on bare possibilities.

WOULD IT BE PRACTICAL TO GIVE THE RULE "*locus regit actum*"
COMPULSORY EFFECT IN THE FUTURE?

§ 128. We have shown that the rule "*locus regit actum*" has, in the present condition of the law, merely a permissive force. The question may, however, be put whether it would not be desirable, by means of statutes and treaties, to give the rule a compulsory application in the future,⁶⁹ so that any legal transaction which does not comply with the forms of the place where it was executed should be regarded as invalid all the world over. As a matter of fact, this new idea is not totally destitute of supporters, especially in connection with the theory of French jurisprudence, which seeks to connect itself with the old statute theory, and on that account desires either to have a category of statutes devoted to form, or to attempt to reckon the rules of law that concern the forms of legal transactions either among the *Statuts réels* or the *Statuts personnels*. This position is represented most thoroughly and in its best light by Duguit, at the close of his work on the forms of legal transactions. His leading arguments are these prepositions, viz.: 1st, That one isolated system of law, *e.g.* that of the domicile of the parties interested, may no doubt hold that the legal transaction is valid, if it conforms to its own rules, and not to those of the place where it was executed, but that in other quarters this very transaction may be regarded as invalid: this would be productive of grave disadvantages for the security of legal intercourse; 2nd, That the proof of a legal transaction must take place according to the rule of the law that prevails at the place where it was entered upon, and must be regulated by that law; and again, that the same law must regulate the proof and the form of one legal transaction; 3rd, That on general legal principle it is inadmissible to allow parties their choice between different forms for a legal transaction, or still more between a particular form and no form at all.

For the first of these propositions no proof at all is adduced. If the State to which the legal relation that is affected or originated by the transaction in question belongs, recognises that transaction as fully operative and valid, why should or must other States do anything else? What matters it to England, if, for instance, two subjects of the German Empire make a bargain in Russia about a thing which is situated in the German Empire, in which empire the bargain is to be carried out, and in concluding their bargain have observed their own native law and not that of Russia?

⁶⁹ It is sad to have to notice that the Institute of International Law in 1887 pronounced in favour of the rule being compulsory as regards marriage ceremonies. On this resolution, see our remarks under the head of marriage.

And what interest could the Russian State itself have in treating the bargain as invalid? At the most, it might have such an interest, if the parties, in order to avoid some Russian impost, *e.g.* a stamp duty, had chosen their own domestic law, or, as their own law allows them to do, had made their contract without any particular form on that account. But in truth nothing of the kind takes place, and Duguit's proposition is simply a *petitio principii*, and at the same time is the reverse of the rule, the soundness of which we have already tested, and on the distinct recognition of which all advance in modern private international law depends—the rule, namely, that every legal relation must be ruled by the law of that territory, the law of which should, in accordance with the nature of the thing, operate upon it.

His second proposition rests upon a principle which is beyond all doubt an error. It is not merely in the shape in which proof is to be taken that we say that proof is dependent on the *lex fori*: it is also in substance dependent on it. There may at times be a doubt whether a rule of law concerns the form or the proof of a legal act, and that is especially the case with certain rules of the law of France, which limit proof by witnesses. But a claim can never be made successfully to turn upside down private international law, which is intended to give rules for the whole civilised world, to meet these rules of law belonging to one single country, which are, besides, very questionable in themselves. We shall see later, that it is possible to do justice even to such vague rules of law, which are by no means deserving of being sanctioned by legislation, without having recourse to an unsound principle.

The third proposition rests ultimately upon a confusion of thought. Parties cannot neglect the forms of a legal transaction, if these are imposed upon them as compulsory regulations. But we do not understand why a system of law should not leave parties a choice between different forms; we find, for example, in very many highly important systems exactly the opposite maxim in regard to the forms of testaments. It is difficult to conceive how it should be a misfortune that the parties should, in certain cases, have the power of electing between the forms of this or that law: as well might it be thought a misfortune that this resuscitated statute theory apparently suffers some prejudice from that power of electing.

But not only are there no reasons upon which an argument for the compulsory force of the rule "*locus regit actum*" can be based, but, on the contrary, there are very distinct reasons against it. In the first place, it is never advisable to break through the rules of legal logic unnecessarily. These rules, however, lead us to recognise all legal transactions as valid in point of form, if they satisfy, in point of form, the law to which they are in substance subject. We must add to this, that if the rule had a compulsory force the parties would not unfrequently be forced, without any real advantage, to subject themselves, *e.g.* in case of marriage, to the forms and formalities of another country which might be costly, roundabout, and it might frequently be offensive to their feelings. In States in which the

officials are not entirely trustworthy, such a rule of subjection to their authority might be a very serious matter; imagine, under such circumstances, a case in which the law of the domicile permits holograph or so-called mystic⁷⁰ testaments, while the State in which the person has his residence does not. Or shall we make out a list of the States in which, in respect of the trustworthiness of the officials, etc., we could give a compulsory force to the rule "*locus regit actum*"? Of course, uncivilised States would be excepted, but what is the limit, according to which the judge is to determine the different cases that arise? To execute legal transactions before a consul or an ambassador of one's native State is not always convenient, or is often too roundabout and expensive. It is simpler to allow the public, whose protection is the object of investing our rule with compulsory force, the opportunity of having recourse, as they require, to their native law. And what would be the result of such a rule, if we could not ascertain with certainty what was the place of the legal transaction?

It is true that in particular cases the legal transaction, which is executed in the form of the *lex loci actus*, is better protected against the risk of subsequently being rendered inoperative, than that which is in accordance with the forms of the native State, particularly in the case of a testament. It is also quite true, that persons ignorant of law can in many cases get information more easily as to the law of the place in which they are staying, than as to the law of their native State. But we should leave the determination of these endlessly various points to the parties themselves, who are concerned in the matter, as the ruling theory has for long done; and all the more shall we do so, as in many cases it is not so very simple to decide, whether some particular enactment concerns the form or the substance of the transaction. But, in such doubtful cases, and at anyrate when the domestic law of one of the parties is decisive of the case, it is advisable to adhere to the domestic law.

Against all these disadvantages it is of little importance that, if our rule has merely a permissive force, it may in isolated cases—if the *lex loci actus* requires a particular form, while the domestic law of the parties recognises the transaction as valid, without any particular form—be doubtful, if the *lex loci actus* has not been observed, whether a party intended to make a binding declaration, or to come under a binding obligation, as the case may be. This point we have noticed already.

NOTE E. ON §§ 117-128 ON THE RULE "*LOCUS REGIT ACTUM*."

[The rule "*locus regit actum*" is received in Scotland, France, and America, but in England is subjected to serious limitations. In France the doctrine is laid down in a case of *Benton v. Horeau*, 26th August 1880, by the Court of Cassation (Jour. vii. p. 480). A contract had been concluded

⁷⁰ [A mystic testament is one signed by the testator, and handed by him, under a sealed cover, to a notary in presence of six witnesses.]

verbally in England between a Frenchman and an Englishman; the Englishman came to sue on the contract in France; it was objected that it was incompetent to prove the debt arising on the contract otherwise than by writing, because the amount of it exceeded 150 francs. To this it was answered, that by the law of England, where the contract was made, writing was not necessary to constitute the obligation, and the rule to be applied was "*locus regit actum*," this being a question as to the validity of the *vinculum obligationis*. Parole proof was allowed, on the ground that the form of the contract and the proof of the execution must be governed by the law of the place of the execution. The intention of the parties was to bind themselves by the law of the place where they were at the time, and the question they put to themselves was, "Do we need to bind ourselves in writing or not?"

In Scotland, a contract executed in conformity with foreign forms is recognised as valid and enforced by the courts, although it does not comply with Scots forms. In the application of this rule the following liberal extension is made: "This," says Erskine, *Instit.* iii. 2-39, "holds even in such obligations as bind the granter to convey subjects" (*i.e.* heritage or real property) "within Scotland; for where one becomes bound by a lawful obligation, he cannot cease to be bound by changing places." All personal obligations or contracts "are deemed as effectual, when they come to receive execution in Scotland, as if they had been perfected in the Scottish form." The rule is, of course, limited to forms; "for," says the same author, "it would be absurd to give the smallest effect to a foreign deed perfected according to the law of the place where it was made out which would not be effectual here, though it had been perfected with all the solemnities required by our law." This statement of the law has received judicial sanction in many cases (*e.g.* in *Purvis' Trustees v. Purvis' Executors*, 23rd March 1861, Ct. of Sess. Reps. 2nd ser. xxiii. p. 831, per Inglis, L.J.C.). "All instruments (without distinction, except in the conveyance of land) executed abroad according to the solemnities of the place of execution, must receive effect in Scotland exactly in the same way as if they were executed within Scotland according to the solemnities of the Act 1681." This rule has been extended, as in France, in the case quoted above, so as to allow a contract concluded in England, where it might be concluded verbally, to be proved in Scotland to have been so constituted, although writing would have been required to constitute it in Scotland (*Dale v. Dumbarton Glass Company*, 1829, Ct. of Sess. Reps. 1st ser. vii. p. 369). The mode of proof, however, must in Scottish courts be regulated by their own law, *i.e.* in certain cases by writ or oath, although the question to be so settled may be, "Was the obligation verbally constituted?" that being a mode of constitution allowed in the particular circumstances by foreign law, and therefore admitted in Scotland. Whereas, however, the author holds that the application of the rule "*locus regit actum*" is permissive merely and not imperative, the law of Scotland requires the observance of the law of the place of execution, *i.e.* makes the rule imperative, unless where the

lex loci solutionis is adopted. A contract, then, which does not satisfy the requirements of the law of the place of execution, will not be received by the court of another country, even although it satisfies the forms of the country in which the court is situated; this inference has been adopted in Scotland (*Taylor v. Scott*, 16th July 1847, Ct. of Sess. Reps. 2nd ser. ix. p. 1504). The court will, however, recognise a contract, and give effect to it, if the formalities of the law of the place of performance are, instead of those of the place of execution, observed in drawing up the contract. The opinion of Lord President Inglis, in *Valery v. Scott*, 4th July 1876, Ct. of Sess. Reps. 4th ser. iii. p. 965, that the observance of either the law of the place of execution or of performance will make a deed effectual, was pronounced in a case where the contract was intended to be carried out in Scotland although executed in France; but, according to his lordship's reasoning, it was immaterial that the *forum* and the *locus solutionis* coincided. The place of performance was to be held to be the "place of the contract," and observance of its forms would be sufficient. The court would recognise and enforce, so far as they could, a contract in the forms of the *locus solutionis*, even although that was a different country from the country to which the court belonged.

The general rule is stated by Prof. Bell, in his "Lectures on Conveyancing," p. 88, chap. iii.: "The privileges allowed to such deeds" (*i.e.* deeds executed by foreigners according to the law of their domicile) "are extended to writings of the same class, even when the granter is a Scotchman, provided the deeds are actually executed out of Scotland, and according to the laws of the place of execution. But it is essential, as to all such deeds, that as a matter of fact they are validly executed according to the laws of the country where they are entered into." The professor, however, as is clear from his statement on p. 90, does not mean to suggest that domiciled Scotsmen, meeting abroad, and concluding a contract which is to be carried out in Scotland, are bound to observe the law of the foreign country, on the contrary, he recommends them to follow the forms of the law of Scotland. His doctrine, therefore, is not at variance with that of the Lord President in *Valery v. Scott*.

Story states the law to a similar effect, § 260 (4): "All formalities, proofs, or authentications of" contracts, "which are required by the *lex loci*, are indispensable to their validity everywhere else." He expresses, however, a doubt as to whether the law of the place of execution, or of the *forum*, will regulate the admissibility of proof of the contract when it comes to be enforced. Probably the distinction on this point taken in Scotland supplies the correct solution.

It will of course be understood that the condition that such contracts, or the solemnities required in their execution, shall not be inconsistent with our rules of morality or of police, is required by the laws of these countries and by that of England: and in the case of a conveyance of real estate, the *lex rei sitæ* must be observed.

The rule in England is not quite so liberally applied; it is no doubt

the case that the rule is recognised, and not merely recognised, but regarded as imperative. "A contract must be available by the law of the place where it is entered into, or it is void all the world over" (per Lord Ellenborough, in *Clegg v. Levy*, 1812, 3 Camp. 167); and Addison states, p. 195, bk. i. cap. 2, "The *lex loci contractus* generally prevails in all that relates to the legal validity of the contract, the *vinculum obligationis*. . . . If the contract is valid by the law of the country where it is made, it is valid everywhere, unless it is *contra bonos mores*, or is a contract for the doing of a thing which is directly prohibited and forbidden in, or contrary to, the public policy of the country where the contract is sought to be enforced."

But the law of England goes further. It seems to hold (Addison, p. 198) that a contract to be enforced in England must be valid as regards form, both by the law of England and by the law of the country in which it is entered into. Westlake, too (§ 208), sums up the English law thus: "A contract, although externally perfect according to the law of the place where it was made, cannot be enforced in England unless evidenced in such manner as English law requires." This doctrine is in direct conflict with the systems of law already referred to, and with the doctrine of the text; it seems indeed to be contradictory of the maxim "*locus regit actum*," as Westlake points out. If the intention be to reserve the decision on all matters of procedure "*litis ordinatoria*" for the *lex fori*, as is indicated from the cases quoted by Addison, that principle is perfectly sound; but the recognition of it need not involve the rejection of a contract as available in England, because it is constituted by other means than those admitted there. The distinction taken in Scotland between the constitution of the obligation and the ascertainment of the fact whether it has been so constituted or not, seems to be the true rule.

A prohibitory law allowing no scope to the will of parties will, as stated in the text, demand observance and exclude the rule "*locus regit actum*."

The application of the rule to particular legal relations—*e.g.* marriage, divorce, bills, etc., and particularly to testaments—will receive further consideration *infra*.

As regards the execution of contracts by means of letters, Addison states the law of England thus (p. 197): "When contracts are entered into between parties residing in different countries, through the medium of letters, the place where the final assent has been given by one party to an offer made by another, is the place where the contract is considered to have been made." And it is by that law that the contract is to be determined.

In Belgium, on the other hand, the contract is not held to be concluded till the acceptance of the offer has reached the offerer, and therefore the place of the conclusion of the contract is, as a rule, held to be the domicile of the offerer. (*Velghe v. Van Oye*, 1876, Jour. ix. p. 564.)

The law of England and America, as to the necessity of stamping foreign contracts, seems to coincide with that of the author. Addison on

Contracts, p. 1060, states the law of England to be, that although foreign documents are not excluded from being received as evidence in English courts, because they are unstamped, and therefore could not be received in their own country, yet if they are void by their own law, they cannot be enforced in England. By "their own country" I understand him to mean the country in which they are executed (see also *Bristow v. Sequeville*, 1850, L. R. 5 Ex. 275). Story, § 260 (4), says: "Thus, if by the laws of a country a contract belonging to that country is void, unless it is written on stamped paper, it ought to be held void everywhere; for unless it be good there, it can have no obligation in any other country." This doctrine is approved by Westlake, p. 251.

In Scotland the law, until recently, was that the court would not take any notice of foreign revenue laws (*Bell's Pr.* § 328; *Menzies*, p. 88; *Stewart v. Gelot*, 1871, Ct. of Sess. Reps. 3rd ser. ix.1057); but this has been doubted (cf. Lord Deas in *Valery v. Scott*, 1876, *ibid.* 4th ser. iii. p. 965). The reasoning of the text would probably now induce the Scottish courts to follow the doctrine of England and the other countries already mentioned, for it is difficult to justify the old practice of giving effect to a contract which the parties must have known to be null.

Fourth Book.

THE LAW OF PERSONS.

(STATUS AND CAPACITY.)

I. THE NATURAL EXISTENCE (*Dasein*) OF PERSONALITY.

CAPACITY OF LIVING.

§ 129. The question, under what law the beginning of a person's physical existence falls, has very seldom been considered by courts of law, because, as a rule, the question is merely one of fact. And yet here, too, we may imagine cases admitting of dispute—as, for instance, when one law does not hold a child to be living unless it is also viable; while another is contented if the child shall have shown a sign of life for a single moment. The object of positive provisions of this kind—as to the precise point at which a new-born child can be held to be alive, since we can have no concern with the acts or contracts of such children—can only be to regulate succession, or, by the criminal law, to give a child more protection than a foetus. These facts are determined by the law that settles the succession of the child to its predecessor, or, if the case in question be a case of criminal attempt upon the life of a child, by the criminal law which would have to be brought into action against the same criminal for any other wrong done by him or her in the same place.

DECLARATION OF DEATH OR DISAPPEARANCE. GENERAL PRINCIPLE.

§ 130. It is a more practical inquiry by what law we are to regulate the fictitious destruction of a man's personality by a judicial declaration of death, which is pronounced in particular cases, where there is a complete uncertainty as to whether a person who has been lost to sight is still in life or not. There can be no occasion to inquire into any acts of such a person, or any crime done against him since he disappeared; and such declarations of death can, therefore, have no other object than to settle the rights of inheritance, and the family relations between the person who has disappeared and his connections: the rights of inheritance in a double sense—first, in so far as claims may be made upon the estate of the person who has disappeared; secondly, in so far as he may himself have

a claim against another person's estate.¹ As far as family relations are considered, the law which is applied to these for other purposes rules here also. As regards questions of succession, however, cases of the first class are ruled by the law of succession that governs the estate of the missing person; cases of the second class by the law that regulates the succession of the person against whom a claim is made.² The view taken by Fiore and many others,³ that the declaration of death may be regarded as a judgment affecting the *status* of the person, and on that account is subject to the law of the State to which the person declared or that is to be declared dead belongs,⁴ comes in its result to the same thing, at least in all countries except those in which succession goes by the *lex rei sitæ*.⁵ For these authors speak of the succession to the property of the missing person, and not of rights of succession falling to him. But the distinction between the two views becomes apparent, if we assume affirmatively that the missing person lived up to the date of the declaration of death, *i.e.* if we take the law which deals with the disappearance as regulative of the right of the missing person to succeed to other people, or if the *lex rei sitæ* is to rule the question of succession.⁶

[The Presumption of Life Limitation (Scotland) Act of 1891 (54 and 55 Vict. c. 29), passed to enable the Courts to deal with the estates of persons who have disappeared for a certain time, and are to be presumed to be dead, enacts in its second section *ad fin.*: "Nothing herein contained shall entitle any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have disappeared." By its 3rd section the statute regulates succession to heritage situated in Scotland

¹ According to a sound view of the common law of Germany, the declaration of death has only reference to the first class. See Heise and Cropp, *Juristische Abhandlungen*, ii. p. 142. Pfeiffer, *Praktische Ausführungen*, iv. p. 362. To a different effect is the proclamation of the Supreme Court of Würtemberg to inferior judicatories, on 17th Aug. 1826. See, too, Supreme Court of Berlin, 6th April 1848 (Striethorst, *Entsch.* xvii. p. 91). Both of these are reported in Kraut's *Grundriss zu Vorlesungen über das deutsche Privatr.* Ed. by Frensdorff, 6th ed. 1886, § 34, Nos. 21 and 22.

² To the same effect, Brocher, i. p. 265; to a contrary effect, Supreme Court at Stuttgart, 10th July 1862 (Seuffert, xv. No. 199). But how can a capacity for succession thus attributed to the missing person control the law of succession, which prevails at the domicile of the person to whom he is to succeed? What, too, would be the result if several heirs to the missing man appeared, and several personal laws were pleaded in regard to one and the same inheritance?

³ Fiore, § 72; Weiss, p. 588.

⁴ If the domicile is held to regulate the personal law, the law of succession and of the family, it must rule here also.

⁵ If, on the other hand, the missing man owned a landed estate in the other country, and the succession is not regarded by the law of that State as an universal succession, it is necessary then that there should be a special declaration of death there, with special effects of its own.

⁶ There can be no reference to the personal law of the persons who have obtained the declarator, *i.e.* the heirs. They enjoy the administration *ad interim* of the estate also, in accordance with the law of the domicile of the person who is to be declared to be dead. By setting the process in motion, or taking over the administration or enjoyment of the estate, they submit themselves to this law. See Weiss, p. 589.

belonging to one who has disappeared. [The principle of this statute is therefore entirely in accordance with that laid down in the text.]

JURISDICTION OF THE COURTS.

§ 131. It is easy on this matter to determine the competency of the courts. The law which deals on the merits with the declaration of death, decides also what court shall pronounce it.⁷

According to the view, then, which takes nationality as the determinant of personal law, there is no room for admitting the jurisdiction of the courts of the country in which the missing man had merely his domicile or his place of residence: we can only pronounce the courts of the last domicile to be competent, when that is within the State to which he belonged as a citizen.⁸ If, like Weiss (p. 589) and Olivi (*Rev. de droit*, 1887, p. 520), we allow *e.g.* a French court to pronounce a declarator of the death of a citizen of the Netherlands, if it can be shown that he had his last known domicile in France, we are landed in insoluble difficulties. There will then be attached to the declaration of the French court—as, in fact, happens with Weiss—effects which it can never have by the law of France, or else the court is forced into pronouncing deliverances which are by the *lex fori* absolutely incompetent.⁹ It is quite overlooked, too, that any system which attributes far-reaching results to this declaration of death, may possibly, just on that account, attach stringent conditions to such applications.

Every State, however, is entitled to enact provisional regulations as a matter of security,¹⁰ and in particular, to set up a provisional curatory in such cases. Indeed, it is bound to do so, in so far as the missing person has property within its territory, not merely in its own interest, for the maintenance of public order, but even in the interests of humanity. These provisional regulations, however, must cease, so soon as the officials of the missing man's own country take up the matter.¹¹

⁷ Olivi (*Revue générale du droit, de la législat.* xii. 1886, p. 136) proposes that the law of the place where the declarator of disappearance is pronounced should rule, even although the court which pronounces it is not the court of the domicile of the missing person; but, on the other hand, he proposes to confine the operation of the decree to the territory to which the court belongs, so that the wife of one who has been declared dead at his domicile, would not be able to marry again in another country, in which the decree did not have that effect. It seems to us that this result is practically a misfortune: it will lead to confusion in family relations, and, as we have shown in the text, is unsound in principle.

⁸ By the Hannoverian statute of 23rd May 1848, § 6, it is properly provided that an application for a declaration of death is to be made to the court to which the missing person, as a matter of general jurisdiction, was last subject "in this country."

⁹ It would, however, be difficult to adduce a case in which a court would find itself entitled to pronounce such a decree otherwise than in accordance with its own law, the *lex fori*.

¹⁰ See, too, Weiss, *ut cit.* Haus (p. 146) will not allow the articles 112-114 of the Code Civil to be applied to a foreigner, *i.e.* in his view a person who is not domiciled in the country.

¹¹ We shall discuss the various presumptions that are recognised as to the period of death of different persons lower down, in treating of Proof. Burge, iv. p. 152, regards the regula-

EXTRA-TERRITORIAL EFFECT.

§ 132. Is a declaration of death or disappearance, pronounced by a competent judge, to be recognised as operative all the world over?

In our view, this question must on principle be answered in the affirmative.¹² The whole matter is simply a prudential regulation for family affairs and questions of succession. Now if, for example, the law of succession were generally to be determined by the personal law, should we not listen to that law, if it enacted that, "Succession to the property of a person, who would be one hundred years old if alive, or who has been absent for a period of ten years without any news of him having reached what was up to that time his domicile, shall be looked upon as having opened"? The judicial process in question merely introduces a series of special precautionary regulations, the purification of which is certified by the judgment. That can be no reason for showing any less respect to the operation of the personal law in another country. Even the jurisprudence of France in this matter recognises the judgment of the competent judge of another country as proof of a fact,¹³ although as a rule, in consequence of the provisions of the Code Civil, apart from international treaties, the judicial sentence of a foreign judge is denied the effect of a *res judicata*. No doubt, as a declaration of this kind in truth merely creates a presumption, the foreign judge, to whom it is pleaded, must be allowed a certain uncontrolled discretion, in virtue of which he may under certain circumstances require an edictal citation in his own country.¹⁴

tions as to disappearance, and the presumptions thereanent, as mere rules of proof, which the judge must in each case determine by his own law. But, as regards the declaration of death, this view leaves it undetermined, whether the judge can only then hold death to be proved if it has been so proved according to the law of his own country, and before its courts, or whether, and under what conditions, he may allow himself to be convinced by the declaration of death made by foreign courts and according to foreign laws; and this declaration of death is something more than a mere rule of proof, if its object is, as it is according to the common law of Rome, to determine the right of succession and the family relations.

¹² Heffter, § 37, note 5, in spite of my exposition in the first edition of this work, remains of opinion that no judicial declaration of death can take the place of real proof of death, in so far as other States, which either do not have any such doctrine, or whose doctrine on the subject is of another character, are concerned, because a mere legal fiction can claim no recognition in a State to which it does not belong. It is not clear what he means by the expression "of another character;" are trifling differences as to the doctrine sufficient to give the doctrine "another character"? In view, however, of the modern Franco-Italian jurisprudence, it will hardly be necessary to refute in detail Heffter's theory. The question is not one of a capricious imposition of disabilities on certain individuals, but it is a regulation of matters of family status and of property, which is practically necessary, the family and the property having been at the best abandoned to the State, whose subject the missing person was when last heard of. If such declaration by a foreign judge were absolutely refused recognition, the result would be uncertainty and confusion, to the great disadvantage of those concerned.

¹³ See, too, Haus, § 40, No. 146, and the judgments to which he refers.

¹⁴ If, for instance, the two countries in question are very distant from each other. In such cases advertisements in the official journals of the one country are useless in the other.

II. STATUS AND CAPACITY. (*Rechts-und Handlungsfähigkeit: État et capacité.*)

A. GENERAL DOCTRINES.

INTRODUCTION. LIMITATION AND DEFINITION OF THE RULES OF LAW THAT BELONG TO THIS SUBJECT.

§ 133. It is a custom which has remained from the days of the old statute theory, to treat a very large number of legal rules and legal doctrines, as having to do with the condition or the capacity of persons.¹ This category is seen in its most extended, and therefore also in its vaguest, form here and there in the Franco-Italian jurisprudence of the most modern school, which has raised the personal rights of the individual into a general regulative principle for private international law, limited, it is true, by the public law of the territory. In German jurisprudence, as a rule, it is merely questions of capacity to have rights and capacity to act that are treated in combination, and this point of view is that which is now being more and more commonly adopted by foreign jurists in discussions of particular topics.

It must, however, at the outset be plain that a collective treatment of all the rules of law, which admit of being so turned in expression as to treat of the incapacity of a person for some act, or for the exercise of some right, as the case may be, may lead to general confusion. Such a collective treatment is in truth not a whit better than the distinction taken by Bartolus, which has been so much mocked at, founded on the principle of considering whether the primary subject of the words of a statute was a person or a thing: for almost all propositions of law admit of being expressed in the form that a person is thereby declared capable or incapable of doing something. For example, if a man is not owner of a thing, it may be said, he is incapable of disposing of it. If a son, because he is not yet emancipated, requires his father's consent before he can enter on any legal transaction, it may be said that he is incapable *per se* of entering on it, etc., etc. We can thus account for the fact that, if we undertake to set up a principle of so much generality as the principle which shall regulate the law of status, the capacity or incapacity of a person, we shall to a certain extent stumble at every corner on practical impossibilities, and involve ourselves in contradictions, which must needs be removed by capricious limitations and exceptions to such an extent, in many cases, that

¹ Savigny uses the expression, "Condition of the person;" Story makes use of the expression, "Capacity of persons," which corresponds with the title we have chosen; and Fœlix comprises the whole subject under the title "*Effet du Statut personnel*," which includes the operation of all the rules that belong to this subject. In the older writers, we find either this latter heading worded as "*Statutum Personale*," or the expression "*Status*." Cf. Code Civil, art. 3: "*Les lois concernant l'état et la capacité.*"

there is little more than a shadow left of the comprehensive principle which was laid down with the utmost assurance at the outset. The distinction between the existence of a legal condition *per se* on the one hand, which according to the theory of many shall be recognised at once in foreign countries according to the standard of the law of the country to which the person belongs, and, on the other hand, the effects produced by this legal condition, which are not recognised in foreign countries—as if a man's legal condition was something perceptible to the senses, like his complexion, or the colour of his hair—is a mere feat of logic, by means of which we can prove everything and nothing, and the magic power of which will always find some believers. Exactly the same thing is to be said of the modern and more dangerous theory of the public interest, according to which, again, the effects of a legal condition or state of capacity may be refused recognition in a foreign country.

§ 134. Let us with these observations consider shortly the course of the historical development of this part of our subject: we must first notice that, as a rule, the following legal topics are treated together under this head, viz. (1) nobility, slavery, civil death, frequently, too, the capacity to inherit, to acquire real property, the loss of reputation (infamy), restrictions on civil capacity by admission into priestly order, the incapacity of juristic and other persons for certain modes of acquisition; and also (2) minority and majority, the incapacity of women for some or for all the acts of civil life, the incapacity of certain other persons for special solemnities attaching to legal acts, the operation of the withdrawal of the capacity to dispose by a declaration of prodigality.

The older authors proceeded (cf. *supra*, § 18) on the assumption that the legislator can only provide for the persons of his own subjects; while, as a rule, foreigners are to be exempted from our laws. If, then, as in all questions relating to this subject, there is a doubt about the *habilitas* or *inhabilitas* of the person, the *lex domicilii* of the person in question is to rule.² The only question is, In what cases are we to assume that there is a *habilitas* or *inhabilitas* of the person? It is obvious that this theory is untenable according to the modern conceptions of sovereignty; and yet, as we shall hereafter see, it has substantially contributed to form a customary law for Europe.

A later theory starts from the conception of the peculiar and individual character of the person. If the personality of a foreigner is to be recognised, it is said, then the legislature must also recognise the attributes of it; for the attributes are indissolubly bound up with the person. As, then, the person of the foreigner is closely subjected to the law of his domicile, so the universal applicability of the *leges domicilii* to all the attributes of the person results as a consequence. “*Statuta in personas directa quaeque*

² Bald. Ubald in L. 1, C. de S. T., Nos. 58, 78, 92; Alb. Brun. art. 8, § 127; Alderah Mascardus, concl. 6, No. 14 *et seq.*

certam eis qualitatem affigunt, transeunt cum personis extra territorium statuentium, ut persona ubique sit uniformis ejusque unus status."³

Others express it thus: "The *status*⁴ of a person must be the same everywhere." The difficulty for the upholders of this theory is to define what laws give a person his attributes, his *status*. Some stand by the general proposition that, if the law makes a person capable or incapable of any relation, this is plainly a statute which will be everywhere recognised in foreign countries as a personal statute,⁵ be this declaration of capacity or incapacity to enter upon legal transactions and to acquire rights a general one, or merely extending to some special transactions and rights.⁶ Others again only allow the *lex domicilii* to decide, if it determines the whole *status* of the person, but do not allow it to do so if the person is declared capable or incapable with reference to some particular acts only. As a matter of fact, rules of law of all kinds may be so expressed that a person is thereby declared capable or incapable of some particular act (*e.g.* the rubric—"The half of every succession, unless the deceased shall have the power of testing upon it, falls to the heir-at-law," is equivalent to "every man has the capacity of testing upon the half of his estate"); and so this rule seems suspicious if stated without restriction.⁷ The point most at issue is as to what is to be the decision in cases where we are concerned with the capacity or incapacity for particular acts, and not with the entire *status*; and it is often excessively difficult to decipher the proper meaning from the obscure expressions of the author. According to Argentræus (§§ 16-18), a statute of the former kind is always a real statute, which is dependent upon the *lex rei sitæ*. The strange distinction of Burgundus (i. § 3, ii. § 4), who holds that the *lex domicilii* should rule so far as the question is one of personal obligation, but the *lex rei sitæ*, on the contrary, so far as the question is one as to the transference of a real right, has been already (§ 20) mentioned.⁸ It would be difficult to reconcile this rule with the principles of any law so as to hold a transference good, where the cedent had not the power to undertake the personal obligation involved in the transference. P. Voet⁹ denies altogether the operation of any

³ Stockmanns' Decis. ; 125, No. 8, cf., too, Christianæus, vol. ii. decis. 3, No. 3—"ob, ut ita loquar, *afficientiam personæ*." Walter, *D. Privatrecht*, § 43.

⁴ D'Aguesseau's Works, iv. p. 638 ; Boullenois, i. pp. 26, 153—"L'homme étant le même partout." Merlin Rép. Testament, sect. 1, § 5, art. 1.

⁵ Danz., *D. Privatrecht*, i. § 53 ; Glück, part i. p. 288.

⁶ Rodenburg, 1, 3, §§ 4-6, ii. 1, § 1 ; Bouhier, chap. 24, Nos. 1-9 ; Duplessis. Consult. Œuvres, i. ii. p. 155 ; Mevius in *Jus. Lub. proleg.* qu. 4, § 25, §§ 4-6.

⁷ Foote, i. p. 30, is right in calling attention to the many meanings which the word "capacity" bears, and to the confusion that is caused thereby. But yet inferences from the mere word "capacity" are much in favour, especially in French jurisprudence.

⁸ He is followed, for instance, by Stockmanns (*decis.* p. 125, Nos. 10, 11) and Christianæus (vol. ii. decis. 56, No. 7) ; so, too, Story, § 431. The whole theory is explained by the desire not to fall into conflict with the rule recognised as necessary, by which the *lex rei sitæ* determines the succession (according to many other French writers, and according to English law). Most of the illustrations cited by the supporters of this theory have reference to the capacity to execute a testament.

⁹ Cap. 2, § 4, No. 6 ; cf., too, No. 9.

statutum personale in reference to foreign real property.¹⁰ Others make a distinction, in the case of special statutes which do not determine the entire *status*, between those which concern persons and those which concern things: in the former case they allow the *lex domicilii*, in the latter the *lex rei sitæ* to rule.¹¹ Here, too, as in the case of the theory of *statuta personalia, realia, and mixta*, it is impossible to determine when a statute refers to a person, and when it refers to a thing. But from the illustrations which these older writers employ, one sees plainly that their theory of these special capacities and incapacities is merely an attempt to carry out universally rules which have been found to fit the expressions of some particular system of law in the subject of succession and the property of married persons. In this connection they had generally before them the rules of the older Germanic law, by which succession and the rights of married persons were special modes of acquiring individual assets of property, and in which, by well-established usage, the *lex rei sitæ* alone was applicable. These rules spoke of the capacity or incapacity of persons, with reference only to the testamentary instructions of a testator, or the power of spouses to give each other property, and these expressions had in one way or another to be brought into harmony with the general theory, which made the *lex domicilii* the rule for determining the capacity or incapacity of persons.

The same controversies may be found among the authors who refer the validity of the *lex domicilii* to the mere *comitas* of the foreign legislator, and to a customary law.¹²

Wächter sets up a special theory as to the import of this customary

¹⁰ It may be noted that Burgundus, like almost all the older writers, maintains the rule that moveables follow the person.

¹¹ Boullenois, i. p. 48: "*Ces statuts personnels particuliers sont ou purs personnels ou personnels réels selon l'objet qu'ils peuvent avoir. Mais il y a cette différence entre le statut particulier pur personnel et la Statut particulier personnel réel en ce que le premier se porte par tout. Le second n'affecte la personne que pour le fonds dont est question . . . doit être par conséquent, borné aux biens situés dans l'étendue du domicile, parce que l'état général des personnes se porte partout.* I. p. 175: "*J'examinerai d'abord, quel est l'état et la condition de la personne dans le lieu de son domicile. Si je la trouve incapable par état j'en conclurai qu'elle n'en peut aucuns (actes à l'étranger). Du domicile de la personne je passerai à la loi de la situation, et j'examinerai, si ces actes permis à celui, qui est capable par état par la loi de son domicile, lui sont défendus à raison d'un Etat contraire qui aurait lieu, ou les biens sont situés, ou s'ils sont indépendamment de l'état. Au premier cas le statut personnel du domicile se trouvant croisé par le statut personnel du lieu de la situation, celui du domicile l'emportera sur celui de la situation. Au second cas le statut personnel du domicile cédera au statut réel de la situation.* Merlin Rép. Stat. *Autorisation Maritale*, § 5, cf. Cochin, Œuvres, i. p. 545. The theory set forth in Cocceji's dissertation, and afterwards with some change by Hert, resembles that of Boullenois (Cocc. tit. v. §§ 3-6, tit. vii. §§ 3, 4, 10; Hert, iv. §§ 4-10), by which the incapacity of a person in general depends upon the *lex domicilii*; but the capacity to undertake particular transactions, or to dispose upon particular things, depends upon the *lex loci actus*, or the *lex rei sitæ*, as the case may be.

¹² Huber, *de confl. lib. i. tit. 3, § 12*, no doubt, pronounces in favour of the *lex domicilii* universally, with the exception of the capacity to test, an exception he gives no justification for, and determines by the *lex rei sitæ*; Pardessus, v. No. 1483, and Massé, ii. p. 91, takes the other side, because such special restrictions are entirely capricious.

law (ii. p. 172).¹³ The attributes of foreigners, in so far as they are recognised by the law of our land, must be determined by their own law unless there is some provision with us with reference to attributes of the kind, by which it is plainly intended to lay down a rule for every one unconditionally, no matter whence he comes. On the other hand, the court must determine the legal operation of these attributes according to the laws of its own State, unless the question is merely one as to the capacity of a foreigner in a foreign land to enter upon contracts, and to oblige himself, which must be determined by the laws of his own State only.¹⁴ A foreigner then, who, by the law of his home, is still a minor, must be treated by us also as a minor, but our courts will only allow him the same rights as our laws allow to our minors. If he claims a *restitutio in integrum* from our courts on account of his personal privilege as a minor, the judge can only give him that in so far as our laws permit it. A foreigner, who is a nobleman by the laws of his own country, is also to be held a nobleman by ours, but our judges cannot give him any rights on account of his nobility, except what our laws give our noblemen.

Savigny¹⁵ establishes the universal validity of the *lex domicilii*, by pointing out that it is impossible to apply any other law than that local law to which the person belongs by residence, to the various personal conditions and qualities by which his status is to be determined. He rejects the distinction taken by Wächter between these attributes themselves and their operation, as also the distinction between a general and a special capacity for contract, and the only exception he admits is in the case of institutions of an anomalous character, which lie outside the limits of the community of law that obtains among independent States, *e.g.* the capacity for polygamy, or the incapacity of certain religious persons to acquire property. It is only in such exceptional cases that the law recognised at the seat of the court is to rule.¹⁶

A fourth theory is founded on the consideration that the tie which exists between the State and individual subjects thereof is not undone by a temporary residence in a foreign country, and therefore the subjects of a State, even in a foreign country, remain subject to their native laws (Hert, iv. c. 8; Renaud, *D. Privatr.* i. § 43, p. 103). This consideration, however, falls to be rejected, in respect that, although the State may rule its own

¹³ Beseler followed him in his first edition, i. p. 151. In his fourth edition, § 39, note 7, Beseler only adheres to this position in so far as it is not legitimate, by means of their personal statutes, to allow foreigners to enjoy privileges as compared with native subjects of the same legal position.

¹⁴ This theory is connected with a judgment of the 1st Civil Senat. of the Supreme Court of Appeal at Lille, of 21st Sept. 1846 (rep. in Seuffert, 13, pp. 102, 103), "The rule that the judge shall always decide according to the law of his country, must always hold good. The exception which has been established by special custom, by which the existence of minority in a foreigner must always be determined by the law of his dwelling-place, cannot be extended so as to determine the legal consequences attaching to such minority."

¹⁵ § 362; Guthrie, p. 148; Gerber, too, § 32; Unger, i. p. 163.

¹⁶ § 365; Guthrie, p. 166. Sects. 349 and 365.

subjects according to its own laws, in case its courts may have to decide the question, the foreign State is in no sense bound to assent to this. (Wächter, ii. p. 169; Story, § 73.) An argument, specially advanced by Renaud, upon the ground that different States mutually recognise each other, contributes nothing to the determination of any question of private law: the State can require no more than that, as regards political rights and duties, her subject shall not be compelled to duties, and shall not share in rights, so long as he remains her subject, which are inconsistent with that character.

Others allow the *lex domicilii* to rule, on the ground that personal attributes constitute the vested rights of all persons (*e.g.* Maurenbrecher, i. § 144). We have, however, already said all that is necessary on the theory of vested rights (p. 80): against the application of it to the law of status we have also this consideration, that, even by the laws of one and the same State, such personal attributes, as they are called, cannot be held to be vested rights.

We may adduce the following considerations to meet all other theories, whether they assume the validity of the *lex domicilii a priori*, or establish it upon a law of custom. The rules of law we are now dealing with, it is said, have to do with the condition and attributes of the person. This condition and these attributes are, however, clearly of a legal character; they exist by force of a positive law, and when that law ceases, these legal attributes themselves cease also. If, then, by a logical process, we deduce the universal validity of a rule of law from the fact that it determines the attributes of a person, that is a mere analogy drawn from the physical attributes and conditions of persons, which, no doubt, remain the same in every country, and is an inadmissible argument. A law that deals with the attributes of persons, according to the common form of expression, has this precise meaning, that rules of law different from the ordinary rules are to be applied to some particular legal relations of some particular persons more definitely designated by certain facts. But then it happens that the law has attached to certain actual peculiarities of certain persons, which are either permanent or exist for a considerable time, the application of a number of important rules, which differ from the ordinary rules. One is then accustomed to designate these actual *de facto* peculiarities as legal attributes and conditions of the person. But it is entirely arbitrary which of these actual physical peculiarities shall retain a name that shows their legal significance; and, for instance, alongside of the ordinary class of "minors," "majors," "prodigals," "nobles,"¹⁷ and so on, one might set other classes, such as "landowners," "absentees," "burgesses," "rustics," "those without rights of succession," etc. If there is, therefore, asserted to be a general customary law, which lays down that the attributes of a person, or his condition in the eye of the law, shall be determined by the

¹⁷ One is a noble who is descended, as matter of fact, in a particular way from particular families, or who by special State recognition is raised to an equality with those so descended.

law of his domicile, it must be shown in detail what are these actual attributes and peculiarities attaching to a person, which are to have, even in foreign countries, some particular legal effect, because by the laws of the domicile of the person to whom they belong they have such an effect, even although the law of the foreign country may attach no such effect to them. It is not allowable to proceed by inference from one set of facts to another because both of them are described as attributes of the person; it is only possible to proceed on grounds which justify an analogous extension of rules of law in other cases. We shall enquire specially, in the case of each particular legal institution, how far the results that follow from general logical principles are modified by customary law.

Authors who take as their starting-point the conception of legal attributes, or the legal condition of the person, acknowledge, as a matter of fact, that in certain cases exceptions are admitted—as, for instance, in the case of slavery or civil death; but if it were a logical truth that the attributes of a person are to be recognised as operative all the world over, there could not be any exceptions at all recognised. It is, however, quite conceivable that the courts of one country should hold a person to be incapable of contracting, while those of another hold him capable, and that the *lex fori* should rule; or that a man who cannot validly enter upon contracts in his own country should be held by the courts of all countries to be capable of contracting in questions as to obligations on which he has entered in another country, and that so the *lex loci contractus* should rule. In support of this latter theory, which prevails largely in English and American practice, there can at least be urged reasons of expediency of no light weight.

Again, as regards the *lex fori*, which is adopted by some authorities as generally regulative of such questions in consequence of the general principles which they assume, and is adopted by others as regulative of cases in which anomalous legal institutions are to be dealt with, we have here simply to refer to the general discussions which we have already gone through. The tendency of modern theories—and it is a sound tendency—rejects such a recourse to the *lex fori*, which is the result of despair of finding another solution, and makes the rights of parties dependent on the accident of whether the suit is proceeding in this or in that country.

NONE BUT THOSE LEGAL PROPOSITIONS WHICH ARE CONCERNED WITH CAPACITY TO HAVE RIGHTS, AND THOSE WHICH ARE CONCERNED WITH CAPACITY TO ACT, BELONG TO THIS PART OF THE SUBJECT.

§ 135. There is only one outlet from all this confusion,¹⁸ viz. to lay down a precise definition of the rules and propositions of law which go to

¹⁸ This confusion is still very marked, e.g. in Haus, p. 110. He comprises under *état, condition, capacité*, for instance, all the law of the family, and must then invoke the theory of vested rights, in order to escape from inconvenient consequences: by this means he only makes the confusion all the greater (see p. 127).

constitute the idea of personality in the legal sense. These rules and propositions are the rules and propositions which deal with the capacity of having rights (*i.e. status*), and those which deal with the capacity to act. No other rules and propositions touch the essence of personality, they merely operate on certain particular rights that belong to persons and affect them.

It follows, in the first place, from the conception of a person, that he should be the subject of rights; not, however, that he should have any particular concrete rights; it is, however, indispensable for an individual who is to take rank as a person, that he should have the capacity of having rights. The second test of personality, which is not, to be accurate, necessarily bound up with the conception of personality in every case, but which is indispensable for general legal intercourse, consists in this, that the person should have a legally operative will, that is, should be capable of acting. Rules of law as to capacity to act belong, therefore, to this subject; persons are, by the very meaning of the term, capable of legal rights and legal acts; a condition of affairs in which persons should not, as a rule, be capable of acting, would hardly be conceivable. In cases, therefore, where it is only particular concrete rights which are conceded or denied to a person, there is no question of the essence of the person, but merely of accidental circumstances belonging to that conception. One might be disposed to include in our subject the family rights of a person, but a complete personality is not, according to modern legal conceptions, conditioned by the fact that the person belongs to a particular family.¹⁹

¹⁹ The distinction mentioned above as having been taken by Wächter, between the attributes of a person and the legal operation of these attributes, rests upon a confusion between the privileges of special classes of persons, which occur in concrete legal relations, and the capacity to enjoy rights and to act, that is to say, the rights of personality in the proper sense. It is, for instance, quite accidental whether or not a minor is in a position to avail himself of the privileges which belong to minors on the head of prescription of actions, or by the *in integrum restitutio*; he may by the law of the land to which he belongs be a minor, and so incapable of acting, and yet by that law be denied the privileges belonging to prescription of actions, or the *in integrum restitutio*. Both depend on the system of law to which the legal relations, wherein it is desired to make use of these privileges, are subject: the privileges attaching to the prescription of actions are merely an abrogation of prescription for that particular case, and so, too, with the *in integrum restitutio*, which constitutes a ground for withdrawal from a legal relation already entered upon, or for the restoration of a legal position that has been lost. Whether a man, who by the law of his domicile is a minor, but a major by the *lex loci actus*, could claim the privileges which the latter law gives to minors, depends upon whether this law gives such privileges only to persons up to a certain age, or to all those who, because of their minority, are under guardianship, and cannot attend to their own affairs. In reason we must take the latter solution, and, as the facts are in accordance therewith, those persons who by the law of their homes are under guardianship, may lay claim to these privileges (*cf.*, however, remarks on the *in integrum restitutio*, *infra*, § 154). Even although the examples given by Wächter are rightly determined by him, the counter argument of Savigny is applicable, if it is sought to apply that distinction to the status and capacity of a person. "That distinction," says Savigny, § 362, Guthrie, p. 150, "between the attributes of a person and their legal effects, rests simply upon the circumstance that many conditions of the person are designated with special names, while others are not. This accidental and indifferent circumstance cannot justify the application of different territorial laws to them. We call him major who has the

MORE ACCURATE DEFINITION OF THE CAPACITY TO ACT.

§ 136. We must, however, limit the capacity to act, in the sense which is to prevail here, to the undertaking of legal acts *inter vivos*.²⁰ This is inferred from the fact that personality ceases with a man's death. The testator does not, in an accurate sense, dispose of his property: all that he can do is to bring it about by a declaration of his will that one person shall or shall not inherit an aggregate of assets, and shall or shall not take over an aggregate of obligations, which up to this time have been united in his person. The privilege of making testamentary dispositions does not belong either to those essential conceptions which necessarily go to make up an individual person, or to the conceptions of those attributes which usually belong to one. This proposition may be shown to be apposite by the illustration already given. It is quite conceivable that in some countries, as was the case in Germany in old times, testamentary dispositions should not be recognised; dispositions *inter vivos* are, however, indispensable for the intercourse of life.^{21 22}

We have a true case of limitation of capacity to act, if the law withdraws from a person the capacity of disposing of some particular class of assets, it may be real property: for instance, the law may forbid one who has been, as an exceptional measure, declared by the special indulgence of the State to be of full age, but who is *de facto* still a minor, to alienate his landed estate. Doubts, however, may be raised as to

fullest capacity to act that age can give him; it is, therefore, merely a name for certain legal effects, for the negation of certain earlier limitations on his capacity. So, too, we call him minor who does not as yet enjoy that full capacity. If a law, however, lays down certain stages of capacity for minors, without giving these stages any special name, there is no reason why these stages of capacity should not be determined by the law of the domicile as well as the entry upon full capacity."

This reasoning, however, destroys Savigny's own theory as well. He, too, derives the application of the *lex domicilii* from the fact that it deals with the legal condition of the person as affected by the various rules of law in question. The special legal condition of a person is, however, merely a way of expressing that under certain circumstances special rules of law are to be applied to the person in question which are not applicable to the legal relations of other persons. See to this effect, and against Wächter, Stobbe, § 30, No. 10, Muheim, pp. 106, 107.

²⁰ In the first edition, I further limited the conception of capacity to act to the capacity of disposing of one's property. This limitation goes too far; it does not take into consideration that there are important legal acts that have nothing to do with property, and capacity to do which is yet a *naturale* of personality, e.g. capacity to give consent to a marriage.

²¹ The theory by which the capacity of making a testament is to be treated on the same principles as are recognised in the case of capacity to act, would lead to this unsound result, that the *testamenti factio* would be ruled solely by that personal law which attached to the testator at the time he made his settlement, without any reference to his personal law at the date of his death.

²² The cases in which a person is prevented from disposing of his property on account of the concurrent right of a third party, have no more to do with this question than the case of a person prevented from disposing of something that is not his own. This distinction, however, as we shall show in treating of the law of property of married persons, is often disregarded, and, it may be supposed, tends to great confusion on the subject.

whether we have a case of true incapacity to act (although there plainly is some limitation of that capacity), in cases where the law merely refuses to allow a person to undertake particular legal transactions, *e.g.* to undertake obligations by bill, or in respect of loans of money, but in other respects leaves him with full capacity to dispose of every asset of his property. In my former edition, I expressed myself to the effect that in such a case we should not hold that there was a true limitation of capacity to act. In support of this view, it may be urged that it is quite possible that a legal transaction of some particular class should be refused recognition all over a State, but at the same time it would be impossible to say that all the inhabitants of that State were incapable of acting. We might take the case of a country in which the law of bills was unknown. It is, however, unnecessary to decide this difficult question here, for the particular rules of customary law, which prevail on the Continent of Europe, have on a sound view no validity or application in the case of these special incapacities to act, such as the incapacity of certain classes of persons to undertake obligations by bill or on a contract of loan.

FUNDAMENTAL DISTINCTION IN THE INTERNATIONAL TREATMENT OF THE
CAPACITY TO HAVE RIGHTS, ON THE ONE HAND, AND THE CAPACITY TO
ACT, ON THE OTHER.

§ 137. If we propose to treat the rules of law as to capacity to have rights, and those as to capacity to act, together, we only do so in deference to the systematic treatment which has been traditionally adopted. In truth, a fundamental distinction must be recognised between those two classes of legal rules in private international law.

The rules of law, which deal with the legal capacity of a person, determine under what conditions an individual is to be viewed as a legal subject, either generally or in relation to particular isolated rights. It might readily be supposed that, as soon as a question about a foreigner was raised, the actual conditions which are recognised by the laws of the domicile of the foreigner should be substituted for the conditions under which any proposition of law that touches legal capacity is applied to natives. A man, therefore, who by the law of his domicile could not acquire real property, would be equally disabled here, just because he was a foreigner. This would, however, imply a decided encroachment upon a principle which is assumed in modern international law, *viz.* that foreigners and natives have the like capacity in the eye of the law.

At the same time, the following considerations prevent this conclusion. Those rules of law, on which the capacity of individuals to have rights depends, rest really upon the political and moral ideas of a nation. If the law recognised at the domicile of the foreigner were to rule, it would often happen that the very facts and circumstances which would with us confer

full rights or some special right, would constitute in his case a ground of disability (*e.g.* in one country Catholics alone, in another Protestants alone, can acquire real property).

Lastly, there are certain rules of law affecting legal capacity which can only be carried out because definite public regulations actually exist in one State, while these regulations do not exist at all, or cannot be applied to the particular case, in some other State where the person concerned is actually resident: (*e.g.* How is it possible to treat a man as civilly dead because he has been sentenced abroad, for a crime committed in another country, to a punishment involving civil death, if he resides in this country, and has not been surrendered by us to the foreign criminal authorities or confined in prison?)

We may say, therefore, that the question is to be resolved just as if the foreign law did not exist at all, and all we need regard is whether the actual conditions are present which are essential to the application of some rule that increases or diminishes legal capacity according to that system of law under which the question otherwise falls.²³

If we are concerned, therefore, with the acquisition of real property, the *lex rei sitæ* will determine the question of the capacity of the foreigner to acquire it.²⁴

§ 138. Rules of law which are concerned with the capacity to act have quite a different purpose.^{25 26} It is not their object to withdraw the

²³ In agreement with this, Stobbe, § 38, ii.; Muheim, § 14 (p. 108). The latter says very soundly, "If our State submits some particular legal relation to foreign law, it must logically also submit the capacity for it to the determination of that law: for the whole matter is a question of the enjoyment of some foreign legal system, and has nothing to do with any interest belonging to our legal system."

²⁴ This is a case where the falsity of the proposition, that in the case of a prohibitive law of that kind the judge must apply his own law, is strikingly exemplified. The judge cannot give a pursuer right to a parcel of real property situated abroad, if that pursuer is, by the law of the place where it lies, incapacitated from acquiring it. Cf., too, the rule which Story, § 101, describes as generally recognised: "The capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made, in the place of their domicile, touching property situated therein."

²⁵ The strict separation of capacity to have rights, on the one hand, from the capacity to act, upon the other, which I upheld in my former edition, is disregarded by the majority of writers, who refuse to enter upon a minute examination of details, which is so important in private international law, and that although the distinction is obvious, and comes up in every concrete decision upon these matters. They prefer to throw these entirely distinct classes of rules together (without thinking of the contradiction which lies in their assertion at the same time of the equality in law of foreigners and natives), and escape from the subject with some indefinite reference to the compulsory character of certain laws, or to their economical or moral objects, or, as in the procedure of the Franco-Italian jurisprudence, to the public interest, as if the laws as to minority, for instance, were not just as much as any others enacted in the public interest. I am glad to see, on the other hand, that in the careful and thorough exposition of private international law in Stobbe's *D. Privatr.* (i. § 30, *præs.* note 11), a sharp separation of the capacity to have rights from the capacity to act has found approval. R. Schmidt (p. 30) seems, too, to approve of the separation; but he confuses the subject by the introduction of things that have no connection with capacity of having rights, *e.g.* the restitution of minors. More recently the distinction has been recognised by Rossel, *Manuel du*

possession and the enjoyment of certain rights from those who are incapacitated ; it is their care that such persons shall not involve themselves in loss by their own acts. This care for the person must be a permanent one, if it is to have effect ; it extends, therefore, to all persons who permanently belong to the State, *i.e.* who are domiciled there. It is, no doubt, conceivable that a system of law should recognise consistently as minors all foreigners who had not attained the particular age fixed by that law as the age of majority ; but this could only be carried out, if at the same time there were established a guardianship for foreigners who were resident in our country only temporarily.²⁷ It is, however, plain that this requirement (and it would be necessary to establish a guardianship for every incapacitated person) could not be carried out, and, as a matter of fact, no one has ever thought of developing the idea. It necessarily follows, without the necessity of proof of the existence of any customary law, according to the reasonable sense of the statutes on the subject, that one who is capable of acting by the law of his own country must be treated by the courts of all countries as capable.²⁸

A SPECIAL CUSTOMARY LAW AMONG THE STATES OF THE CONTINENT OF EUROPE IN REGARD TO CAPACITY TO ACT.

§ 139. The converse of this proposition, *viz.* that any one who by the laws of his own domicile is incapable of acting, is to be recognised as incapable everywhere, cannot, on the other hand, be shown to follow as a necessary logical inference. On the contrary, the inference from the

droit civil de la Suisse Romande, Basel 1886, p. 10, and *v. Martens*, § 70. W. Dolk, *Internationaal Privaatr.* i. Utrecht 1880, specially insists upon the distinction. Roth, *D. Privatr.* p. 283, first throws the two together, and subsequently makes the distinction, without laying any foundation for it. Weiss, p. 543, makes this distinction, "*L'état de la personne consiste dans ce qu'elle est : sa capacité consiste dans ce qu'elle peut, au regard du droit.*" But this is a distinction which in truth is no distinction. That which a person in the eye of the law is, is merely another way of expressing that which in the eye of the law he has power to do. A man is of full age = a man has full powers of disposing ; a man is under age = a man has not full powers of disposing. This deliverance does not advance us a step, and I cannot see that Weiss has taken anything by it.

²⁶ Brocher (*Nouv. Tr.* p. 90) also recognises, although somewhat indistinctly, that a difference must be made between status, or capacity to have rights, and capacity to act. The "*Incapacités naturelles*," which, according to Brocher, will as a rule have operation in other countries, are limitations of the capacity to act : his "*Incapacités sociales*" are limitations on status, or the capacity to have rights.

²⁷ No doubt there is in some countries a system of guardianship for those who have landed property ; that is explained by the fact that principles of feudal law are either still recognised there, or erroneously adhered to ; but it does not furnish any objection to our theory, since on the opposite assumption there would have to be a special system of guardianship established for foreigners who had no landed property.

²⁸ In so far I am unable to agree with the following observation of Wächter (*ii.* p. 177) : "It is not a necessary consequence of the silence of our laws as to the status of foreigners, that they intend to proclaim that their general provisions on that head are inapplicable to foreigners, unless they specially confine them to their own subjects."

purpose of these laws as to incapacity to act, as already expounded, is that foreigners, if they have the capacity to act by the laws of the country where the transaction which may be in question takes place, must be held to have that capacity by the courts of all countries except those of their native country, and those of any other where a similar law to that recognised in their own country is in force. It may be laid down that the legislature will never be inclined to show greater protective care for foreigners than for its own subjects, and if it proclaims that the latter, on attaining a certain age, no longer stand in need of the care which it exercises over minors, but are quite fit to protect their own interests, it would seem thereby to lay down a similar rule for foreigners.²⁹

Here, however, we are met by a customary law, which is recognised at least all over the Continent of Europe, according to which this logical deduction is pushed aside, and in this second case also foreigners are judged by the law of their domicile. The origin of this customary law, of which we will give a more particular exposition in connection with the different legal institutions, is explained by the gradual nature of the development of the idea of sovereignty in the individual European States. Jurists looked upon all territorial laws, which deviated from the common imperial, *i.e.* the Roman law, as statutes binding only upon persons who either voluntarily subjected themselves to them (a case that often happened when new towns were founded or new laws enacted), or for whom there could be invented a fiction of voluntary subjection to them, as in the case of those who committed some delict which was punishable according to the particular law there recognised, although not so by common law. Hence came the rule that a law which concerned the person was not

²⁹ This is the result at which the Supreme Court of Louisiana arrived as the ground of a judgment, [*Saul and his Creditors*, 17 Martin 596,] which is, it must be said, assailed by Story. Story, § 75, says: "Now, supposing the case of our law, fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here, placing it at twenty-one, no objection could, perhaps, be made to the rule just stated. And it may be, and we believe would be, true that a contract made here at any time between the two periods already mentioned would bind him. But reverse the facts of the case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this State, and entered into contracts: would it be permitted that he should in our courts, and to the demand of one of our citizens, plead as to protection against his engagement, the law of a foreign country of which the people of Louisiana had no knowledge?"

But it is not the mere ground of expediency, that the inhabitants of one country are not bound to know the laws of another, that is to determine the question.

R. Schmid (p. 43), who, without any detailed investigation, rejects the customary law, to which we are immediately to refer, argues purely in the style we have indicated. But he goes so far as to read the conclusion that a man who would be of full capacity, *e.g.* of full age, by our law, whereas by the law of his own country he would not be, ought to be treated as of full capacity by our courts, even in cases in which the question relates to a contract concluded in his own country, which is the country of both parties. His reason is a simple one, that to be treated as a minor is an advantage, which our courts cannot be the means of bestowing in larger measure on foreigners than upon our own countrymen. It is a good thing for international intercourse that Schmid stands almost alone in these views.

binding on foreigners, a rule which applies to cases of the kind in question if it is to have any application at all, since the care of the person of the incapacitated is very prominent in these statutes.

To that too was added the fact, which, as we have seen, favoured the rise of the rule "*locus regit actum*"—viz. that all the law courts of Christendom were considered as belonging to one great empire united under the Emperor and Pope, if not *de facto*, at least *de jure*. Now, if we take a case of incapacity to act, which has its origin in a judicial decree—the incapacity of the prodigal—this must receive effect everywhere (as the decrees of one court must be recognised by every other court), if it was the deliverance of the *judex domicilii*, and what had been laid down by the *judex domicilii* must also have been laid down by the enactment of the legislator of the domicile, particularly as in the Middle Ages the functions of the judge and legislator were frequently united in one and the same person.³⁰ This theory, dating from the days of the later commentators, has been followed by almost all writers down to the most recent times, with a very few exceptions. They disputed over special cases, which were by many improperly ranked alongside of questions of capacity to act; they did not define accurately their conception of that capacity, and thus, in their endeavours to unite a recognised system of practice and all its detailed consequences with their theory of the universal validity of the *lex domicilii*, they set up inconsistent and capricious rules: but in the cases, which, according to the theory we have laid down, belong to the subject of capacity to act, they, and the courts too in their judgments, made the *lex domicilii* the fountain, even although, like J. Voet³¹ and many of his followers, they derived the general recognition of this law from the practice of friendly intercourse among individual States, the so-called *Comitas Nationum*, and not from logical considerations. The Legislature in many cases attached itself to this theory.³²

³⁰ Cf. Barthol. de Salic. in L. 1, C. de S. Trin., No. 14. Alb. Brunus, *de statutis*, x. § 57.

³¹ *De Stat.* § 7. Cf. with the passages cited below in connection with the different rules of law.

³² Besides the authors already cited, the following pronounce generally for the validity of the *lex domicilii*: Titius, i. c. 10, § 26 *et seq.*; Reyscher, § 82; Phillips, § 24, p. 187; Hofaker, *de eff.* § 24; *Principia*, § 139; Haus, p. 25; Hommel *Rhaps. Quaest.* vol. ii. obs. 409, No. 3; Eichhorn, § 35; Schäffner, § 33; Klüber, 55; Reinhardt, *Ergänzungen*, i. 1, p. 130; Heffter, § 38, 1: "A foreign State may, no doubt, modify or disregard altogether the legal relations" (*i.e.* status of citizenship, in which Heffter includes capacity to act) "when it is called upon to apply them to conditions, persons or things in its own territory; if, however, it does not do so, it implies that they are to be left to be determined by the law of the domicile:" Thöl, § 78 (although with the preliminary explanation that to treat foreigners by the *lex domicilii* is only a statistical rule). Wening Iugenheim, § 22; Mühlenbruch, § 72; Spangenberg, *Dissertationes*, i. p. 149 (with a note that this theory has been followed in practice by the Supreme Court of Appeal at Celle). Mittermaier, § 31; Casanova-Brusa, p. 367; Lomonaco, p. 80; Stobbe, § 21, *note* 21; Fiore, § 45; Dernburg, § 46, *note* 9; Asser-Rivier, § 19; Laurent, ii. § 43 and § 92; Calvo, § 926; Bard, § 127; v. Martens, § 70; Durand, § 172; Weiss, p. 590. The fourth article of the statute book of the Canton of Bern; 1st and 3rd articles of the statute book of Freiburg; § 10 of the Regulations of 10th November 1834, for

NON-RECOGNITION OF THIS CUSTOMARY LAW IN THE UNITED STATES.
LAW OF ENGLAND.

§ 140. On the other hand, the law of the United States decides questions of capacity to act according to the *lex loci contractus*. This position is defended on the ground of the protection it affords to commercial intercourse against appeals to foreign laws unknown to one of the parties.³³ The English doctrine at one time³⁴ would take no other point of view than this, but more lately it has become unsettled, and seems to be tending in the same direction as continental opinion. Particularly—and this is a matter to which we shall recur again—capacity to marry is more and more tested by the law of the country where the party has his home, and the pressure of logic seems to be forcing lawyers to treat other contracts on the same footing. Foote, however (p. 31), still describes the principle of determining the question, in so far as it bears on the transactions of ordinary business life, according to the *lex loci actus*, as a practical course.³⁵

NOTE F. ON §§ 137-140, INTERNATIONAL RULES AS TO CAPACITY TO ACT.

[The subject is so fully discussed in the text, and the references to different authorities are so complete, that there is little to add. Reference

the Papal States; § 33, §§ 4 and 34 of the Austrian statute book (on this cf. Savigny, § 363, Guthrie, p. 156; note on Unger, p. 163) expressly recognise that a foreigner's personal capacity to act is to be determined by the *lex domicilii*, not merely in the case of subjects who enter into contracts abroad, but also in the case of foreigners who enter into contracts in the territory of these States. Codex Maximil. Bavaricus, civ. i. 2, 17. It is silently implied in the provisions of the Code Civil, art. 3. (So, too, the universal opinion of French jurists, confirmed by constant judgments of their courts, Fœlix, p. 64.) The same provision is to be found in the 12th article of the Sardinian statute book, article 3rd of the statute book for the Canton Wallis, article 3rd of the new statute book for the kingdom of Poland, article 9th of the statute book of Louisiana. Codice Civ. Italiano dispos. gen. art. 6: "*Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono.*" See a series of French and Italian decisions given by Fiore. Append. p. 542, Decision of the Senate of Warsaw of 1873 (Jour. i. p. 48). In Spain, too (Torres Campos, p. 279), capacity (*la aptitud y la capacidad legal*) is decided by the law of the domicile. The 23rd, 34th, and 35th sections of the introduction to the Allgem. Preuss. Landrecht contain express recognition of the view defended here as applicable to foreigners who deal in Prussia, although there are one-sided modifications in favour of native Prussians. Prussian *Gerichtssordnung*, i. Tit. 1, §§ 5, 6. See Savigny, § 363.

We must draw a clear line of distinction between capacity in the sense in which we have used it (see definition in §§ 135, 136) and capacity for delicts, *i.e.* capacity to incur obligations by committing an illegal act. (Cf. Muheim, p. 130.) This is without exception to be ruled by the law to which the illegal act is in itself subject, in our view, therefore, by the *lex loci actus*.

³³ Story, §§ 75 *et seq.*; Wharton, §§ 112 *et seq.*; *præs.* § 115. This view, as far as German writers are concerned, I find nowhere except in Heineccius, *Pract.* ii. 11, sec. 5. Alef's view (§ 32) stands quite alone: "*Quoties de habilitate personae est disceptatio, toties praevallet statutum quod actui resistit, ideoque quod agitur effectu caret.*"

³⁴ Burge, i. pp. 27, 28.

³⁵ See Westlake, p. 43 *et seq.*; Phillimore, § 382, says as to the Anglo-American doctrine, that it is distinguished by a "painful and clumsy inconsistency."

may be made to the last chapter of Lord Fraser's work on "Parent and Child," p. 570 *et seq.*, for an exhaustive discussion of the principles of international law applicable to the present question. His lordship comes to the conclusion that in Scotland the *lex domicilii* will determine whether a person is to be considered a minor or of full age, and will also determine what are the privileges of minority. This rule needs no qualification in cases where the foreigner alone is principally concerned: his personal and domestic relations, his powers of managing his estate, and generally all questions other than questions of contract, will be solved, in so far as they are affected by the minority of the foreigner, according to his own personal law—*i.e.* the law of his domicile. But when questions of contract emerge, the rule must be qualified: we have then to deal with the interests of a Scotsman who has contracted with a foreigner, as well as with those of the foreigner himself, and international law must deal fairly with both parties. The question for solution in such cases will always be, did the Scotsman know the condition and status of the person with whom he contracted; did he use reasonable care and prudence; was he put upon his enquiry; and has he by his own neglect placed himself in a position of disadvantage? If he has acted prudently and with reasonable care, and if there was nothing in the appearance of the other party or the nature of the transaction to raise enquiry, justice requires that the *lex loci contractus* should govern the rights of parties, and that the foreigner should not be able to shield himself by appealing to his own law of status, of which the other party was ignorant, and to which his attention was not directed.

The rule admits, according to his lordship, of another exception; obligations *in re mercatoria* by a minor engaged in trade, and debts for board and lodging, will bind a foreigner as much as a native, and upon the same grounds.

In England there seems to be doubt whether minority and majority are to be determined by the law of the place of the contract in question or by the law of the domicile of the person: on the one hand, in *Simonin v. Mallac*, 1860, 2 S. and T. 77, a learned judge says: "In general, the personal competency and incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made;" while, on the other hand, the very high authority of Lord Westbury sanctions the statement that "the civil status is governed universally by one single principle—namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy—must depend" (*Udny v. Udny*, 1869, L. R. 1, Sc. App. 457 and Court of Sess. Reps. 3rd ser. vii. H. of L. p. 89). Westlake, pp. 45, 46, inclines to the view that the doctrine of Lord Westbury may be taken as likely to be regulative of English law in the future. In a recent case in the House of Lords (*Cooper v. Cooper*, Feb. 24, 1888, Court of Sess. Reps.

4th ser. xv. p. 21), which was taken on appeal from the Scots courts, the question was raised whether an Irish lady, not of full age, and therefore by the law of Ireland incapable of contracting, could on the head of minority alone set aside a marriage contract, which she had executed on her marriage with a Scotsman, it being the intention of the parties that their married life should be passed in Scotland. The House held, that the contract having been made in the country in which she was domiciled, no conflict of law arose, for it could not be contended that, by contemplating a different country as the place of the fulfilment of the contract, *i.e.* contemplating a change of domicile after the contract should be made, the lady could alter the capacity which she then had.

Lord Macnaghten, however, says of the question as to whether the law of the domicile of the party, or the law of the place where the contract is made, is to determine that party's competency or incompetency to contract: "Perhaps in this country the question is not finally settled, though the preponderance of opinion here, as well as abroad, seems to be in favour of the law of the domicile." The doctrine so laid down does not seem to be confined to questions of alleged incapacity or capacity on account of age, but to be of general application (see Westlake, p. 45 *et seq.*). This judgment, like that of Lord Westbury, will be applicable to English and Scots law alike. Although it may be accepted as a statement of the general principle, the exceptions by which Lord Fraser, as we have seen, qualifies the law of Scotland, may quite fairly be grafted on it.

In America the rule seems to be laid down by Story, as cited by the author—viz. that the *lex loci contractus* rules (cf. the case of Saul and his creditors, cited *supra*, note 29, and by Story).

The French law in its general statement is that the term of minority is always to be ascertained by reference to the law of the country of the foreigner's nationality; and, for example, a Cuban, by whose native law the age of majority is twenty-five, is held incapable of contracting in France before attaining that age (Trib. civ. de la Seine, *Ferron v. de Santa Venia*, 1878, Jour. v. p. 502). But this rule is qualified by another—viz. that French courts will protect French creditors, if they have acted in good faith and without rashness. A Cuban of twenty-two years of age, who by the law of his own country would not attain majority till twenty-five, whereas in France twenty-one is the age of majority, had accepted certain bills, and had stated thereon that he was domiciled in France; the bank which discounted these bills had not been in direct communication with him, but had made inquiries from one of his creditors who had been the medium between them, and had been assured of the full capacity of the acceptor. In these circumstances, the plea of incapacity was repelled (*Fourgeand v. Comte de Santa Venia*; Cour de Paris, 1879, Jour. vi. p. 488). Again, in the case of *Cussac v. Hartog*, 1883 (Jour. x. 290), the Cour de Paris held that the rule of a foreigner's personal statute could not be applied, without modification, in the case of a foreigner resident in France for a short time

only, so as to benefit him at the expense of French traders, who had dealt with him without any undue want of precaution, and from whom he had concealed the fact that he was a foreigner. The same rule was applied in the case of *Gache v. Drake del Castillo*, 1886 (Jour. xiv. 178), by the Tribunal of the Seine. (See the text of § 142 *infra*.)

In Belgium the rule is that the status of each person is determined by the law of his own country; thus a Dutch minor, who is by the law of Belgium major, cannot dispose of his real property in Belgium without observing the precautionary measures which Belgian law requires in the case of the alienation of the heritage of minors. It will be noted that the status of the person in this case is determined by the law of his domicile, none the less that the subject of the contract is real estate (*Erambert v. Clerdent*, etc., Cour de Liège, 1879, Jour. viii. 87).

In Germany the ordinary rule is the same as generally upon the continent—viz. that the status of the person is determined by the law of his domicile; but by § 53 of the German Code of Procedure, a foreigner who has no capacity to sue by the law of his own country, may yet sue in Germany, if the law of that country allows natives of his age to do so.

A somewhat peculiar case is reported as decided in the Supreme Court of Austria in 1882 (Jour. xiii. p. 468). A Prussian lady attained majority, twenty-one years of age, in 1878: next year she married an Austrian, and by the Austrian law the age of majority is twenty-four. After her marriage she accepted a bill in Austria, and, on being sued for payment, pleaded that she was an Austrian, and therefore not of age. The court of first instance sustained this defence, but on appeal decree went against her, on the ground that by her marriage she could not destroy rights which she had acquired, *i.e.* could not relapse into minority again. M. Clunet, however, doubts the soundness of this decision. See his note in the Journal.]

REACTION OF MODERN POSITIVE LAW AGAINST THIS CUSTOMARY LAW.

§ 141. On the other hand, the more recent statutes of the European continent are tending more and more to make an exception from the rule of recognising the law of the country to which the parties belong, by recognising contracts concluded in any country as valid, if the foreigner contracting would by the laws of that country be deemed to be of full capacity.³⁶ Thus, to a certain extent, the theory of the law of the United

³⁶ Thus the Prussian *Allgem. Landr. Einleitung*, §§ 23 and 35. § 23 provides: "The personal attributes and powers of an individual shall be determined by the law of the jurisdiction in which he has his domicile." § 35, again, runs thus: "A foreigner, however, who makes contracts in this country, about things that are situated here, will have his capacity to contract determined by the law, which will be most favourable to the subsistence of the contracts." To this effect, too, the statute book for Zürich, § 2, subsec. 2. Saxon statute book, § 8: "The capacity of a foreigner will be determined by the law of this country, if there is a question as to his liability arising upon a contract made in this country." (Construed literally, this implies that a foreigner who is of full capacity by the law of his own

States, which originally was that of England, is making itself felt, although there is room for doubt whether the result is to declare that the *lex loci actus* regulates such obligations generally, or only does so to the effect of favouring obligations which are undertaken in the country of the legislator himself. Thorough-going measures of this kind, in favour of the subjects of the countries which hold this theory, have, as we think, not been fully tested so long as the execution of foreign judgments, without examination of their merits, takes place only to the limited extent, or under the many restrictions, which we find at present to be the case. If we assume an extended and a reciprocal recognition of foreign judgments, it would then frequently be an easy matter for a person who was under guardianship or curatory, to withdraw himself from that limitation upon his powers by making a journey into some neighbouring country, in which a different legal system prevailed, and so to laugh at the law of his own country. Although such a system seems feasible enough in the United States, where this manœuvre cannot be put in practice without crossing the ocean or a vast extent of desert country, the situation of affairs in Europe is quite different, as indeed will soon come to be the case in North America.

The new draft of a commercial code for Portugal has, therefore, rightly declared against such enactments.

AN INTERMEDIATE PRINCIPLE. (MOST MODERN FRENCH PRACTICE.)

§ 142. French jurisprudence has recently hit upon a *via media*. The view has several times been recognised that a foreigner, who by the law of France would have full capacity, cannot escape from an obligation undertaken by him in France, by an appeal to his own domestic law, his personal statute, which differs from that of France in this point, if no neglect of precautions to inform himself of the capacity of the foreigner can be charged against the other party.³⁷

country, will be treated as wanting in capacity in Saxony, if by the law of Saxony he is so wanting. See Stobbe, § 21, note 24. This is certainly peculiar.) The Swiss Federal Statute, too, which came into force on 1st January 1882, provides in its tenth article, after making capacity dependent on the law of the nationality, and drawing the line of full age at twenty, that the foreigner, who by the law of Switzerland has full capacity, will validly bind himself in Switzerland, although, by the law of his own country, he may not be clothed with full capacity. (Cf. Martin, Jour. x. p. 29.) Muheim (p. 123) declares against such obligations, except in connection with bills. In relation to capacity in the law of bills, see the General German *Wechselordnung*, § 84: "The capacity of a foreigner to undertake obligations by bill, is determined by the law of the State to which he belongs. But yet a foreigner who, by the law of his native country, has not this capacity, will be bound by such obligations undertaken by him in this country, in so far as, by the law of this country, he is capable of undertaking them." Substantially to the same effect, art. 2 of the "*Projet d'une loi uniforme sur les lettres de change et les billets à ordre*," sketched by the International Congress at Antwerp in 1885. For an application of this principle, which in our view is not at all appropriate, is § 53 of the German *Civilprozessordnung*; see the subject of the law of process.

³⁷ So Demolombe, *droit civil*, i. pp. 117, 118, and the judgments of the Cour de Paris of 1858, and the Court of Cassation of 1861, cited by Weiss, p. 546. But see, in the same sense,

We would be glad to believe that the future belongs to this theory,³⁸ which is an intermediate theory between the doctrines of the Continent of Europe and of England and America, and which, according to Lord Fraser, is in harmony with the practice of Scotland (see *supra*, p. 310). It does, however, on one side lead to strange results, which are highly inconvenient for countries whose frontiers are easily crossed, if a man, who in his own country is incapable, by simply crossing the frontier can attain full capacity in accordance with the *lex loci actus*, or, at least, will be regarded by the courts of the other country as of full capacity;³⁹ while, on the other hand, the rule "*qui cum alio contrahit, vel est vel esse debet non ignarus conditionis ejus*," cannot without serious results be applied to all such contracts, in which there is often no occasion to suspect a foreigner in the other party, or in which it would put too severe an obstacle upon trade, if a difficult and perhaps protracted inquiry as to the law of the country to which he belongs had to be set on foot.⁴⁰ Of course, such a provision in the law would never be called in to aid *mala fides*, i.e. to assist a man who actually knew that the foreigner contracting with him had not full capacity. This objection may no doubt be taken, that the question of "due care" will in practice raise many difficulties: these do not, however, seem to be insurmountable. As a matter of fact, we know that, in very many matters of daily life, e.g. in unimportant ready-money sales in a shop, any enquiry as to the capacity of the party, if he seems to be of full capacity by the rules of our law (i.e. of full age), would be looked upon as something quite unusual, while the case is otherwise in unimportant transactions on credit, or in sales of heritable property; while to contract a marriage, without precise information as to the personal legal position of the other spouses, would be thought to be gross carelessness. But it cannot be shown that there is any protection for gross carelessness or for *mala fides* in our rule; that *mala fides* which, for example, would rob a young man, who by the

the judgment of the Cour de Paris of October 1883 (Jour. x. p. 291), and the Trib. Civ. Seine 1st July 1886 (Jour. xiv. p. 178), in relation to "*achats faits pour les besoins usuels*," if the other party "*a traité sans imprudence et de bonne foi*." In connection with capacity to contract by bills, see judgment of the Cour de Paris of 10th June 1879 (Jour. vi. p. 488). According to this a foreign minor who, by the law of France, would be major, cannot dispute the validity of obligations on bills undertaken by him in France as against *bona fide* third parties who hold the bills, and who have acted with sufficient caution. In 1883 I recommended the two following propositions for adoption by the Institute of International Law, viz. :—

"(1.) *La capacité personnelle, même en matière commerciale est régie par la loi nationale de la partie.*

"(2.) *Toutefois, une partie (ou le successeur de celle-ci) ayant agi de bonne foi, le contrat (ou l'acte d'acquisition) serait valable quant à la capacité personnelle, selon la loi du contrat*" (Annuaire vii. p. 49).

I should like to add in (2), after the words "*bonne foi*," the words "*et sans imprudence grave*."

³⁸ Bard, § 137, also declares for it.

³⁹ Such rules must necessarily also do much to hamper the recognition of foreign judicial decisions.

⁴⁰ Similarly, too, Aubry et Rau, i. § 21, note 29. See, too, Brocher, *Nouv. Tr.* p. 104. . . . "*Les tribunaux peuvent apprécier les faits et rechercher de quel côté se trouve la faute principale.*"

law of his own country was still under age; still, however, by the categorical words of the new Swiss statute and of the Saxon code, even such *mala fides* receives protection.⁴¹

Laurent (ii. §§ 51 and 95) combats this theory fiercely, and he is right to this extent, that it is hardly possible to maintain it intact against the provision of article 3 of the Code civil, and that it is also impracticable for it to prevail against the customary law of the European Continent without special legislative sanction. But he is wrong in asserting that the operation of the personal statute is annulled by the theory of the French Court of Cassation, and wrong also in asserting that the law of a man's home only declares an incapacity which has a real existence in itself (see *supra*, as to the general principles of incapacity, p. 300). In the draft of a statute book for Belgium, prepared by himself, Laurent falls upon a device which comes very close to the theory against which he is fighting, but in one respect is less practical.⁴² The foreigner who contracts in Belgium shall, he suggests, always declare his personal law, and any incapacity which it may impose upon him, otherwise the other party contracting in good faith may demand the application of the law of Belgium. Apart altogether from the very possible case that a man should be mistaken as to his own nationality, or should not be accurately acquainted with its laws, such a *professio legis* in these modern times would be in marked conflict with the usages of our intercourse, and could hardly be observed.⁴³

SPECIAL INCAPACITIES. (INCAPACITY FOR CERTAIN PARTICULAR KINDS OF LEGAL TRANSACTIONS.)

§ 143. Such a modified application of the party's own law, with a view to advancing the security of commerce,⁴⁴ and not with the more selfish view of favouring the citizens of our own country, would practically also put an end to a difficult special controversy, the controversy, namely,

⁴¹ It would certainly be going too far to say, with some authors, that no regard at all can be paid to the foreign personal statute, where this conflicts with the interest of our own citizen. Such a theory of interest is unwelcome. Against it, see Clunet, Jour. v. p. 502; French jurisprudence has declared against it.

⁴² *Avant projet de revision du code civil (belge) titre, prélim. art. 15 (i. p. 95).* The Belgian Commission, recently (1884) established, has again omitted this special provision. It proposes (art. 4) that capacity should be simply and solely determined by the *loi nationale* of the party contracting, even as regards the so-called special incapacities; and argues in support of this, on the one hand, that one who is incapable should be protected against his own thoughtlessness (*écarte*), and, on the other hand, appeals to the rule so often employed here, which we have already cited (L. 19, D. *de R. J.* 50, 17; Rev. xvi. pp. 449, 450). There may, however, be disputes as to the meaning of the latter passage wrenched away from the context, and even in their own country minors do not enjoy an absolute protection against their own follies. Otherwise we should have to protect them even against a true *dolus* on their part, which had turned out to their disadvantage.

⁴³ Such a compulsitor would be necessarily imposed, as Laurent proposes, in the case of the execution of notarial deeds.

⁴⁴ Against this, no doubt, is Weiss, p. 546.

whether we must pronounce a legal transaction not to be binding, by reason of some special incapacity which exists according to the foreign personal statute; by reason, that is to say, of a rule of law which leaves the person in general with full legal capacity, and only declares him or her to be incapable of undertaking certain particular obligations, *e.g.* obligations by bills, loans of money (*S. Cum Macedonianum*), and suretyships (*S. Cum Velleianum*).

International recognition of such special incapacities, by reason of rules of law that are quite special, indisputably implies a very serious danger to commerce. In these cases there is, as a rule, a total absence of any point on which the other party may rely for warning and information.⁴⁵ At this point, too, the opinions of those who in other respects declare for the application of the law of the foreigner's own country, begin to diverge.⁴⁶ My belief is that there is no sufficient evidence of any general law of custom in the matter of these special incapacities, by which incapacity, existing in virtue of the law of the domicile or nationality, can be made generally available.⁴⁷ I am, however, of the opinion that the judge of the foreigner's own country must take the incapacity as the basis of his judgment, even against a different rule of law prevailing at the *locus actus*, and even where the other contracting party can show absolute *bona fides*; thus, I fear, these special incapacities, the numbers of which have, no doubt, been much thinned by modern legislation, must give occasion for a variety of conflicts of law. Such conflicts would cease, if the principle we have recommended were adopted. In a foreign country it would, as a rule, be possible to be ignorant of the special incapacities of our law, without giving any ground for a charge of remissness, and thus the judge of the country to which the defender in the action belonged, might reach the same result as the judge of the country in which the transaction was concluded, or was to be carried out.⁴⁸

⁴⁵ Whereas the grounds of general incapacity (no doubt with some modifications) are recognised in all civilised countries, just because they are more natural in their character, and whereas the persons who are generally recognised as subject to this incapacity, do not, as a rule, have in fact the assets of their property ready to hand, so that the other party to the contract is directly put upon his enquiry, the case is often exactly the reverse with the special incapacities, which are frequently quite arbitrary.

⁴⁶ Laurent, ii. § 57, admits the difference in opinion which has prevailed since the times of the Post Glossatores. Against the recognition of any law of custom, see v. Martens, p. 301.

⁴⁷ Many take no particular notice of the point. Wächter, ii. p. 172; Savigny, § 364; Guthrie, p. 157; Stobbe, § 30 *ad fin.*; Böhlau, p. 489; R. O. H. 22; *Entsch.* 22, p. 67; Förster, ii. § 140, note 224; Schmid, p. 45; Laurent, ii. § 58, v. § 69, declare in favour of ruling special incapacities also by the law of the person's own country. Laurent does not, however, prove much by the ground which he adduces in the first place, "*l'état est une chose complexe et indivisible.*" *Status* is merely a comprehensive expression of various legal capacities. (Judgment of the Court of Chambéry, of 9th January 1884, Jour. xii. p. 180.)

⁴⁸ Many of the so-called special incapacities may perhaps turn out to be mere forms. In many systems, it is certain, the so-called curatory of women (entirely done away with in Germany) has sunk to a mere form, and as such is subjected to the rule "*locus regit actum.*" See below on this.

The exception, now generally recognised, by which the dole of the incapacitated person renders him liable to the other contracting party in damages or reparation, implies a certain approximation to this general principle. Even in the days of the Roman law, the minor who dishonestly gave himself out as of full age, was refused restitution. In his own country, a man can only practise a deceit of that kind by fraudulently claiming to be older than he is, or stating that he has obtained the *venia ætatis*. Abroad, however, he may do it without making any false statement as to his age, but either by asserting that by the law of his own country the age which he admits constitutes majority, or by dishonestly concealing what his own law is, under circumstances which cast on him an obligation to disclose it.⁴⁹ If we are a little less strict in insisting on all the conditions of actual fraud, and content ourselves with saddling the foreigner who is under an incapacity with the duty of disclosing it, when the other party is obviously in error as to the true state of affairs, the practical result will not differ very markedly from the principle of legislation which we have recommended.⁵⁰

SUBSEQUENT CHANGE OF THE PERSONAL LAW.

§ 144. There is, lastly, a question to which the authorities give different answers, viz. whether in the cases we have discussed the appeal is to the law of the State or domicile to which the person belongs at the time of the act in question, or to that to which he belonged at the time of his birth. The majority of writers who examine this speciality pronounce in favour of the former,⁵¹ and undoubtedly they are right. Laws which deal with capacity have for their object the permanent protection of the person, and apply, therefore, to those persons only who belong permanently to the State. If the connection of the person with the State has ceased upon his changing his residence into another country, the time has come for that protective care to cease. The person then stands under the protection of the law of his new home.

Although some authors, like Merlin,⁵² have enunciated doubts on the

⁴⁹ In support of this view, see Laurent, ii. §§ 94, 95; Picard, Jour. viii. 485, and the Belgian practice (cf. C. de Liège 1872); Weiss, p. 547.

⁵⁰ Many authors (as Holzschuber, i. p. 58) confine the operation of the personal statute to conflicts of different provincial systems. After what has already been said (§ 35), this view needs no special refutation; no more does the theory (Kori, iii. p. 174) that the *lex domicilii*, as regards questions of capacity, only rules the property which may be situated in that country. It rests upon an inadmissible confusion of the merits of the judicial sentence with the accidental possibility of carrying it into execution.

⁵¹ Argentræus, Nos. 47-49; J. Voet, Comm. in Dig. iv. 4, No. v. 1, No. 101; Burgundus, ii. Nos. 5, 6, 8; Rodenburg, ii. p. 2, c. 1, §§ 4, 6; Pothier, *Cout. d'Orléans*, c. 1, art. 1, No. 13; Hert, iv. Nos. 5-8; Brinckmann, *Wissenschaftl. Rechtskunde*, i. p. 20; Phillips, p. 189; Burge, i. pp. 118, 119; Story, §§ 59, 69; Savigny, § 388; Guthrie, p. 355.

⁵² Rép. *Autorisation Maritale*, § 10, art. 4; *Majorité*, § 4; *Effet rétroactif*, §§ 3 and 2, art. 5 and 3.

subject, and others, like Bouhier,⁵³ following the lead of Froland,⁵⁴ have pronounced in favour of the opposite rule, admitting, however, important exceptions, this difference of opinion is, upon a closer examination of the arguments of these authors, accounted for in this way. In the first place, they have in their minds the rules of law which concern legal capacity or status in the true sense, and again, in virtue of a general usage applicable to an institute of law, which takes a prominent place in this connection, viz. nobility, the nobleman, as we shall see subsequently, retains as a rule the rights of his rank on emigration to another country. In the second place, these writers drag into the discussion rules of law which have no concern with capacity to act, but deal with the rights of third parties in the whole of an aggregate of property, and the consequent want of dispositive power in the proprietor thereof; e.g. the rules which regulate a husband's rights over his wife's estate. Lastly, however, they think it unreasonable that any one, who has already attained majority by his own law, should become a minor again, in obedience to the law of a new domicile, if by it a more advanced age is required to constitute majority. This inference, however, as we shall see later, is removed by another consideration.

Of course, a legal transaction once well concluded will not become invalid by the subsequent emergence of some incapacity; will not become so, for instance, by reason of the obligant becoming the citizen of some State, by the law of which he is incapacitated.⁵⁵ But just as little will a legal transaction, which is invalid because the pretended obligant is under legal incapacity, become valid by this person becoming the citizen of some other State, by the law of which he would have been of full capacity.⁵⁶

B. SPECIAL QUESTIONS, TOUCHING THE CAPACITY TO HAVE RIGHTS (*Status*).
SLAVERY, CIVIL DEATH, BONDAGE.

§ 145. It may be considered as admitted by all the authorities, that any one who is in his domicile a slave, is recognised as a free man so long as he is in a country which does not recognise slavery.¹ The question, as

⁵³ Chap. 22, §§ 4-10, 147, 148.

⁵⁴ On this subject, see Story, § 55a.

⁵⁵ But see the case referred to in note F, *supra*, p. 312.

⁵⁶ It is remarkable that Schmid, p. 53, asserts this. On the other hand, see Stobbe, § 30, note 27.

¹ Mornacius, ad L. 20, D. 4-6, *ex quibus causis*; J. Voet, Comment. in Dig., l. 5, § 3; and so early as 1315, an ordinance of Louis X. of the 2nd July. See Massé, ii. pp. 83, 84. It was, however, permitted by some other older French edicts that slaves might be temporarily brought to France from French colonies.—Massé. See, too, Grönewegen ad Inst. l. 1, § 8, No. 3; Story, § 96; Wächter, ii. p. 172; Savigny, § 349 and § 365; Guthrie, pp. 80 and 168; Stobbe, § 30, note 11. See in Halleck-Baker, i. p. 202, an interesting historical exposition of the English decisions for centuries on this subject. See, too, Laferrière, "*Histoire des principes de la révolution Française*," p. 138. The Decree of 28th September 1791, art. i., "*Tout individu est libre aussitôt qu'il est entre en France*," which did not, however, put an end to slavery in the French colonies, was a mere repetition of a rule which had been recognised since the 16th century. § 198 of the *Preuss. Allgem. Landr.* ii. 5, which secured to foreigners their rights over slaves whom they brought with them, was repealed by a special law of 9th March 1857.

to whether a man is a slave or free, coincides with the question whether he is capable of any legal rights or not, and the answer immediately follows from what we have said as to the legal rules regulating that capacity. We may also refer to the consideration which is in the view of many persons, viz. that slavery must be regarded, in a country which does not recognise it, as a condition totally at variance with the laws which are laid down for the government of that country.² It seems a more doubtful question whether one who has become free will become once more a slave if he shall return to his domicile. As we cannot proceed upon any such hypothesis as that the slave by his stay in the other State acquires another personal *status*,³ we arrive at the conclusion which is recognised in American practice, that a person returning home in this way is again to be held to be a slave there if his stay in the other State has been merely temporary.⁴ In any case the slave State would refuse to see any ground for freedom in the merely temporary stay in another country, while the slave could not appeal to the protection of the law of the free State, since he does not belong to it. It is otherwise if the slave acquires a domicile in the foreign State, and thereby becomes attached to that State. In such a case, the principle of free right of emigration recognised by public law requires an international recognition of the slave's release, to the same extent as the acquisition of a new citizenship shall be recognised. Third States must therefore recognise it absolutely;⁵ the principles laid down in § 62 will determine whether the State in which he was formerly a slave will recognise it.⁶ The jurisprudence of the United States went further than this at the time at which slavery still existed in some of the States. Although it was an admitted rule that runaway slaves could be followed into non-slave-holding States, it was equally well recognised that if a slave, with his master's leave,⁷ lived for a consider-

² Schäffner, pp. 45, 46; Esperson, Jour. vii. p. 338. Also Clunet's paper there on a recent case (marriage of a slave who had escaped from the harem of the ex-Khedive with an Italian in Italy).

³ See the ground of decision of the court of Massachusetts, reported by Story, § 96, note 6, p. 121: "Not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his status or condition."

⁴ Story, p. 131. Wharton, § 106.

⁵ All the more as slavery can make no claim for international recognition. See Grotius, *de J.B.* ii. c. 22, § 11; Puffendorf, *de jure nat.* iii. c. 1, 2, vi. c. 3, § 2.

⁶ Bluntschli, § 361, is inexact, without further argument and investigation. The question how far British ships of war may receive slaves is soundly and accurately treated in the "Slave Circulars" issued on 31st July and 5th December 1875, by the Admiralty to the commanders of British ships of war (see in Halleck-Baker, i. p. 208). On the open sea British ships are unconditionally permitted to receive fugitive slaves: but as ships of war are not adapted for that purpose, the runaways must be landed as soon as possible, in such a way as to secure their freedom. In the territorial waters of foreign powers, British ships of war may not assist in the violation of foreign territorial laws, and may therefore only occasionally receive runaways who are in immediate danger of their lives. On the shores of certain specially named countries (*e.g.* on the east coast of Africa), persons are to be received, if they assert some breach of State treaties concluded with England. On that subject an enquiry takes place. In many of the treaties concluded by England, one of the conditions is that slaves who reach an English man-of-war are to be free.

⁷ This limitation is explained by the laws then in force as to runaway slaves.

able time in one of the free States, and acquired citizenship there, his freedom must subsequently be recognised even in the slave State.⁸

Many writers justify the freedom of slaves in States which do not recognise slavery, by the proposition that our courts and our officials generally could not recognise rules and institutes of law, which are at variance with public law, and with the public morality of our State. This proposition goes too far, and leads to incorrect results (see § 36 *supra*). If the slave is living in a slave State, he does not become free by a declaration of our courts that he is free, and the existence of slavery in full measure in another country must be recognised as a fact even by our courts, if they desire to pronounce judgments that shall not be in contradiction of facts. If then the validity of a legal transaction is in question, because an individual is by the law of his own country looked upon as a slave, the legal rules of the place, in which the individual was really resident at the time when he undertook the obligation, will rule.⁹ For it was at this moment that the will of the contracting parties was directed to the origination of the transaction in question, and no effect can be produced on the validity or invalidity of the declaration of intention, which then took place, by the circumstance that the transaction was subsequently brought up for comment in the court of another country, or became of some operation in another country, putting out of view the case of an express or implied ratification subsequently being validly made in some other country. In any other view the judge must assume the validity of his own legal system all the world over, and intercourse with foreign countries would hardly be possible. Another result is that a man, who, by the laws of his actual domicile, has no legal personality, will be unable, so long as he lives there, to exercise any rights in our country, or to make any effectual declaration of intention, it may be, for instance, by means of letters. This result may also be justified on grounds of expediency. If a person, who in another country is ranked as a slave, could make declarations of intention there by which any property he happened to have in this country could be affected, the peculiar relation in which he is placed might be used for oppressions and extortions, which should have their first effect in our country. It will be a sounder course to set up a *cura absentis*, if we find in this country any property belonging to the subjects of another State, who are under some incapacity in their own country.¹⁰ In so far as

⁸ Story, p. 135, note *ad fin.* Wharton, *ut cit.*

⁹ Schmid (p. 40) takes a different view. He desires that our courts should treat the declarations of a slave emitted in a slave State as of legal effect. But even the jurisprudence of Rome is against this; it is familiar that the legal acts of a Roman citizen, who had fallen into the power of the enemy, were no longer looked on as valid. Schmid's view would perhaps be right, if the whole legal system of a State, in which slavery is recognised, could not be recognised by us as a legal system at all. Cf. L. 19, *pr.* §§ 1-3, D. *de postliminio*, 49, 15. Against Schmid, see in particular the more exact exposition by Muheim, § 14, c. pp. 110, 111.

¹⁰ In this way, no doubt, the property of a slave which happens to be in this country may be used to buy his freedom. By that means Schmid's objections, in which it may be thought there is some practical force, are got rid of.

regards slavery our discussion is of little value at the present day, but it must also be applicable to civil death, and in this connection it may be more useful.

Whatever is true of slavery, may be assumed to be true of bondage.

OTHER RESTRICTIONS ON CAPACITY: BY REASON OF A CRIMINAL SENTENCE:
BY REASON OF RELIGIOUS PROFESSION.

§ 146. The legal systems of the present day show various examples of restrictions on legal capacity or *status*, by reason of a criminal sentence. The most thorough-going of these restrictions is that of civil death,¹¹ but there is no doubt that this has now been recognised as an institution that may be rejected, and it is therefore by degrees disappearing from all legal systems. In the next place, it is undoubtedly recognised that a limitation of legal capacity or *status*, which is unknown to our law, on that account cannot, and must not, have any operation in this country. If a man in country A is declared incapable of driving some trade, that cannot be kept up against him in country B, where an incapacity of that character is altogether unknown.¹² If an incapacity of the same character does exist in country B also, the question comes to be whether the conditions of fact, which the law of country B requires, are present in the case on hand.¹³ The question whether incapacity, which rests upon a criminal sentence,¹⁴ *e.g.* incapacity to take an oath, or to hold a curatory, shall receive effect in another country, if such an incapacity is familiar there also as the result of a judicial sentence, is more difficult to answer. To give effect to such a declaration of incapacity would simply be a partial execution of a foreign criminal sentence, but the penalties of wrong-doing cannot be carried out by our legal system, unless it is persuaded by means of its own procedure of the justice of the punishment, and accordingly it will be more correct to answer the question, which we have put, in the negative. The case may certainly occur that a person, who undoubtedly would have to be regarded in this country as unworthy to exercise some right conceded to honourable men only, on account of some crime which he has committed, may yet

¹¹ See on this subject especially, Savigny, system v. p. 151.

¹² On the other hand, if the incapacity in question exists in our State only, and not in another State, our courts cannot refuse the persons, who are by our law declared to be incapacitated, the right in question in connection with any legal relations that may belong to that other State. This is properly recognised by the judgment of the French Court of Cassation, of 7th June 1806 and 26th January 1807, to the effect that the sentence of civil death pronounced in France upon the emigrés left them all their property abroad (cf. Weiss, p. 621). Enquiry must be made as to what laws rule the legal relation in question in other respects.

¹³ So, *e.g.* Günther, iv. p. 728; Mittermaier, i. § 30, note 13; Oppenheim, p. 393; Wächter, ii. p. 184; Story, § 92; Fiore, § 50; Stobbe, § 30, note 12; Wharton, § 107.

¹⁴ In so far as a diminution of legal capacity is attached, not to any criminal sentence, but to a fact, this fact has always the same effect, which the law, which in other respects furnishes the rule for determination and regulation of the legal relation in question, assigns to it. Cf. Muheim, p. 112.

make claim to exercise that right, because it is the sentence of a foreign court, and not of a court of this country, that has deprived him of it. There is only one means of meeting this difficulty, unless we are at once to have recourse to the serious expedient of recognising unconditionally the sentence of foreign criminal courts. That means has been adopted by the German legal system, as it formerly was by the Prussian system, with good reason, but only in so far as its own subjects are concerned.¹⁵ It is, that is to say, recognised as possible, where a sentence has been passed in a foreign country, that a new criminal process should be started with no other object in view but this, to wipe out the rights of the convict as an honourable citizen, or some of them. Such a provision as this has, as a mere threat, a far-reaching effect: if no claim is made to exercise the rights and privileges in question, the practical course will be to waive the institution of a process for the object we have specified. Besides that foreigners will, as a general rule, make no claim to exercise the rights of honourable citizens, *e.g.* the political franchise. The only class of difficulties which arises is that description which springs from the fact that a foreigner has been declared in a foreign country incapable of taking an oath,¹⁶ on account of some delict, which by our law must or may be visited with a like penalty. As a matter of legislation, it seems to be sound to leave the discretion of the judge to determine this question,¹⁷ viz. whether sufficient credit can be given to the foreign sentence, *e.g.* regard being had to the fact whether it is or is not disputed by the foreigner who is concerned, and regard also being had to the likeness between the judicial arrangements and the laws of our own and of the foreign State in question. Some authors propose to attach a general international recognition to a sentence which destroys or limits the honour or legal capacity of a person pronounced by a judge of his own country (or, according to older notions, of his own domicile). In so doing, however, they either forget the peculiar nature of a criminal sentence, or, in a way which is inadmissible, regard the *status* of a person as something belonging to him by nature, a character stamped upon him by his own law.¹⁸

¹⁵ *Deutsches Strafgesetzbuch*, § 37, and besides Olshausen, *Comm. zum D.R.G.B.* § 37 (Former Prussian *Str. G.B.* § 24).

¹⁶ Cf. *Strafprozessordnung für das Deutsche Reich*, § 56, No. 2, in connection with *Str. G.B.* § 161.

¹⁷ The question *de lege lata*, according to the *Deutsche Strafprozessordnung*, is doubtful. Glaser, *Handbuch des Deutschen Strafprocesses*, i. p. 565, proposes to rank the foreign sentence as high as that of our own judge. Löwe is of a different opinion (in which I concur *de lege lata*). See *Comm. zur d. Strafprozessordnung*, § 56, No. 2.

¹⁸ *E.g.* Bald Ubald, in L. 1, C. de S. Trin. No. 100; Burgundus, iii. p. 12; Boubier, cap. 24, Nos. 134-138; Boullenois, ii. p. 19. (Baldus, however, makes an exception of the case, where the *poena* has to do merely with an *actus extrinsecus*, *e.g.* the summons to appear in court, and Boubier gives his judgment with this qualification, that the infamy which arises from a criminal sentence is generally recognised only if it is in accord with the *jus commune*.) Brocher in recent times takes this view; Rev. iii. p. 435; Weiss, p. 621. On the other hand, see P. Voet, iv. 3, No. 18, 19; and J. Voet, *de stat.* § 7, as also, among modern authors, Fiore, § 50 *ad fin.*; Wharton, § 108 *ad fin.* "As a general rule, it is fully settled that penal laws have no extra-territorial effect" Aubry et Rau, § 31, note 40, and specially, too, Bard, § 135.

The special question, whether a restitution by the sovereign of all rights taken away by a sentence of infamy, by virtue of the prerogative of mercy, must also be respected in another country,¹⁹ depends on the conditions under which a pardon bestowed in one country is to be recognised in another.

The question, then, can only be completely disposed of in connection with criminal law. A pardon bestowed by the State which is alone or primarily, according to international principles, competent to inflict punishment, must be recognised by other countries also. In any case, no further limitations upon the good repute of a person can be founded upon a sentence passed upon him in a foreign country, which has been abrogated by the pardon.

It needs no discussion to show that limitations of *status* on the ground of religious profession have no extra-territorial operation. In this connection, however, we see very clearly that it is an entirely false principle to set capacity to have rights (*status*) and capacity to act on the same footing.²⁰ The decision in any particular case is at once supplied in this subject, by remembering that only those laws which regulate the legal relation in question in other respects, have anything to do with the determination of this question. Thus, if a man in his own country is declared incapable of succession, because he has given up some particular religious belief, he may still take as heir an estate in a country in which religious beliefs have no bearing upon the right of succession.²¹

ENTRY INTO A RELIGIOUS ORDER.

§ 147. Special consideration may well be given to that partial legal incapacity which is produced by the law of the Catholic Church, and also by the law of some States, by entering a religious order. Strict logic seems to require that the legal system of a country, in which religious vows have no longer any civil effect, should refuse to attribute any such effect to legal incapacity of this kind, even although it does exist according to the law of the country to which the individual belongs. The practical outcome of this would be that a monk, who is incapable of taking succession by the laws of his own State, could be the heir of a person who belongs to another State, in which the incapacity has no longer any effect in civil matters. There is, however, something to be said for the view, that a man who has taken the *votum*

¹⁹ Hommel, *Rhaps Quæst.* vol. ii. obs. 409, No. 3. "*Famæ restitutus a principe domicilii omnino est restitutus.*"

²⁰ If Protestants are forbidden to acquire landed property by the law of one country, a theory different from ours would result in preventing the Protestant subjects of this country from acquiring land even in a Protestant country. Savigny, §§ 349, 365; Guthrie, pp. 79, 167; Story, §§ 91, 92; Wächter, ii. p. 173; Fiore, § 50; Wharton, § 109; v. Martens, § 70; Weiss, p. 622.

²¹ See Weiss, p. 622. The application of the *lex fori*—because, forsooth, we are here concerned with coercitive laws—leads to results that are quite unreasonable.

paupertatis, has thereby renounced for himself all rights of succession.²² The question whether the order to which he belongs takes his place, is a question which must depend on the law which in other respects regulates the succession in the particular case, generally, therefore, the law of the country of the deceased. The outcome of the opposite view²³ is to enrich either the foreign monastery, or it may be the foreign fisk, at the expense of the relations of the deceased, who belong to the same country as he belonged to. The former result, too, would take place against the desire of the system of law to which the monk or nun and the monastery themselves belonged. It is by the canon law that property, which has truly passed to the monk or nun, becomes in turn the property of the religious house, in countries where the vow is recognised as having a civil effect.²⁴ It is, however, beyond doubt sound law to regard as null the marriage of a monk who belongs to another country, and by whose personal law his vows have a recognised effect *quoad civilia*,²⁵ and not to permit it to take place before the officials of another country who are charged with the care of matters of *status*: for it is the personal statute of the husband which primarily furnishes the rule for marriage and the marriage ceremony. There is certainly no doubt that, so soon as the monk is naturalised in a country which does not regard such vows as binding, he reacquires the capacity of marrying.²⁶ With regard to the legal capacity of a corporation or juristic person we may refer to §§ 104-107 *supra*.²⁷

²² Savigny, § 365; Guthrie, p. 167, note (a), is somewhat to the same effect. That may, too, be asserted for the case of a person entering a monastery in a foreign country, provided that the vow of poverty has a compulsory force there.

²³ See Story, § 104; Wharton, § 107; Weiss, p. 622.

²⁴ French jurisprudence is to a certain extent inclined in such cases to assign an operative effect to the incapacity even in a foreign country. Cf. Boullenois, i. p. 66, and the references given by Brocher, i. p. 175; his own deliverances are very indefinite. Laurent, vi. § 180, declares distinctly in favour of the extra-territorial operation of the incapacities in question, but no doubt for the reason, which can hardly be formulated as a proposition of law, that otherwise we should encourage the institution of religious orders.

²⁵ To this effect a decision of the *Cour de Paris* on 13th June 1814 (cf. Brocher *ut cit.*), which has led to much comment.

²⁶ [See a curious case reported in Jour. xvii. p. 356, under date 16th June 1887, decided in the Supreme Court of Spain, where a suit was instituted by the next of kin of a deceased to deprive his widow of the benefits she took under his will, on the ground of immoral conduct contemptuous of his memory, the conduct so described being her marriage at Gibraltar with a priest of the Roman Catholic Church, like herself a Spanish subject, in conformity with English law. She was assuizled from the conclusions of the action, but there is no determination as to the legality of the marriage.]

The courts of France have held the marriage of a Catholic priest, celebrated in London according to English forms, null. *Rouet v. Rouet*, Trib. Civ. de la Seine, 1886. Jour. xiv. p. 66.]

²⁷ As regards religious corporations, see Esperson, Jour. vii. p. 338. He attributes extra-territorial effect to an incapacity created by the *loi nationale*. Savigny (*ut cit.*), on the other hand, applies the *lex fori*. But can it be said that Spanish monasteries have no rights of property in land in Spain, because German courts will not recognise it? Stobbe (§ 30, note 20), who makes the acquisition of real property dependent on the *lex rei sitæ*, is more correct. See Wharton, § 107, note. I am clearly of opinion, with him, that the incapacity of a French Jesuit to give instruction, which has its origin in the French law of 1880, cannot be applied to him in America.

PRIVILEGES OF RANK. NOBILITY.

§ 148. Special privileges of rank or position are determined, not by the *lex domicilii* of the person concerned, but by the law of the State to which the legal relation which may be in question otherwise belongs.²⁸ (For the foundation of this rule, see *supra*, § 137.) The only doubt on the subject seems to arise in the case of the privileges attaching to what is called nobility.

Some authors hold the privileges of nobility as confined strictly to the territory in which they have their origin, either by descent or by grant:²⁹ others make a distinction between nobility which is enjoyed by virtue of descent and new nobility conferred by the sovereign, recognising the former only as universally valid.³⁰

Lastly, a large number of eminent authors consider nobility as valid everywhere, whether it rests on descent or on grant, and make no exception from the rule unless the sovereign should grant nobility to one who is not his subject.³¹

In fact, as Savigny remarks (§ 365; Guthrie, p. 168), no general rule can be laid down. It depends upon the import of the rules of law establishing the privileges of nobility whether these privileges are to be conceded to native nobles only, or to foreigners also. Where the only consequences of these rules is to confer distinguishing marks of honour, then, by a general international usage, which certainly cannot be disputed nowadays,³² these are conceded to foreign nobles also.³³ The use of titles of nobility, which a man has a legal right to bear by the law of his personal status, is recognised without the necessity of any special licence, if the foreigner does not enter the community of the State, and without any doubt is recognised, if he makes only a temporary stay there. Other special rights, on the other hand, can only be conceded to native nobility.³⁴

²⁸ Wächter, ii. p. 172 *et seq.*; Reyscher, § 82.

²⁹ Hert, iv. § 16; Alef, No. 41; Casaregis, *disc.* 43, No. 17.

³⁰ P. Voet, *de Stat.* iv. 3, § 16; J. Voet, *Comm.* i. 5, § 3; Seger, p. 20; Duplessis, ii. p. 456, "*à l'égard des étrangers de race leur noblesse est un droit de sang qui les suit partout.*"

³¹ Henr. de Cocceji, v. § 9; Boullenois, i. p. 67; Bouhier, chap. 24, No. 134; Titius, i. c. 10, § 26; Günther, p. 130; Walter, § 45; Renaud, i. § 42, i.

³² Cf. Martens, § 98.

³³ See Stobbe, § 30. An exception must be made when a sovereign confers nobility on one who is not his subject. Nobility is intended in its essence to determine the permanent social relations of a person, and these in relation to his fellow-subjects; it can, therefore, only be conferred upon subjects of the State.

³⁴ Thöl, § 78, note 6: "He who gets his nobility from us has such and such rights; he who gets it from a foreign power has such and such rights; the latter has not in our country the rights called nobility." There is no substantial difference between what is said in the text and Beseler's view (i. § 39, note 6), if he assigns a merely social import to the privileges of nobility in a foreign country, and not a legal significance. The latter expression, however, is not a happy one. We cannot well forbid a foreign nobleman to use his style and title as a nobleman in this country.

We cannot carry the distinction between hereditary and created nobility with us in this theory, and there is no theoretical ground for its adoption: one as well as the other rests on the laws of the State.³⁵ As far as Germany is concerned, it may be noted that patents of nobility which have existed since the days of the earlier empire, or which were conferred by the sovereign authority of the empire before 6th August 1806, are recognised in all German States, not merely from reasons of international law, but because they had been recognised by the older sovereign authority of these countries.

When a man passes over into the community or citizenship of another State, nobility which has been conferred on him in his former domicile will be regarded as tacitly conceded to him in his new home;³⁶ but if nobility is not recognised in this new country, it is, on the grounds already adduced (*supra*, note 33), lost.^{37 38} The same principles must necessarily rule, and as a matter of fact do rule, the possession and the wearing of orders³⁹ and decorations.

A criminal sentence by which nobility or the right to orders and decorations is withdrawn, can make no claim to extra-territorial effect, unless it has been pronounced by the country to which the criminal belongs, or deals with orders which belong to the country of the court that pronounces the sentence.

³⁵ Günther goes too far in asserting that nobility cannot be withdrawn from a person by any State, because it is recognised by the collective monarchical States of Christian and European civilisation. Nobility really depends on the law of the domicile of the person. This is the necessary condition of the recognition of it in other States, and the latter must cease to recognise it if the former withdraws its privileges.

³⁶ Thöl *ut cit.* "A foreign patent of nobility confirmed in this country gives all the rights called nobility in our country." With regard to Austria, see Vesque v. Pittlingen, p. 167, and the precise discussions of Karminski, pp. 41, 42. The title of nobility which an immigrant has borne in a foreign country is allowed to be enjoyed by him in Austria, if he is to be naturalised there, but is officially examined. Karminski thinks that the better course is to make a special grant *de novo* to the immigrant of the dignity or the nobility he has enjoyed in another country. We cannot approve of this view. The foreigner shall and ought to enter the citizenship of the new State in the same rank, generally speaking, as he enjoyed in his former allegiance.

³⁷ Renaud, i. § 42, note 3. See *Code civ.* art. 18: "*Le Français qui aura perdu sa qualité de Français pourra toujours la recouvrer en rentrant en France avec l'autorisation . . . et en déclarant qu'il veut s'y fixer et qu'il renonce à toute distinction contraire à la loi Française.*" A man, who desires to be naturalised in the United States, must make a declaration that he has renounced all hereditary and noble titles. (Statutes, p. 2165, 4.)

³⁸ Older writers, in dealing with the question of legal capacity, treat of the rights of illegitimate and legitimated children in connection with the question of legal capacity. By modern legal conceptions, which, as a rule, regard legitimate and illegitimate children as of the same legal capacity, this subject belongs to Family Law.

³⁹ On decorations, see Lehr's paper in *Jour. xiv.* pp. 297-302. The foreigner requires no permission from the Government of his domicile to wear orders. But he becomes amenable to the criminal law of that place if he wears orders to which he has no right. *Trib. corr. Corbeil, Jour. xiv.* p. 180.

C. SPECIAL QUESTIONS TOUCHING CAPACITY TO ACT.

MINORITY (*venia ætatis*): CHANGE OF NATIONALITY.

§ 149. We have already shown why this incapacity to act must, according to the law of the Continent of Europe, be as a rule determined by the personal statute of the party concerned.¹ Logic requires that the personal statute of a minor shall also determine whether, and, if so, what particular acts of disposition *inter vivos*² may, as an exception, be undertaken by minors.³ It is therefore unnecessary to do more than to notice some specialities, with regard to which doubt may arise.

(1.) By systems of territorial law, it is in the power of the sovereign⁴

¹ Molinaeus in L. 1, C. de S. Trin.; Huber, § 12; Argentré, No. 7; Hert, iv. § 11; Rodenburg, ii. §§ 1, 2; Abraham a Wesel, *ad Nov. Const. Ultraj.* art. 13, No. 25; Henr. de Cocceji, v. 3; Bouhier, chap. xxv. No. 1; Boullenois, i. pp. 53, 54; Merlin, Rép. *Majorité*, § 5; Hofecker, *de off.* § 24; Ricci, p. 522; Haus, p. 27; Wheaton, i. p. 111; Walter, § 45; Günther, p. 727; Klüber, § 55; Thöl, §§ 81, 87; Renaud, i. 42-44; Gerber, § 32; Schöffner, pp. 47, 48; Savigny, § 361; Fœlix, i. § 33, p. 85; Massé, ii. p. 84; Weiss, p. 592; Stobbe, § 30, after note 246; J. Voet seems to hesitate; cf. Comm. 4.1, § 29, with 4.4, § 8; Gand, Nos. 482, 483, proposes that the *lex rei sitæ* should rule in cases as to the disposition of real property. On the whole of this subject, however, he proceeds very arbitrarily, and (506) lays down the proposition that the foreigner who contracts in France subjects himself, in so far as his capacity to act is concerned, to the laws of France. It is, however, obvious, that it cannot be in the power of any person to determine his own legal capacity as he will. Former English and American practice, on the other hand—probably on the grounds of expediency, which have already been refuted—pronounced for the *lex loci contractus* (Story, § 82, § 103, Wharton, § 112). Burge, i. p. 125, approves of this, and allows the *lex rei sitæ* to rule in questions as to the disposal of real property, because, by his view, it would encroach upon the sovereign rights of the individual States if the *lex loci contractus* were taken as the rule for these cases also (p. 120). According to Burge, i. p. 133, the *lex loci contractus* is to decide if the person is by it a minor, but is by the law of his domicile of full age. “For it would not be reasonable that two different laws should be applied to one and the same contract,” which is Burge’s reason, must be rejected as a *petitio principii*. Burge, like many other authors, throws together the rules of law on this subject, and those which deal with the capacity to execute testaments. Grotius, *de J. B.* ii. c. 11, § 2, in the same way makes the *lex loci contractus* rule. He argues from the position that the foreigner becomes a *subditus temporarius* at the seat of the contract. Wharton proposes that where capacity to act exists in any person by virtue of the law of his own country, it should be recognised everywhere, on the same grounds as I have already adduced, to which, too, Schmid has given in his adherence. Among the reasons of expediency which in his view support the *lex loci actus* in other cases, Wharton dwells specially on the prejudice which one, who is minor by the law of his own country, may suffer, if it is made impossible for him to trade in all other countries. But this prejudice can only arise if the minor emigrates for good, and then he may, with consent of the supreme curatorial authority, domicile himself in the foreign country. In the year 1873, the Russian Senate at Warsaw determined that the question whether a person is to be regarded as a minor must, even in the case of real property situated in Russian Poland, be determined by the personal statute of the foreigner concerned, and that too, even in the case where by Russian law he would be of full age. Jour. i. p. 48.

² We have nothing to do here with *mortis causa* deeds. Cf. *supra*, § 136, note.

³ See *supra*, § 134, on the distinction drawn by Wächter between the attributes of a person and their operation.

⁴ Or of a judicial officer, or the father, etc. See *Code Civ.* 476 (*Emancipation*).

to confer the rights of majority upon a minor either in full or in part. This grant of majority is made in virtue of the laws of that country, although it requires a special act of the authority of the State, and it has therefore the force of law; such a case, therefore, is to be regarded in the same light as if the *lex domicilii* appointed an earlier age as the initial age of majority for all its subjects.⁵ From this it follows that majority can be conferred by the sovereign on none but his own subjects.⁶

(2.) The capacity of a person to act is settled, as we have seen, by the laws that are recognised at the place of the domicile which that person had at the time of the transaction which is in question. If, then, one who is already major acquires nationality in a country where a more advanced age than that required by his own country is the age of majority, it seems that he must again become minor. Some authors have expressly drawn this conclusion.⁷ Besides those who regard majority once attained as persistent in conformity with the general principle assumed by them, to the effect that legal capacity is determined by the original personal law and cannot be altered, many who hold an opposite view of the general principle make an exception in this case, either on grounds of expediency,⁸ which obviously recommend such an exception, or because they regard the majority conferred by the country of the first domicile as a vested right, not to be lost by any subsequent change of domicile.⁹

Apart from considerations of expediency, to which no force can be given, if an accurate legal view contradicts their conclusions, we must recognise that, as we saw before, and as even Savigny elsewhere admits, the theory of vested rights must be thrown out of the system of international law, since its justification is rested on a circle of reasoning. This capacity to act, besides, does not belong to the category of vested rights in the ordinary sense.¹⁰

Savigny thinks that his view receives special confirmation by comparing it with the case of *venia ætatis*, acquired specially at the place of the earlier domicile. The consequences of such a grant by the sovereign cannot, he says, be afterwards withdrawn, and it would be unnatural and arbitrary to attribute less force to the majority established by the law of the earlier domicile than to that established by grant. This last argument

⁵ Hert, iv. § 11; Hommel Rhaps, vol. ii. obs. 409; Burgundus, i. 12. The Royal Chancellory of Hanover at Celle, on 17th January 1820, removed a guardian because of a *venia ætatis* granted in another country (Bülow and Hagemann, Discussions, vol. vii. No. 80, p. 244). Hagemann approves. Schäffner, p. 48.

⁶ Boullenois, i. p. 55.

⁷ Hert, iv. § 12, note 5; Walter, § 42; Günther, p. 727. So, too, a judgment of the Supreme Court of Appeal at Celle, on 14th October 1831, in affirmance of a decision of the Chancellory of Hanover. Bülow and Hagemann, vol. x. p. 98. Of course, even according to this theory, obligations undertaken at the period of the earlier domicile are not invalidated by the change.

⁸ Boullenois, ii. p. 12.

⁹ Especially Savigny, § 365; Guthrie, p. 170.

¹⁰ Unger, pp. 130, 131.

rests also upon a circle of reasoning. The special grant of the rights of majority is not any more, or in any higher sense, a vested right, than the statutory majority. If the latter were not recognised at the seat of the new domicile, neither would the *venia ætatis* be recognised. I believe, however, that I may confess I have arrived at the same result¹¹ on strictly legal grounds. It is necessary that a person should have, in order to an independent and voluntary acquisition of a domicile, capacity to act, and that both by the law of the domicile which he has and by that of the country to which he intends to remove; the former, that he may be able to undo the tie which binds him to his native country; the latter, that he may be in a position to enter into the new allegiance. The authority of the State which permits one who is minor by her laws, to establish his domicile independently in her territory, silently recognises the capacity of this person to act; she silently concedes the rights of majority, if she permits any one who is not yet major by her laws to establish his abode independently in her territory. To justify this exception, there is no need to appeal to the considerations of expediency which we have mentioned; they are quite inadmissible as arguments.¹²

On the other hand, however, we must hold that a person who is still a minor by the law of the domicile which he has hitherto enjoyed, becomes major at once upon acquiring citizenship in another State, if he is of the age which it requires as a condition of majority. This may have practical results in the case of a girl, not of full age, marrying a foreigner

¹¹ This result is recognised in the practice of Prussia, Koch, Comm. on, § 23 of the introduction to the Prussian A.L.R.; Bornemann, i. p. 53, note 1; Förster, i. § 11, note 17. See, too, a judgment of the Supreme Court of Appeal at Munich, 28th March 1862 (Seuffert, 16, No. 185). To the same effect Stobbe, § 30, note 28; Schmid, p. 52 (the latter makes the extraordinary reservation, that the persons who by the personal statute which they have subsequently acquired are of full age and capacity, may voluntarily renounce the rights of majority); also statute book of the Argentine Republic (according to Daireaux, Jour. xiii. p. 298; Judgment of the Supreme Court of Austria, 9th August 1882, Jour. xiii. p. 468). On the other side, Lyon-Caen, *ibid.* As a matter of fact, the determination cannot be supported, as this last judgment attempts to support it, on the theory of vested rights. Brocher, *Nouv. Tr.* § 24, p. 94, expresses his views hesitatingly, but at last comes to agree with the view of the text.

¹² Muheim, p. 118, pronounces against the soundness of the views taken in the text, for, says he, (1) there is no such thing as a tacit concession of the *venia ætatis*; (2) the same argument would avail in the case of a change of law by persons whose domicile made them still minors; (3) my argument does not apply to the acquisition of a domicile at common law, which requires no sanction from the authorities of the State. Our first ground, however, is not a new or independent argument, but merely an illustration of the leading idea that a State, which recognises the will of any person as effectual to carry through the important act of a change of allegiance, involving his whole personal *status*, cannot afterwards treat that person as minor. His third objection is got rid of in the same way: the State does not sanction the domicile, but assumes an operative and effective will in the person to change his domicile. As regards the second argument, we may say that no legal system will, at the present day, think of suddenly subjecting to a curatory all persons who by their own law have attained majority, even although it holds that the age of majority is more advanced than it is held to be by its neighbours.

by the laws of whose State the wife is at once recognised as of full age.^{13 14}

Of course, the acts which the person has done when he was, according to the law of his original country, of full age, must remain legal and valid acts, even although by the law of his new country he should again become minor (cf. Brocher, *Nouv. Tr. ut cit.*).

CURATORY OF WOMEN.

§ 150. According to the principles which we have already laid down (*supra*, § 135), we have to deal with a real incapacity to act (which must be treated as a personal law, and so must be regulated by the *lex domicilii* or nationality, as the case may be), in those cases in which a woman needs, in order to do legal acts, the consent of some one else who may, if he likes, refuse his consent; although it may be that the necessary consent can be given by a competent court.¹⁵ If the man who supplements her capacity—her guardian or curator—only gives her advice, or, if the woman may choose any other guardian she pleases in place of one who refuses his consent, until she finds one whose will coincides with her own, then we have to do with a mere form, which may perhaps protect her from hasty acts, and this must be ruled by the maxim "*locus regit actum*." It is possible, too, that there are only certain special classes of legal transactions, in which the woman requires the consent of her curator or of her husband: in such cases, the principles which we assume as regulative of these special incapacities must give the rule.

The differences of opinion that prevail as to whether the necessity of the assistance of a curator is to be determined by the law of the domicile of the woman, or by the *lex loci contractus*, are explained by the varieties of such curatory corresponding to the categories given above; these were in the contemplation of the authors who treat of the subject, and from them they constructed a general rule.¹⁶ In more modern times such curatory

¹³ Cf. v. Wächter, ii. p. 187; Schmid, p. 84; Stobbe, § 30, note 29.

¹⁴ See below, on the law of curatory or guardianship, as to the alienation of immoveable property belonging to minors: according to some writers, who in other respects hold capacity to act to be determined by the *lex domicilii*, this power is to be regulated by the *lex rei sitæ*. On the restitution of minors, see § 154.

¹⁵ It is an entirely different case from that with which we are dealing here, where a husband has some independent right of his own, such as an usufruct, over his wife's property, by reason of which she cannot alienate any part of her estate without his consent.

¹⁶ The following declare for the universal validity of the *lex domicilii*, viz.: Curtius Rochus, *de stat.* 9, § 26; Boullenois, i. pp. 437-439; Günther, p. 728; Fœlix, i. § 89, p. 206; Schmid, p. 45. Judgment of the Supreme Court of Appeal at Darmstadt, 18th March 1873 (Seuffert, 28, No. 188). The short report of this decision in Seuffert does not make it clear whether the matter dealt with was not an authority given by the woman at her domicile to carry on a litigation in another country. See, too, the court at Chambéry, 9th Jan. 1884 (Jour. xii. p. 180). (This deliverance is sound so far as the requirement of the *Autorisation Maritale* existing in the French law is concerned, C. civ. art. 217.) The authority of the *lex loci contractus* is supported by Henr. de Cocceji, vii. 10; D. Mevius in *Jus. Lub. proleg.* qu. 4, § 17, because the assistance

exists only in the case of married women, whose curator is their husband (Gerber, §§ 245, 246), and it has the effect of making the women altogether or partly incapable of acting.¹⁷ If the co-operation of a curator is required by the law of the place of the contract, but is not required by the woman's personal statute, then a contract concluded without such co-operation is not invalid for this reason, that the rule "*locus regit actum*" makes the observance of the forms required at the place of the contract, as well as other forms, optional to the parties; but still, if the forms of the domicile of the parties, and not those of the place of the contract, are observed, there must, as in all such cases, be circumstances to show the intention of the woman to enter upon a binding contract.

Lastly, if the curatory is a rule of process, the judge would sist process until a curator is appointed, in accordance with the law of the court.¹⁸

It is obvious that in so far as a wife, by the law of her nationality, requires no consent from her husband to carry on a suit, she cannot be required to produce any such consent, when she is carrying on a suit in another country, although the law of the court in which the process is dependent needs such a consent for wives who belong to that country.¹⁹

of a curator is a mere formality attaching to the legal act—Ricci, p. 537; Witzendorf, *de statutis civitatum provincialium*, xx. No. 2; Alderanus Mascardus, concl. 6, No. 111. In modern times Beseler, § 134, and a judgment of the Supreme Court of Appeal at Kiel, on 9th September 1863 (Seuffert, 17, No. 1), support the theory that curatory of women (except in cases in which the wife as such needs the consent of her husband) is a mere matter of form. Wächter, ii. p. 180, although he considers that to require the advice or consent of a curator is to limit the capacity of acting (note 302), reaches the result, that we must determine the capacity of women according to our own law, if they deal in our country: this view springs from the distinction between the legal qualities of a person and their operation, to which we have referred. On the other hand, see Savigny, § 362; Guthrie, p. 151, who purposes apparently to apply the *lex domicilii* everywhere. On these different views, see Stobbe, § 30, note 30, whose own opinion is merely hypothetical.

¹⁷ Merlin's declaration, *Rép. Vo. Autorisation Maritale*—that the provisions of certain French *coutumes*, to the effect that a married woman can only validly contract with the consent of her husband, constitute a personal law which must be administered by the laws of her domicile—is therefore correct.

¹⁸ Mittermaier, no doubt, has this case in view, *Archiv.* vol. 13, p. 305, when he proposes that the law recognised at the seat of the tribunal should determine as to the necessity of such curatory. Judgment of the Supreme Court of Appeal at Jena, 17th February 1827 (Seuffert, 4, p. 374): "The curatory of women in Saxony was originally merely a curatory *ad litem* (Procedure in Saxony, i. 43, 44, 46, 47; ii. 63): there is no such thing as an incapacity in unmarried women to dispose of their estate, and for extra-judicial contracts they do not require a curator. The curator required for proceedings in court is a mere adviser, who may be dismissed at pleasure, and whose advice is a mere formality required to validate the transaction. Such an external solemnity prescribed for judicial business is plainly to be judged by the law of the place where the judicial contract was concluded, and cannot be required in places where it is not prescribed. The full capacity of a woman who is not subject to curatory by the law of her domicile must be recognised in every Saxon court, even without the advice of a curator, and in the same way a woman, who by the law of her domicile is only to a certain extent fettered by the necessity of a curator's concurrence, can validly contract where such curatory does not exist." Cf., too, the decision of the same court, reported by Seuffert, 13, p. 255, of date 15th December 1831.

¹⁹ In connection with the law of England, see § 11 of 33 and 34 Vict. c. 93; see, also, *Code civ.* § 215; Clunet, Jour. vii. p. 186.

If by the married woman's own law, or personal statute, a judicial authority is required, this can only be given by the court of her own country, and cannot be given by the court where the action depends.²⁰

CURATORY BY REASON OF WEAKNESS OF MIND.

§ 151. The incapacity of persons who are weak in mind is a natural fact which, as such, must be recognised all the world over. The special processes introduced by modern legal systems for the appointment of curators, have these objects only—*first*, to prove the mental weakness which constitutes the incapacity, and to a certain extent to raise a presumption, on which the public may rely; and, *secondly*, to give the curator, who is to be appointed, authority to act in name of the afflicted person.

No doubt, in general, we may be satisfied if the State which is concerned with the permanent protection of the person has adopted such measures on his behalf.

If, then, the competent officials of a man's own country have put him under curatory, the appointment will *prima facie* be recognised abroad, and the curator will be regarded as entitled to represent him.²¹ But, on the one hand, in view of the difficulty of defining the degree of mental weakness, which will afford a reasonable ground for the appointment of a curator, it is possible that we may recognise theories, which differ considerably from those held in other countries. In such a case it would be a palpable infraction of *jus publicum*, and perhaps also an offence against public morality, if we were to exclude from the enjoyment of his property, and to disable in the conduct of his business, a person who had been in another country, on grounds which we should pronounce insufficient, pronounced to be of unsound mind. At the same time, too, third parties might suffer serious prejudice if the deliverance of the foreign judge were unreservedly recognised, inasmuch as they, in accordance with the views that prevail in our country, might regard him as fully *compos mentis*. It must therefore, in the first place, be open to our officials to refuse effect to possible demands to be made upon them by the foreign officials, if it is obvious that our legal theories would not have justified the institution of a curatory, although in doubt effect will be given to the decree of the

²⁰ So, too, Clunet *ut cit.*

²¹ This representation is recognised in English practice; *e.g.* a curator appointed in a foreign country may raise actions, and receive and discharge moneys in England. Wharton, § 122, *note*. [The law of Scotland is thus stated by Lord President Inglis in *Sawyer v. Sloan*, 1875, Ct. of Sess. Reps. 4th ser. iii. 271: "I do not think the principle of international law admits of any doubt. It is quite unnecessary that fresh guardians should be appointed to manage personal estate, even when situated in another country. The case of heritage, of course, is different. His title to sue will also be recognised" (*ibid.* and *Gordon v. Earl of Stair*, 1835, Ct. of Sess. Reps. 1st ser. xiii. 1073). As regards England, Scotland, and Ireland, this law is recognised by statute. See 52 & 53 Vict. c. 41, § 53.]

courts of the country to which the *incapax* belongs:²² in the next place, those who have contracted with him must be allowed to lead proof to that effect, and in so far as the deliverances of the foreign court are not officially intimated in our country, we shall not be in a position to say that there is any presumption for them to overcome.

Again, no measures of constraint can be taken against any person, even if he belongs to another country, within our territory, except such as are prescribed by our law. Such measures are part of the *jus publicum*. For instance, a foreigner can only be taken by force to a lunatic asylum, if our laws permit this.²³

CURATORY BY REASON OF PRODIGALITY.

§ 152. The incapacity of acting imposed on those persons, who, for instance, are placed under curatory according to the common law of Rome on account of prodigality (or, according to the language of French jurisprudence, are effected by an *interdiction*), is not, of course, like mental incapacity, a natural fact. The judicial decree, however, which proclaims such an incapacity, prescribes, without doubt, a permanent protective care for the prodigal, and receives effect all over the world in accordance with the laws of the country to which he belongs. This view has been adopted by authors on the continent of Europe almost without an exception.²⁴

It has, no doubt, been objected that interdiction is really a police regulation, although the decree is pronounced by the courts, and accordingly must be limited in its operation to the territory to which the person placed under curatory belongs.²⁵ But it is a police regulation in no other sense than any other kind of guardianship is so. There is no ground for distinction in this respect in the fact that it is only found in isolated cases, while guardianship on account of minority is a thing that occurs more frequently.

The contention that interdiction, resting, as it does, upon the sentence of a foreign judge, can only receive effect under the same conditions as are

²² The practice of England and the United States is practically to the same effect. Wharton, § 122, note 5: "A decree of lunacy, when entered by a foreign court, is from the nature of things open to impeachment for want of jurisdiction, for fraud or for gross irregularity in the procedure. See, too, Pigott, pp. 296-299, and the statute 16 & 17 Vict. c. 70, § 45.

²³ See below, under the head of curatory.

²⁴ Alb. Brunus, *de Stat.* x. § 57; Barthol. *de Saliceto* in L. i. C. de S. Trin. No. 14; Alderanus Mascardus, concl. 6, No. 20; Argent. No. 7; Burgundus, iii. 12; Rodenburg, ii. 1, § 4; Huber, § 12 (vouching for the practice on this point); P. Voet, iv. 3, No. 17; Abraham a Wesel, *ad Nov. Const. Ultraj.* art. 13, No. 26; Casaregis, disc. 43, No. 16; Hommel Rhaps. vol. ii. obs. 409, No. 3; Nic. Everhardi, jun., Cons. vol. ii. Cons. 28, No. 82; D'Aguesseau Œuvres, iv. p. 638; Boullenois, i. p. 603; Massé, ii. p. 87; Fœlix, i. p. 207; Asser-Rivier, § 60; Laurent, vi. § 72; Weiss, p. 618. In particular, the interdiction of a foreigner set up by the officials of his own country is recognised by French law so as to affect property situated in France. See, too, Laurent *ut cit.*, and the judgment of the Court of Ghent cited by him, of date 26th March 1847.

²⁵ Günther, p. 729.

required for the application of a foreign decree, is more plausible.²⁶ But it is no act of contentious jurisdiction to place a person under curatory, although it may be that in some countries, in order to give the judicial cognition more completeness, and to ensure the person against arbitrary and groundless attempts upon his liberty, the curatory is issued under the form of a litigious proceeding between different parties, as is required by the law of France.²⁷

What the judge here adjudicates upon is not a relation of private law between different individuals; he has simply to pronounce a protective order for the interest of that person who is about to be placed under curatory, in which, no doubt, others may be interested, and with reference to which they may be entitled to make suggestions.²⁸

The fact that extravagant expenditure is frequently a sign of incipient mental disease, is an argument for the universal recognition of a declarator of prodigality.

A curatory, even if it be established by the courts of the country to which the person belongs, can never be recognised in another country where such a form of guardianship, *i.e.* on account of prodigality, is unknown. To give effect to the requisitions of the court which has made the appointment, or to recognise the curator in any transaction which may be about to be undertaken there, would be an invasion of the law of the land as to personal freedom, or the security of property and possession, as the case might be. Thus far, but only thus far, is Wharton right when (p. 122) he refuses any extra-territorial effect to a declarator of prodigality within the territory of the common law of the United States. But if a person, who has been placed under curatory on account of prodigality, emigrates to a country in which such curatories are unknown, the question whether he has recovered full capacity by this emigration, will depend upon the answer that is to be given to the preliminary enquiry, *viz.* whether, by the law of the State to which the emigrant has hitherto belonged, the naturalisation which has taken place in the other country must be recognised. If we assume that the liberty of emigration is not destroyed by the interdiction, which is to affect property only, then the curatory would fall to be dissolved when naturalisation (but not mere emigration) had taken place, and the emigrant must have his property restored to him.²⁹ This rule will give the line for dealing with the

²⁶ The older authorities, curiously enough, partly for this very reason, justified the universal validity of the *lex domicilii* in questions of incapacity to act.

²⁷ Code Civil, art. 513 *et seq.*, art. 489 *et seq.*

²⁸ See Fiore, *Effetti*. § 192.

²⁹ So proclamation of the Supreme Court of Appeal at Darmstadt, 13th March 1847 (Seuffert, xiii. § 102), to the effect that, as according to the Hessian law at that time any one who was free to form his own personal relations was entitled to emigrate, the *prodigus* was under no limitations in that respect. *Contra* a declaration of the Supreme Court of Appeal at Lübeck, of 2nd June 1877 (Seuffert, § xxxiii. 315), in accordance with Bohlau, *Mecklen. Landr.* ii. p. 302, on the ground that an interdiction imposed by the proper authority gives rise to a legal condition of the person, which, to use the expression of the Supreme Court of Appeal,

complaints which a report of the United States Consul Byers raised against the officers of some Swiss cantons, who refused to give up the property of persons who had been under curatory, but who had subsequently emigrated to the United States.^{30 31}

The incapacity of the prodigal has often been ranked with the loss of disposing power which falls upon a bankrupt. This is, however, incorrect. The bankrupt is not incapable of legal acts; he can certainly enter upon contracts, although the other party does not thereby acquire any rights against the sequestrated estate; and by Roman law he may renounce a succession that opens to him. The curatory that exists in bankruptcy is also not merely for the benefit of the bankrupt, but has for its end to protect the estate for the creditors.³²

This distinction will be made clearer in discussing bankruptcy.

has an universal claim for recognition, or, as Böhlau says, accompanies the person everywhere. This is, however, a *petitio principii*. A legal condition of the person is in legal import merely a figurative expression, which combines the application of a series of legal propositions. One must however admit the judgment of the court of Lübeck to this extent, that all effects of the interdiction do not cease, and all difficulty is got rid of by the simple expedient of holding that, in such a case of emigration, the interdiction and curatory are provisionally continued until the authorities of the State, in which the emigrant is being naturalised, are in a position to decide whether they are to be dissolved. The judgment of the court at Lübeck recognises that the curatory ceases *ipso jure*, if interdiction is no part of the law of the country in which the person has settled.

³⁰ See Wharton *ut cit.*

³¹ As to whether the *judex domicilii* is not competent to impose a curatory, although the competency and effect of it may have to be determined by the *loi nationale*, see *infra* on the competency of courts.

³² The operation of a declaration of prodigality in a foreign country was discussed in the decision on 16th January 1836, by the Cour Royale, at Paris, on appeal in the suit of the Duke of Cambridge—who had been nominated curator to Charles, Duke of Brunswick, by the joint nomination of the King of England and William, Duke of Brunswick, by virtue of their right as agnates, and in respect of their relative's prodigality—against various persons in France, in whose hands Duke Charles had placed sums of money. Counsel for the Duke of Cambridge contended (1) that the personal statute now in question was universally valid; (2) that the foreign deliverance by the family had the effect of a satisfactory proof of the incapacity of Duke Charles to manage his own property. On the other side, it was answered—(1) Foreign judgments are of no effect in France. (2) It did not follow from the 3rd article of the Code Civil that the *status* and legal capacity of foreigners were to be determined by the law of their domicile; on the contrary, another rule was recognised if, as in the present case, the foreign law was at variance with the general principles of French legislation, in respect that the forms prescribed by the Code Civil for procedure in interdiction, so as to avoid abuses, had not been observed. (3) The whole proceeding had a mere political object—to prevent Duke Charles from entering on possession of his dominions, and therefore, like a political statute declaring emigrants to be civilly dead, could not be enforced in a foreign country.

The Tribunal of the Seine adopted the reasoning of Duke Charles's counsel, and the court of Paris affirmed the judgment on 16th January 1836, because the question was as to a political rule which had no operation in a foreign country. Cf. Sirey, 36, 2, pp. 70-78; Gand, No. 512.

This latter ground, if sound, is very far-reaching. The community of legal interests belonging to different nations, which finds its expression in private international law, cannot apply to acts of the State authority, which quit the area of the regular legal order of things and direct themselves, as exceptional measures, against individuals, although they may end in giving rise to judicial steps of procedure, such as arrestments. Accordingly, the German deprivation laws of 1866 can produce no effect upon the property of the dethroned princes in foreign countries.

NOTE G ON § 152. RECOGNITION OF FOREIGN INTERDICTIONS.

["Certainly, in this country, no effect would be given to any legal incapacity merely dependent on the decrees of a foreign tribunal until those decrees were here produced. When produced, they might be received as proof of incapacity till redargued. But a foreign interdiction, even when properly vouched here, can hardly have any effect in this country till publication according to the forms of Scots law."—Fraser, "Parent and Child," p. 588. The cases in which English and foreign courts have exercised their jurisdiction in the interdiction of foreigners resident but not domiciled in the territory of the court, or in the administration of their affairs in case of lunacy, are noted below, *note on* the paragraphs dealing with Curatory generally.

ON SOME SPECIAL CASES OF LIMITED CAPACITY FOR OBLIGATIONS.

(*S. Cum Velleianum, S. Cum Macedonianum.*)

§ 153. We have already enunciated the view that the so-called special incapacities to act should have no claim for recognition in a foreign country. We propose now simply to show that some rules of law of this description are in substance rules as to solemnities or forms, which create difficulties in incurring particular obligations, and are in some respects very important.

(1.) As regards the limitations put upon women, and specially upon wives, in Roman law by the *S. Cons. Velleianum*, the "*Authentica si qua mulier*,"³³ the suretyship of a woman is, as a rule, null unless a particular form, viz. the execution of a public deed subscribed by three witnesses, be observed; besides that, it may be defeated by pleading the *S. Cons. Velleianum* as an exception; and in all cases, finally, the suretyship of a wife undertaken for her husband is null. In practice, however, this is so far modified that a cautionary obligation, which was undertaken or ratified on oath by a woman, after she had been instructed by a person learned in the law as to its consequences (and in the case of a married woman undertaking such an obligation for her husband in his absence), is held valid.³⁴ According to the Roman law of modern times, the matter is reduced to this—since a woman by observing the forms introduced by

³³ There are special declarations as to the suretyship of women by Duplessis, *Consult.* 26, *Œuvres*, ii. p. 156 (he is for the universal validity of the *lex domicilii*); Bouhier, cap. 27, Nos. 5, 6; Boullenois, i. p. 187; Seuffert, *Comm.* i. p. 248, No. 42; Walter, § 45; Thöl, § 85, No. 7; Fœlix, i. p. 204, and note thereon by Demangeat (as the latter remarks, Fœlix's argument is inconsistent); Laurent, v. § 69; Stobbe, § 30 *ad fin.* It may be observed that many of the older writers, such as Bouhier, confuse the *Senatus Consultum Velleianum* with entirely different restrictions of German law upon the capacity of a wife.

³⁴ Cf. Puchta, *Pandect*, § 407. The Hanoverian statute of 28th Dec. 1821, for instance, requires, in doing away with the cautionary obligation upon oath, that the woman should be instructed by the court, and that the obligation of suretyship should be published in the minutes of the court. On the provisions of the law of Spain, see Lehr, *Elements of Spanish Law*, 1880, p. 406. By a Prussian statute of 1st Dec. 1869, applicable to the whole monarchy except the jurisdiction of Köln, all the special provisions as to the suretyship of women are swept away.

practice and the Canon Law, can always become surety—that special protective forms exist for women with reference to the assumption of cautionary obligations. If, then, any recognition at all is to be given to the rule “*locus regit actum*,” a cautionary obligation undertaken without the protective forms must be held to be valid, if the woman had the power to become surety without them at the place where it was undertaken, and that too in spite of the assumption that all “special” incapacities are to be determined in accordance with the *lex domicilii*. Conversely, a cautionary obligation, which a woman is by the law of her domicile capable of undertaking, is not invalid, although these provisions of the Roman law are in force by the *lex loci actus*. Thus, for instance, a woman domiciled in dominions where Roman law is the common law, can undertake a valid obligation of this kind, where the Common Code of Austria,³⁵ or the Code Civil,³⁶ is recognised, and the cautionary obligation of a woman domiciled in France or Austria is not invalid, if she becomes surety without special instruction as to the law, or ratification upon oath, in any country where the *S. Cons. Velleianum* and the “*Authentica si qua mulier*” are in force as part of the common law of the land.³⁷

(2.) By Roman law (*S. Cons. Macedonianum*), the obligations incurred by persons still under paternal power, by receipt of a loan, are as a rule of no effect. We cannot here appeal to any such ground as was urged with reference to the cautionary obligations of women, that by modern law the act becomes valid if certain forms are observed. Besides the general grounds already adduced, we have the following argument in favour of the opinion we have adopted. Even by the provisions of the Roman law, if the lender did not know that the borrower was under paternal power, and had a reasonable ground for his ignorance, the *S. Cons. Macedonianum* could not be pleaded.³⁸ According to the meaning and the spirit of the whole enactment, this must be extended to the case of the son who is in a foreign country, the inhabitants of which are not required to know our laws, and, looking to their own law, have not the possibility of such a plea before their eyes.³⁹ One sees that even in those days the law of Rome came

³⁵ § 134.

³⁶ The Code Civil has tacitly removed the provisions of the Roman law.

³⁷ The judgment of the Cour Royale of Paris of 15th March 1831, affirmed by the Court of Cassation (Sirey, xxxiii. i. p. 665), which declared the suretyship of a Spanish lady, who, in undertaking a cautionary obligation for her husband, had hypothecated her real property in France, to be valid, is according to the view we have adopted right in its result, but not upon the grounds taken by the Cour Royale. These were—1st, Because the property hypothecated was situated in France, and therefore the personal capacity of the female pursuer to incur obligations, and the effect of the obligations incurred by her (which she maintained to be null) must be determined by French law; 2nd, Because contracts and obligations which had been made and undertaken in France, and for the performance of which a party was entitled to sue in a French court, could be subject to no other law than that of France.

³⁸ L. 3, § 1; D. ad *S. Cons. Macedonianum*, 14, 6.

³⁹ A minor who has borrowed money from another minor is not allowed to plead the *Senatus Consultum* (L. 11, § 7; L. 34, D. de *minor* 4, 4), and there is no *condictio* for money that has been repaid by him who got it (L. 14, D. de *reb. cred.* 12, 1).

pretty near the solution of the question which was recommended as a general principle for legislation in international relations (*supra*, § 142).

An objection to our view might be raised upon the ground that the inhabitants of a country where the *Senatus Consultum* is in force, would only have to take a journey into some other country where it is not recognised, in order to escape its provisions. But although we have laid it down that the *S. Cons. Macedonianum* is not to be applied to every case in accordance with the personal law, we do not mean to say that the validity of the loan is to be determined by the law of the place where it is made. What we have said is that the competency of pleading the *Senatus Consultum* will be determined by the same law as will regulate the validity of the loan in other respects; and that law, in the case supposed of a transaction *in fraudem legis* will be, as we shall show in connection with the law of obligations, just the law of the State to which the contracting parties belong, or of their domicile, whichever of these general principles of regulation we adopt.

Here, too, as in the case of the *S. Cons. Velleianum*, the validity of the loan can be maintained, although it is made in conformity merely with the law recognised at the place of the domicile or the national home of the debtor.⁴⁰ A son under paternal power, therefore, who has his domicile in Hamburg,⁴¹ may validly incur an obligation by receiving a loan in a country where the common law of Rome is recognised.⁴²

The same principles that determined the validity of the *exceptio S. Ci. Macedoniani* will find application to analogous cases—*e.g.*, the invalidity which particular systems attribute to loans made to members of particular classes of persons.

We have already discussed the proper determination of the capacity to contract by bills, and we shall return to it when we come to deal with the law of bills. We can only repeat that in all the questions that may arise under this head commercial intercourse is sufficiently protected; and the object in view is not overshot, if we apply the principle of protecting a party, who contracts in good faith, and is not completely negligent of his own interests, against objections that may be supported by reference to rules of law unknown to the *lex loci actus*.

APPENDIX.

In integrum restitutio.

§ 154. *In integrum restitutio* is the reduction in certain cases of a legal relation that has been entered upon, or the restoration of a relation that

⁴⁰ Bouhier, cap. 27, No. 3; Walter, § 45; Thöl., § 85, note 7; Savigny, § 364; Guthrie, p. 158, pronounce for the universal validity of the *lex domicilii* in reference to the *S. Cons. Macedonianum*.

⁴¹ The laws of Hamburg know nothing of the *exceptio S. Ci. Macedoniani* (Baumeister's *Hamburgisches Privatr.* ii. p. 51).

⁴² The question how far the father is bound by the acts of the child still under his power does not belong to this subject, but to the law of the family.

has been lost, by means of the decree of a judge, upon considerations of equity and expediency. It belongs to no special division of our subject, and is rather a measure of universal application, for it may conceivably be applied in every department known to private law, and even to many that belong to public law, according to the provisions that may be laid down by the law of each territory. The position we have assigned to it at the close of the discussion on the law of persons is justified in this way, that there is no room in a treatise on private international law for what is called a "general chapter," such as we find in the textbooks of particular territorial laws; the purely logical development of legal ideas, which supplies the material for such a chapter, cannot from its nature be made the subject of a work upon the conflict of laws; while this *in integrum restitutio*, just because it may be found in connection with most relations of private law, is most aptly treated at the very beginning of the system.

The special characteristic of this restitution is, that the judgment of the court, instead of making a declaration as to a legal relation already in existence, or what is to be assumed as in existence by the representations of parties—the ordinary case in a civil suit—here deliberately and consciously reduces a legal relation that exists, or restores one that has been lost.¹ We might, therefore, by reversing the considerations which in ordinary cases of civil suits exclude the application of the *lex fori* because of the end that is in view² (setting aside the class of suits which the court holds to be immoral or indecent), hold that the *lex fori* is applicable in all cases of restitution; and some authors do in fact take this view.³ But although restitution has for its object to re-establish a legal relation that has been lost, or to reduce one that exists, it does both of these things upon grounds which were present at the time when that relation originated or was lost; in other words, the competency of restitution implies an imperfect invalidity in the origin or extinction of the legal relation which is concerned,⁴ and one end in view is to support that existing state of legal relations which the ordinary rules of law justify, by aid, first, of a special proviso that the person who desires to avail himself of the invalidity in question shall have to appeal to the judge; next, by the possibility of renouncing the legal remedy and allowing prescription to run upon that renunciation; and, lastly, by permitting the judge to pronounce a broad judgment, not hampered by any particular narrow rules of law, in all such cases as it shall appear to him to be for the interest, and in conformity with the requirements of legal intercourse to do so. As, therefore, there is no place, for the application of the *lex fori* in questions involving substantive legal rights, the result is that this *in integrum restitutio* falls under the

¹ Savigny, Syst. vii. p. 100.

² Cf. *supra*, § 26.

³ Walter, *D. Privatr.* § 44; Holzschuher, i. p. 78.

⁴ See the resolution of the Supreme Court of Berlin on 14th February 1842 (Dec. 7, p. 323), which gives expression to this theory in reference to the applicability of new legislation as to restitution.

same local law as that to which the legal relation affected by the proposed restitution belongs. This is the view which most authorities take. The result of this is, that restitution against the loss of a real right in immoveable property is determined by the *lex rei sitæ*,⁵ against the consequences of a binding contract by the laws to which this contract is subject for other purposes,⁶ against the prescription of a suit by the laws by which the suit is itself to be ruled, and against delays of process⁷ and judicial sentences by the law of the place where the process is proceeding.

Many writers, however, make an exception in regard to the restitution of minors. They hold that to be merely a special mode of the operation of incapacity to act, and therefore they determine it according to the *lex domicilii* of him who seeks the restitution.⁸ But although the restitution which is ensured for minors may, as a matter of fact, have consequences resembling those of incapacity to act, and although in classical Roman law it served, as a matter of fact, as a substitute for incapacity, so as to protect them against prejudicial transactions,⁹ yet in a juristic sense they are quite distinct from each other, just as much as a penal statute against persons who take a dishonest advantage of a minor is distinct from a statute prescribing the incapacity of minors.¹⁰ Such a penal statute has a common object with the other; but it follows necessarily, from the difference of the path by which the object is reached, that there can be no question in such a case of applying to both the *lex domicilii* of the minor.

At the same time, the following modifications of the general rule we have expounded must be recognised as applicable to the restitution of minors in conformity with the *lex domicilii*.

(1.) The restitution of minors in modern law,¹¹ where they have no capacity to act, rests upon the ground that because of their minority they are not fit to attend to their own affairs, and that they are from their minority under guardianship; but whether this latter fact is true or not depends, as we have seen, upon the personal law, and so, therefore, must the further question whether a person in a question of restitution is to be treated as a minor.¹²

⁵ So P. Voet, 9, 2; J. Voet, in Dig. 4, 1, § 29. Judgments of the Courts of Cassation and Revision at Berlin in 1847, Seuffert, ii. § 2.

⁶ P. Voet, l.c., J. Voet, l.c.; Hert, iv. 66; Henr. de Cocceji, vii. 9; Bartolus, in L. 1. C. de S. Trin. No. 19; Bald. Ubald. L. 1, C. de S. Trin. No. 94; Baldus Perus, *de statutis Vo. Territorium*, § 1; Christianæus, Decis. vol. i. drois, 283; Burge, ii. p. 844; Savigny, § 374; Guthrie, p. 247; Mittermaier, *Arch. für civ. Praxis*, 13, p. 301.

⁷ The older authors say the laws of the place are to be applied in this case, *ubi contracta es mora (negligentia)*; cf. Bartolus, P. Voet, J. Voet, *ut cit. supra*.

⁸ So Boullenois, ii. p. 439; Bouhier, cap. 25, Nos. 62-66; Merlin, Rép. Vo. *Majorité*, § 5; decision of the Supreme Court at Berlin, on 25th March 1833 (Simon & Strampff, i. p. 279).

⁹ Savigny, § 365; Guthrie, p. 168; vii. p. 146; Laurent, viii. § 72.

¹⁰ So the *Lex Plætoria* in older Roman law. See Savigny, l.c. Cf. in modern law the German Criminal Code, §§ 301, 302.

¹¹ Otherwise by the older Roman law.

¹² Cf. J. Voet, l.c.

(2.) The restitution of minors rests upon a special protection which is extended to them. That, however, can only take place where it is so extended by the personal law of the minor. If a foreign State proposed to afford such protection to a minor against the law of his own State, no benefit would accrue to the minor,¹³ but his credit would much more probably be shaken, and his position as a person of property thrown into confusion. No restitution, therefore, can be afforded by a foreign court where it is excluded on the head of minority by the personal law.¹⁴ This is perhaps unimportant, since, if restitution of minors is not recognised by the *lex domicilii*, it may be assumed that the constitution of the administration by curators is such as to render this legal remedy unnecessary or even prejudicial.¹⁵

¹³ See the exposition given above, § 135.

¹⁴ Huber, § 12; Ricci, p. 522. The Supreme Court of Appeal at Celle laid down, in a judgment of 1782, that a native of Magdeburg, who sought *restitutio in integrum* from the Court of Hanover, must have suffered the lesion complained of before his twenty-first year (in accordance with the law of his domicile). V. Bülow and Hagemann, *Prakt. Erört.* i. p. 150 (cf. Rundohr, *Jurist. Erfahrungen*, iii. p. 992). (In the older provinces of Hanover, Roman law is the common law.)

¹⁵ Wächter, ii. pp. 174-179, is of the opinion that the judge can only give the minor restitution in so far as the laws of the judge permit. This argument, however, would necessitate the application of the *lex fori*, not here only, but in every other case.

Fifth Book.

LAW OF THE FAMILY.

INTRODUCTORY.

§ 155. The law of the family is, as we have already remarked above, to be ruled by the law of the State to which the person belongs, or, as others will have it, by the *lex domicilii*. Difficulties arise, however, in this subject, either because—

In the first place, the persons who are concerned belong to different States, or have different domiciles, as the case may be. The question then comes to be, whether the personal law of the one or that of the other is to rule, or whether, and to what extent, the rules laid down by the laws of both of the persons concerned must be observed, in order to effect a binding contract, *e.g.* a marriage:

In the second place, the persons concerned may change their allegiance, or domiciles, as the case may be; it may then be matter of doubt whether, and to what extent, the earlier or the later allegiance, or domicile, as the case may be, should give the rule:

In the third place, the exercise of privileges belonging to the law of the family may be hampered by the law of the person's residence:

In the fourth place, the will of the persons concerned supplies the rule to a certain extent, and it is to be ascertained from the circumstances:

In the fifth place, the family relations may produce effects upon the law of property, which in itself may be subject to the law of some other territory.

In seeking solutions for the important questions which international law presents in connection with the law of the family, we must, as an essential, keep constantly in our view that the laws of different countries must be so interpreted, and an international agreement must so far as possible be effected, so as to avoid conflicting decisions as to the family

status of one and the same person, since it is in family relations that such conflicts will be specially dangerous, and will have a specially prejudicial effect on public morality.¹

I. MARRIAGE.

INTRODUCTORY.

§ 156. The special difficulties in the international treatment of marriage,² arise from the facts that—

In the first place, marriage on the one hand rests upon a *consensus*, *i.e.* upon a contract, while on the other hand the effects or consequences of this contract are not subject to the will of the parties, but are regulated directly by the law. As marriage is intended to set up a permanent condition, the law which regulates it is naturally the law of the State to which the spouses permanently belong; but again, the spouses, in virtue of their free powers of emigration, may withdraw themselves from the dominion of any particular law:

In the second place, marriage is in its essence a relation which cannot come into existence, or continue in existence, on the part of one only of the two spouses, and, again, it would seem that it can only be realised, if the personal law is the same for both the husband and the wife; and thus it may seem to be a question how far the freedom of emigration of one of the spouses should give way to the principle of the unity of the law of the marriage, or, conversely, how far this principle of unity is to give way to the freedom of emigration:³

In the third place, very serious differences must be admitted to exist on this subject in the legal systems of civilised States, which in other respects are closely akin, while it is just on such a subject as this that differences are directly traceable to principles of morals or of manners, and are therefore most unfavourable to the application of foreign rules of law.

A. PERSONAL CAPACITY TO CONTRACT MARRIAGE. IMPEDIMENTS TO MARRIAGE. CONSENT OF THE SPOUSES.

NECESSITY FOR OBSERVANCE OF THE PERSONAL LAW. DIFFERENT VIEW TAKEN BY THE LAW OF THE UNITED STATES, AND BY THE SWISS STATUTE OF 1874.

§ 157. (1.) The jurisprudence of the Continent of Europe has long been agreed that the capacity to contract marriage must exist, in order that a marriage should be valid, according to the law of the parties' own

¹ See, to this effect, Brocher, *Nouv. Tr.* § 28, p. 108.

² Beach-Lawrence gives a number of interesting cases and decisions, ii. pp. 270-398; for some well-known cases, see Calvo, iii. p. 149.

³ See, in this sense, Brocher, *Nouv. Tr.* § 34, p. 123.

country:^{4 5} and that in any event it is not enough if they have such capacity by the law of the place in which the marriage is celebrated. The decisions of the English courts are more and more approaching the same result.^{6 7} The jurisprudence of the United States, however, will, as the law of England once did, keep the law of the place of celebration in view at the same time to this extent, that it will hold a marriage which is valid according to that law to be valid everywhere. This point of view is in recent times represented by Wharton:⁸ at least he can see no reason for deviating from it as far as America is concerned.⁹

The law, in setting up rules as to the possibility of marriage, means, on the one hand, to provide for the welfare of its citizens, by protecting them from the consequences of premature marriages, or marriages without full consent.¹⁰ On the other hand, it has in view also the welfare of families, when, for example, it forbids the union of persons too closely related to

⁴ As regards capacity for marriage, the view that the law of a person's allegiance must determine the question is more and more widely recognised. See v. Martens, p. 303.

⁵ Henr. de Cocceji, *De fund.* vii. 22; Cochín, *Œuvres*, ii. p. 154; Seger, pp. 8, 9; Walter, § 46; Holzschuher, i. p. 82; Boullenois, i. pp. 495, 496; Wächter, ii. p. 185; Püttlingen, § 56; Thöl, § 80; Mittermaier, i. § 30, p. 116; Savigny, § 379, i.; Guthrie, p. 291; Brocher, *Rev.* v. p. 154; Stobbe, § 34, ii.; Fiore, § 79; Laurent, iv. § 263; Bard, § 139; v. Martens, § 716; Asser-Rivier, § 47; Durand, § 144; Weiss, p. 630; Wheaton, § 92, p. 122. As to the recognition of this principle in legislation, see Fœlix, ii. p. 483. See, too, the judgment of the Supreme Court at Berlin, reported in the *Decisions*, 29, p. 380, 15th January 1855 (especially p. 398).

⁶ Burge (i. pp. 190-194, 195), and apparently also Story (§ 119*a*), following Huber, § 8; and Bouhier, ch. 24, § 12, 90, would refuse to recognise a marriage which was celebrated in a foreign country *in fraudem legis*, merely to avoid some prohibition which prevailed in the country to which the parties belonged.

⁷ Westlake-Holtzendorff, § 17; Alexander (*Jour.* vi. p. 521); Piggott, p. 272.

⁸ § 126 *et seq.* In his first edition, Wharton tried to base the international treatment of the law of marriage upon a distinction between Christian principles, which could not be gainsaid, and must be recognised everywhere, and purely municipal principles with no international effect. See, against this, Brocher, *Nouv. Tr.* p. 111. Wharton has now abandoned this position.

⁹ See, to this effect, Dudley Field, §§ 547, 548: "A marriage valid according to the law of the place where it is contracted is valid everywhere, and the issue of such a marriage is everywhere legitimate. A marriage invalid according to the law of the place where it is contracted is invalid everywhere, and the issue of such marriage is everywhere illegitimate." The error or inexactness of these principles seem, however, to be demonstrated by the limitation (in my opinion just as erroneous) which is added by § 552, viz.: "A marriage, though valid according to the law of the place where it is contracted, will not be recognised as valid in any country in which the circumstances of such marriage would render the personal relation between the parties a crime." Is the son of a Turk, by whose law polygamy is sanctioned, on that account to be held illegitimate in America?

¹⁰ This consideration supplies us with a principle by means of which we can solve this peculiar case. It may happen that the personal law of a man, who is intending to marry, obliges him to seek the assent of some relative, while this relative is subject to a law which gives him no such right to assent to the marriage. The assent must be required all the same, in respect that its object is to protect immature persons, just as much as to recognise a right of the relative in question. But we cannot apply this rule to the case of the *Actes respectueux*, which, by article 151 of the Code Civil, persons up to the age of twenty-five years must pay to their relatives. (But see a judgment of the Trib. Civ. of the Seine on 21st Dec. 1885, *Jour.* xiii. p. 443.)

each other: for the family is the kernel of the State. It would be unreasonable to release citizens from the obligations of their own law, provided they contracted their marriages in another country, crossing the frontier and returning again at once. And again, what interest would any State have in subjecting persons, who had no permanent connection with it, to these rules? And, granting that it desired to do so, could it do so effectually? Will any State forbid all foreigners, to whose marriage, if they were subjects of its own, it would have some objection, to reside in its territories? It would lose itself in a sea of troublesome inquiries.

But, on the other hand, the application of the law of the place of celebration may be defended on the ground that persons who desire to enter on a marriage, should not be checked by the application of the personal law of one or other of the spouses. Considerations of this kind will to a certain extent commend themselves in the case of other contracts, but they have no application to a contract of marriage.¹¹

In the case of an union for life, it would in almost every case be an act of wanton thoughtlessness to forbear to make close enquiry into the personal circumstances of the other party; and rules of law are not set up for entirely exceptional cases. Durand, too, is justified in saying that, if there were a country which sanctioned a marriage, forbidden by the rest of the world, this one system of law would be sufficient to furnish a means of evading the laws of every other civilised country. The more intercourse extends, the more intolerable must the practical results of a rule be, which should prescribe that a marriage valid at the place of celebration should settle all questions as to the capacity of the parties to contract marriage, or to contract marriage with each other. That such a rule can be still observed in the United States without serious difficulties, and without creating the most open disregard of the law, may be explained by the fact that that country is separated from most other civilised States by the ocean. But as the ocean more and more ceases to constitute a barrier against a return to one's own country, so much the more distinctly must the intrinsic fault of their system make itself felt, as indeed we see in the case of England, where it is gradually being abandoned, as the

¹¹ This analogy no doubt is urged by König, *Zeitsch. für Schweiz. Recht*, 1886, p. 11. But, strangely enough, on page 16 we find this statement, viz.: "The effect which marriage is to have upon the civil status of the wife can be determined by no law save the national law of the husband. It is the law of that State alone to which the husband belongs, that can say whether a wife by her marriage with a foreigner acquires his name, his status, and his home . . . for the law of that State alone to which the wife and the child born before marriage are about to belong as citizens can rule their status and their nationality." But why should the *lex loci actus* not be applied in the case of a *matrimonium subsequens* also? König (p. 14) proposes to consider a marriage as assailable only in case the ground of nullity is recognised both by the law that prevails in the country to which the parties belong, and that of the place of the celebration of the marriage. This is provided in the 54th article of the Swiss statute of 24th December 1874, but it is for all that not beyond the region of debate, especially as Ch. Brocher (*Jour. ii. p. 456*) says on this subject, "*Une telle règle s'écarte beaucoup de notre ancien droit Suisse, et même en la supposant convenable, il aurait été nécessaire d'y apporter de notables exceptions.*"

Channel ceases to be an obstacle to free intercourse.¹² Wharton is of opinion that the rule, that the personal capacity for contracting a marriage shall be determined by the law of the place of the celebration, is in America recommended by the considerations that, on the one hand, the many limitations which the old world puts upon the capacity of contracting marriage (*e.g.* by requiring the consent of parents) are contrary to the natural ideas of the United States, and that restrictions of that class are only suitable for countries which are afraid of being overpopulated, whereas in the United States there is still room for a large increase of population. That leads us back to the principle enunciated by Savigny, which in my opinion is erroneous, that where economical reasons may be assigned as the foundation of any rule of law—although the necessity of the parents' consent has, as a matter of history, an origin elsewhere than in economical theories—or where you can discover a conflict of ideas or theories of morals, then foreign rules of law are to be ignored. We have already noticed that this view is untenable; the question of population, on which Wharton lays so much stress, is only justified, if the States declare themselves willing to accept as permanent citizens the persons in question, *i.e.* if they declare them to be American citizens, and give them naturalisation. They may facilitate naturalisation in the States, instead of rendering it more difficult, as they are at present doing, and this they may do without giving new citizens the political franchise at once. But to determine the personal capacity for marriage by the *lex loci actus* can have no other result than to lead to deplorable confusion, in the case of persons who have any intention of returning to Europe. For the State to which they belong will not make up its mind to recognise the rule laid down by the United States.

The last line of defence for this rule of the United States is its alleged simplicity.¹³ People who wish to marry, do not require to furnish any information as to the law of the country to which they belong, etc., and much smaller demands will be made on the intelligence and prudence of the authorities who are charged with the superintendence of the law of *status*, than would fall to be made under a system which applied the personal law in such matters. But as intercourse increases this advantage turns to a disadvantage: the whole system ends in a general subversion of the authority of the law.¹⁴

¹² At the same time, the present law of Switzerland shows a certain inclination to this system. See König's proposal to the Institute of Dr. Inter. (Annuaire, 9th year, pp. 73, 74).

¹³ But see Phillimore's excellent remarks, iv. § 336.

¹⁴ It might be thought that, if we were to adopt the view which makes the personal law dependent on the domicile, there would be no such great objection to allowing the law of the place of celebration to give the rule for determining all questions, since the official or clergyman of the domicile would be the competent and proper authority to celebrate the marriage. But, in the first place, the official of the bride's domicile is just as much the competent and proper person as the official of the bridegroom's domicile: in the second place, in such matters the conception of domicile is frequently not very accurate, *e.g.* the Imperial German Statute of 1875, § 42, places the ordinary residence on the same footing as domicile; and, in the third place, the incompetency of the authority who celebrates is, according to many systems of law, not fatal to the validity of the marriage. See German Imperial Statute, § 42, subsec. 2.

RESPECT DUE TO THE LAW OF THE PLACE OF CELEBRATION ; DETERMINATION
AS TO MARRIAGES ACTUALLY CONTRACTED, ON THE ONE HAND, AND
RULE OF CONDUCT FOR STATE OFFICIALS, ON THE OTHER.

§ 158. We have noticed that there is a general agreement to assume that there is capacity to contract marriage, and that the law of the country of the spouses will give the rule, in cases in which the laws of the countries of both spouses affirm their capacity ; and that in such cases no heed need be paid to any restrictive law on the subject which may happen to exist at the place of the celebration, *e.g.* a law which makes the validity of the marriage dependent on the consent of the father and the like.

On the other hand, this question may be raised: If the intending spouses have full capacity to marry according to the law of State A, need the authorities of that State concern themselves with the enquiry, whether they possess that capacity by the law of the country to which they belong? May we not say—just as the parties to any other contract you like may dictate it in any terms they please to a notary, who cannot refuse to authenticate it, so long as it is not prohibited by the law which he is bound to obey, although it may possibly be of no validity—that the parties in the case of marriage must be entitled to contract a marriage at their own risk, although by the law of the country to which they belong it may not be effectual?

The practice of almost all States—except that of the United States—very properly pronounces against any such freedom¹⁵ of marriage. If the marriage is invalid in the home of the intending spouses, the most serious disadvantages would arise from such a recognition, not only for the spouses themselves, but in the future for their descendants, their family. In fact, marriage will be degraded to the level of a miserable farce, at least if the law of the married person's own State is to have extra-territorial effect, in so far as the main legal incidents and qualities of the marriage are concerned: and again, if the descendants of a marriage of a foreigner with a native woman, which has been declared to be invalid, should at any time be in want of means of support, the burden of their maintenance may fall upon the woman's country. We are therefore well founded in requiring that the intending spouses shall show that by the law of their own country they are capable of contracting marriage. Of course, we cannot require absolutely irrefutable proof: proof of that kind could only be got by way of a legal process. No such irrefutable proof is required

¹⁵ See to this effect, and on the necessity of certificates, Fiore, § 90 ; Swiss statute of 1874, § 37, § 3: "*Si l'époux est étranger, le mariage ne peut être célébré que sur présentation d'une déclaration de l'autorité étrangère compétente constatant que le mariage sera reconnu par elle avec toutes ses suites légales.*" The Italian statute book, § 103, § 1, says expressly, "*Lo straniero che voglia contrarre matrimonio nel regno, deve presentare all'uffiziale dello stato civile una dichiarazione dell'autorità competente del paese a cui appartiene, dal quali consti che giusta le leggi da cui dipende, nulla osta al divisato matrimonio.*"

even when both spouses are natives of this country. A process of nullity may be brought to cut down a marriage contracted by spouses belonging to this country before the officials of this country. In international practice we are contented with certificates^{16 17} from the officials of the country to which the intended spouses belong.

In this connection it would be desirable that provision should be made by statute, or by international treaties framed with precision and care, for the appointment of officials, who should be in a position to issue such certificates, and should have a competent knowledge of the law. At present parties and the officials charged with the superintendence of matters of *status* are often puzzled to know what officials should or may issue these certificates.¹⁸ The best machinery for the purpose would be small divisions of judges sitting together. The matter, as one affecting the prosperity of whole families, is too important to be committed to subordinate administrative officials merely, or to the officials charged with the superintendence of civil *status*, particularly as, in many instances, legal rules must be expounded to some foreign official. Again, on the other hand, I am unable to understand how the issue of such certificates is inconsistent with the position which a judge occupies. It may no doubt be that occasionally a certificate of the kind may give an incorrect answer to some difficult question of law, or that, in a process afterwards raised in the courts, the tribunal of ultimate resort takes a different view. But we know that such rectifications of judicial opinions and decisions take place in other matters, and no one finds anything unbecoming in the fact that they do so take place. At all events, some precaution would be taken to ensure the legal rights of the parties.¹⁹

¹⁶ See *v. Sicherer*, p. 268, as to the certificates required in different German States. (The Imperial German statute as to the registration of personal *status* and the celebration of a marriage, of 6th February 1875, simply says that the officials must require proof of the necessary conditions for a valid marriage, without making special mention of foreigners.) The rule for certificates in France is furnished by a despatch of the minister of Justice, of 4th May 1831, cf. *Durand*, p. 302: as regards Sweden, see *Olivecrona*, *Jour.* xi. p. 355; *Austria*, *Vesque von Püttlingen*, p. 215. Of course, no such certificate will be required from the citizens of a country which recognises as valid the marriage of its subjects, provided it is valid by the law of the place of celebration. See *Vesque v. Püttlingen*, p. 215. Such a certificate will be superfluous in the case of citizens of the United States.

¹⁷ The procedure must not be too strict, else much harm may be done by the prohibition of marriages. At bottom, the question we are dealing with is a prudential regulation. In cases of necessity, we may content ourselves with the sworn assurances of the spouses, unless these shall appear to be obviously unworthy of credit, and in any case some means of proof other than certificates must in pressing cases be admitted. See Imperial German statute of 6th February 1875, § 45.

¹⁸ In pressing cases in France, the so-called *actes de notoriété* have been held sufficient, *i.e.* formal declarations by French witnesses as to the foreigners' circumstances. *Durand*, p. 310, pronounces these documents to be absolutely valueless: to the same effect *Laurent*, iv. § 299; "*En fait sept Parisiens viennent déclarer devant le juge de paix que le futur époux est apte à contracter mariage d'après les lois de son pays. Cela ressemble à une scène de vaudeville plus qu'à une garantie légale.*"

¹⁹ It might, perhaps, be of some practical service to substitute for the certificates on the bride's side, whose national law is of importance merely in some isolated particulars, a kind of

§ 159. But, on the other hand, it may be asked whether no attention at all is to be paid to a prohibitive law which is in force at the place where it is proposed to celebrate the marriage. Here a distinction must be taken,²⁰ although it is a distinction which is not always kept clearly enough in view.²¹

A. Suppose the question to be as to the validity of a marriage already celebrated. In that case we cannot admit any exception.²² The State in whose dominions the marriage ceremony has taken place, has no interest at all to look upon this marriage as any less valid than a marriage contracted by foreigners in their own country. If we recognise a marriage between two foreigners, who are not yet according to our law capable of contracting marriage, there is no reason for refusing to recognise it, because the consent of these persons happens to have been interchanged within our territory.^{23 24}

prohibitory procedure. For this reason the following provision was inserted in the project which Brusa and I laid before the Institute of International Law in 1885 (Annuaire, viii. p. 68): "*Régulièrement l'admissibilité du mariage en conformité de la loi nationale de la partie est pronvée par un certificat de l'autorité compétente de la partie.*"

"*Néanmoins, lorsque la fiancée a l'âge requis per sa loi nationale, l'officier de l'état civil ne lui demandera pas son certificat national, si après une notification du mariage projeté, faite par la fiancée au consulat ou à la légation de son Etat un délai convenable est passé sans que l'officier de l'état civil ait reçu un acte formel d'opposition. Le délai sera fixé par la cour supérieure à la demande de la fiancée.*"

²⁰ In the proposals, which were in 1885 made to the Institute of International Law by Brusa and myself, it will be found that these two questions are kept apart, cf. especially § 5 of the proposal (Annuaire, 8th year, p. 68). In the transactions at Heidelberg in 1887 (Annuaire, 9, pp. 107 and 127), the necessity of the distinction is recognised.

²¹ The provisions of the Italian Statute Book (§ 102) are indistinct: "*La capacità dello straniero a contrarre matrimonio è determinato dalle leggi del paese a cui appartiene.*"

"*Anche lo straniero però è soggetto agli impedimenti stabiliti nella sezione seconda del capo I. di questo libro.*"

Literally read, these provisions would make foreigners subject not only to the prohibitions of the law of Italy in the case of too near relationship, but also to those enactments which require the consent of parents. Esperson (Jour. vii. p. 342) proposes on this account to distinguish between *conditions affirmatives*, and *negatives*, and to make the latter only apply to foreigners. I do not think that this distinction can be logically carried out; the requirement, e.g. of a particular age, may be expressed in an affirmative as well as in a negative form.

²² Fiore (Jour. xiv. p. 157) holds the strange opinion, that if the marriage of a foreigner is held to be dissolved on account of his disappearance, in accordance with the law of his personal status, a second marriage contracted by the other spouse in Italy is invalid, for the marriage is, as regards "*empêchements*," subject to all the laws of Italy. That recalls in some measure the doctrines of Bartolus; under the term "*empêchements*," in so far as the expression itself goes, all personal incapacities may be included.

²³ See, too, Hinschius, *Das Reichsgesetz über die Beurkundung des Personenstandes und die Eheschliessung vom 6th Feb. 1875*, Berlin 1875. At p. 28 he lays down that German prohibitive laws must be obeyed by German officials. But he goes too far in his application of this indefinite idea. Laurent, iv. § 295, is sounder in forbidding marriage (so far at least as relationship of the parties is concerned) only in case where there is an impediment which no dispensation can remove.

²⁴ The home State has still less interest in respecting the law of the place where (by mere accident) the ceremony happens to have taken place. The Tribunal at Pontoise came to a sound determination in 1884, in holding that although a marriage between a white and a coloured person is null at the place where it takes place, no such impediment to marriage can be recognised in the case of a Frenchman marrying a negress (Jour. xii. 296).

B. The question may be whether the officials of our State, especially those charged with the care of matters of *status*, shall lend a hand in the celebration of any matrimonial ties that can be conceived between foreigners, merely on the authority of the laws of these foreigners themselves, without regard to our law, and to the views of morality and propriety that prevail in this country. This question is undoubtedly to be answered in the negative. That result must plainly be so, if the same sexual connection would be held to be a criminal delict in this country, *e.g.* incest or polygamy.²⁵

But we must limit such marriages still further.²⁶ A solemn union of two persons with the co-operation of the public authorities may lead to an open scandal, even although the sexual union does not imply a criminal delict; *e.g.* two persons may propose to be married, who, according to our views, are clearly too young to give a solemn consent to marriage, or a widow may desire to wed in defiance of the period of mourning that is unconditionally prescribed by our law. Prohibitions of this kind must be recognised by our officials, who are concerned with matters of *status*, being, as they are, unconditional according to our law, and irrespective of the law of the country to which the intending spouses belong. No doubt, in so far as age is concerned, we might allow dispensations in the case of foreigners. The climate in which the individual was born and grew up, and his descent, have an influence on the maturity of his intellect and powers of deliberation. On that account, no general rule can be laid down to determine how far the law that rules our officials may take into account the divergent law which regulates the matter in the native country of the proposed spouses. A reasonable discretion must decide; and that had better be committed to the discretion of a divisional court. On the other hand, I am of opinion that our official can never depart from the law of this country which regulates the widow's period of mourning. If the primary reason for such limitations on marriage is to guard against the *turbatio sanguinis*, as it is termed (more correctly, the uncertainty of paternity), it might be said that so far as foreigners' families are concerned,²⁷ our State is not interested in the matter; the point in dispute still is, whether our officials are to lend a helping hand to such *turbatio sanguinis*, and are to con-

²⁵ Cf. Olivi, Rev. xv. p. 221. According to a paper by Olivecrona, Jour. xi. p. 356, no foreigners can be married in Sweden, if by the law of Sweden there is any impediment to their marriage.

²⁶ Cf. treaty by the States of Spanish America in 1878, art. 10-12 (*Zeitschr. für d. ges. Handelsr.* xxv. p. 547): "Legal capacity to contract marriage is determined by the national law of the parties. Foreigners, who intend to marry in this country, are bound to prove their capacity before the magistrate who may be designated by the local law for this purpose. At the same time, in so far as '*impedimentos dirimentes*' are concerned, they remain subject to the law of this country."

²⁷ For this reason many people hold a provision of that kind (cf., for instance, Code Civil, § 228) to be simply a personal law, so that the *lex loci actus* is not to be taken into consideration as regards the marriage. Laurent, v. § 325; Fiore, Jour. xiii. p. 169; Trib. Civ. de la Seine, 4th Jan. 1872.

sent to assist in realising, what our manners and customs treat as an impropriety. If we are to be strict, that is inadmissible.²⁸ In this case there can be no dispensations, or at least only to the extent to which our law allows them.²⁹

We must not, however, go any further.³⁰ The case of the marriage of persons who are obviously immature, and the marriage of a widow whose husband is but a short time dead, are the only instances in which (putting out of view unions which involve a criminal offence) marriage, according to the rules of capacity observed by the foreign system of law, can imply an open offence against the sentiments of propriety which prevail in the place of the celebration. Too near relationship, which does not, however, exhibit the sexual union as a crime, has no concern for a State to which the spouses owe no permanent allegiance. Still less will that State pay any regard to the consent of parents, if the domestic law of the foreign spouses takes no account of it. Even the capacity of a divorced spouse to re-marry, is simply to be determined by the law of the country to which he belongs. If the law of the place in which the marriage is to take place knows no real divorce, as was the case in France before the statute of 7th July 1884 came into operation, still the officer charged with the care of matters of *status* cannot, according to a sound view of principle, refuse to proceed with the wedding.³¹ And the question must be answered in the same way, in the case where one spouse has disappeared and has been declared to be dead, and the other has, in consequence, the right of marrying again. Laurent (vi. § 339) proposes that the law of the place in which the second marriage is entered into, shall in this case be observed, in so far as it prohibits a marriage in these circumstances; but the reason which he assigns, viz. that we are in such cases dealing with a crime, which must be dealt with by the law of the place where the act was done, rests on a *petitio principii*.

²⁸ To the same effect, Brocher, i. p. 278; Clunet (Jour. xiii. p. 369, *note*); Cour de Paris 13th Feb. 1872 (Jour. iv. p. 31). It seems to me that the question is rather doubtful in France, looking to § 194 of the Code pénal.

²⁹ The case of observance of the period of mourning by foreign spouses I do not think very important, and on that account the proposals which were made by Brusa and myself to the Institute of International Law took no notice of it.

³⁰ See Lehr (Jour. xi. p. 50), against too extreme a regard to the law of the place of celebration. It is often very hard for a foreigner to obtain the necessary dispensation, which a native citizen would easily get, because he and his family circumstances are better known.

³¹ That is the preponderating result of modern French jurisprudence. Verger, p. 23 (see citations in Weiss, p. 635); so, too, Fiore, § 34 (Jour. xiii. p. 170); Esperson (Jour. vii. p. 344). At this date there is no divorce in Italy. French jurisprudence recognised this effect of a foreign decree of divorce, even in cases in which the marriage had been celebrated in France (cf. Verger, p. 25), and that, too, even when the spouses did not become foreigners until after their marriage. Verger (p. 270) will not come to the same conclusion if only one of the spouses has emigrated: "*en effet, si pour l'accomplissement du mariage, il faut le concours de deux capacités, ce concours est nécessaire aussi pour le rompre. L'incapacité de l'un des deux époux ne peut être convertie par la capacité de l'autre.*"

WHAT IS TO BE THE RESULT, IF THE PERSONAL LAW OF THE BRIDEGROOM, ON THE ONE HAND, AND THAT OF THE BRIDE, ON THE OTHER, GIVE DIFFERENT RULES AS TO THE CAPACITY OF THE PARTIES?

§ 160. Must there be personal capacity, both absolutely and in respect of the particular marriage that is in question, according to the laws of both spouses—according to that of the bride, as well as that of the bridegroom?³²

Many authorities³³ answer this question with a direct affirmative. For although, by her marriage, the woman enters the State to which her husband belongs, still a condition precedent to her entry is that she shall be capable of it, and her capacity can only be determined by the law to which she has, up to that moment, belonged.

A distinction must, however, be taken. The marriage is to subsist in the husband's State, and it is to this State that the family, the foundation of which is laid by the marriage, is to belong. Impediments to marriage, which are considered indispensable for the good of families, or of the State itself, to which the new family is to belong in permanence, will be taken into account in the light of the law of the State to which the family is intended to belong, *i.e.* the law of the husband's State, and will be judged of by that law. To this class belong the objection founded on too close kinship, the objection which takes its origin in the prohibition by the State of marriages between adherents of different religious professions,³⁴ etc.,³⁵ or in the necessity of an authoritative permission to marry, as a proof of capacity to acquire rights of property thereby. None of these matters concern the State to which the woman has up to that time belonged, and

³² Peculiarly enough, the proposals made to the Institute of International Law at Munich in 1883, by Arntz and Westlake, suggested that the law of the place of the celebration should be observed, as well as the domestic law of the spouses, and yet no provision was made as to whether the existence of impediments by the law of the place of celebration should merely interfere with the exercise by the officials of their powers, or should infer a nullity in the marriage, although it had been celebrated (cf. *Annuaire*, 7th year, 1883-1885, p. 43, §§ 2 and 3).

³³ Wheaton, i. p. 113; Wächter, ii. p. 186; Harum in Haimert's Magazine, vii. p. 397; Gand, § 378; v. Sicherer, *Personenstand*, p. 130; Hinschius, Comm. p. 168, and in v. Holtzendorff's *Rechtslexicon*, 3rd ed. i. p. 596; Stobbe, § 34, note 3; Brocher, i. p. 308; Fiore, § 87; Olivi, Rev. xv. p. 221; Calvo, iii. § 776; Clunet, Jour. vi. p. 502.

³⁴ Or among persons of different races. Thus the decision of the Civil Tribunal of Pontoise (Jour. xii. p. 296), in 1884, was in its results quite correct, viz. that although, by the law of the place of celebration, a marriage between a white and a coloured person was null, such an impediment to marriage was not to be recognised as effecting the marriage of a Frenchman to a negress. The reason given, viz. "*Attendu que les empêchements de cette nature ne sauraient exister qu'autant que l'incapacité relative de l'époux déclaré incapable rencontre dans l'autre époux cette même incapacité*," is certainly wrong. The effect of the vows of a religious order on the husband, if by his personal law (*loi nationale*) it is an impediment, as a matter of municipal law, is to annul his marriage, even with a Frenchwoman and celebrated in France (Aubry et Rau, i. § 31, note 6). To the same effect, Merlin, Rép. Loi, § 6, note 6; so, too, Olivi, Rev. xv. p. 226.

³⁵ Laurent insists on this distinction (§ 323), but he gives it some mysterious connection with his theory of *statut réel*.

which she is now quitting. As the woman has in any view a right to emigrate, she has the power, by naturalising herself in a new country, of denying effect to all these limitations imposed by the law to which she once belonged. Naturalisation as a preliminary to marriage would, however, in such cases be an empty form, and all the more so, as all States accord naturalisation directly to the wife of a citizen of the country *ipso jure*.³⁶ ³⁷

But the case is quite otherwise with impediments to marriage, which have more the character of rules of private law, and are directed obviously to the protection of the individual and his or her rights. These provisions, in so far as they confer a right upon the wife herself to attack the marriage as a nullity, are not in any case lost by the fact of marriage.³⁸ The State which sets up impediments to marriage of this nature—*e.g.* defective age, error, compulsion or force, impotence in the husband—has, on the contrary, the most vital interest in maintaining them even in the case of foreign marriages, just for the protection of its own subjects. The State, however, into which the woman would otherwise pass by her marriage, must allow these impediments their full effect, although it has not enacted them for its own citizens, just because, directly or indirectly, they touch upon the consent through which the foreign woman has entered upon the marriage, and thereby also upon a new allegiance.³⁹ Indeed it is plain, in the case of

³⁶ This is the explanation of the interesting discussion by Lord Selborne, to be found in Jour. xi. p. 195 [*i.e.* his Lordship's judgment in the House of Lords, in *Harvey v. Farnie*, 1882, L.R. 8, App. Ca. p. 43].

³⁷ This is of special importance in the case of the woman's own law refusing her, as a divorced wife, the right to marry again (in other words, refusing to recognise any true divorce), while the law of the intending husband permits such marriages.

A judgment of the Supreme Court of Austria, of 17th January 1871 (Jour. iv. p. 77), pronounced the marriage of an Austrian woman, a Catholic, who had been separated from her husband, to be null. A more recent decision of the same court, of 26th November 1876, follows the opposite theory, which is in agreement with that which is adopted in the text (Jour. iv. pp. 78, 79). The editorial note on p. 78 pronounces in favour of the former. A judgment of the same Supreme Court, of 6th March 1878 (Jour. vi. p. 500), seems in its reasoning, which is somewhat generally expressed, to recur to the former theory, according to which the grounds of incapacity must, in the case of each of the spouses, be tested absolutely by their own personal statute. In that case, however, on the one hand, there was incapacity according to the husband's own law—the law of Hungary forbids marriage between Jews and Christians, and the husband was a Hungarian Jew—and, on the other hand, the question was raised at the instance of the wife, who disputed the marriage on the ground of essential error. The decision, therefore, is much more in support of the view of the text than against it. That view would, in the circumstances, reach the same result.

³⁸ The distinction is hinted at by Unger (p. 190, note 118), although not quite adequately grasped by him: "In so far as the question is merely one as to curatory in matrimonial matters, or the necessity of obtaining consents from third persons for contracting marriage, each party must no doubt be judged by his or her own law, but in so far as the question is one as to their mutual relations, *e.g.* as to the capacity of a Jewess or Christian woman to marry a Christian or a Jew, or of a cousin or aunt to marry a cousin or nephew, it may be that in the view of both parties reference is made exclusively to the domicile of the husband."

³⁹ The *Actes respectueux*, which according to the Code Civil (§ 151) may take the place of the consent of the parents when parties are of full age, are, however, properly looked upon by French law as matters of form, which do not absolutely require to be observed in a foreign country, unless the marriage in other respects is obviously clandestine. Laurent, iv. § 271. Trib. Seine, 10th January 1885 (Jour. xii. p. 89).

several of these impediments, that the legislator who enacted them regarded the person who is affected by them as incapable of legal acts in so far as the contracting of a marriage is concerned; that is the case, for instance, where a person has not yet reached the necessary age, and so, too, if he or she is declared, on account of deficient years, to be entirely incapable of marriage, without consent of the father or guardian. If, then, in other matters we judge of incapacity to do legal acts by reference to the law of the person's own country, we must follow the same rule here also.

The matter stands differently if the consent of the father, for instance, were necessary, without respect to the age of the bride. In such a case, there could be no question of an enlargement of an imperfect capacity of action, the whole question would be as to a private right of the father. But that private right could not be taken into account as against the full right of emigration which belongs to the daughter, at least in so far as the State into which the daughter passes by virtue of her marriage is concerned. The case here is just the same as it would be if the one State set up limitations upon emigration of another kind, which other States would refuse to recognise.⁴⁰

§ 161. It is, however, sounder policy in most cases in which a daughter has succeeded in reaching a foreign territory with the man of her choice, to attribute no further effect to any absence of consent to the marriage by parents and guardians, than is recognised by the personal law of the husband himself. If the civil officer charged with such matters refuses to perform the ceremony, merely because in the bride's domicile the consent of her parents or guardians is necessary, and has not been given, the bride thereby is disgraced, and the husband is tempted afterwards to abandon the bride who has run away from her parents. It is, therefore, desirable to facilitate in such cases a dispensation for the marriage, and all the more so as many systems, which treat the want of parents' consent as a cause for the dissolution of a marriage, provide that its place may be supplied by judicial sanction given in the exercise of a discretion. Such a dispensation must be given particularly in cases in which the tribunal,⁴¹ which has power to award it, finds that the bride's purpose is deliberate and unconstrained, and that she is not prevented from returning to her parents or guardians merely by want of means of doing so. If the officials of the country, in which the intending spouses happen to be, would only celebrate the marriage after such a *causa cognitio* by a supreme court, it would be the best course even for the State to which the wife belongs, with a view

⁴⁰ The soundness of the view taken in the text is made abundantly clear in the case of a wife who has been married in her own country, and has not yet followed her husband into his home. Shall her own State force her to follow a husband, whom she does not require to follow according to the law of her own State, on account of some error owing to a deceit practised on her by her husband? See Laurent, iv. § 323.

⁴¹ Of course, the tribunal which controls the official, before whom the marriage is to take place.

to the good of families, and parity of treatment of the same marriage by different States, to recognise as valid a marriage of this kind.⁴²

For these reasons the following rules were proposed in a sketch for the regulation of international law, which Brusa and I laid before the Institute of International Law at Brussels in 1885 (*Annuaire*, 8th year, p. 68):—

“(5.) *L'officier de l'état civil d'un pays quelconque procédera à la célébration du mariage, si le mariage n'est pas prohibé par la loi nationale du mari.*⁴³

“*Toute fois l'officier doit observer de même :*

“a. *Quant à la fiancée, la loi nationale de celle ci et la loi du lieu de la célébration en ce qui concerne l'âge requis pour la célébration du mariage, et encore la loi nationale de la fiancée, en ce qui concerne le consentement nécessaire des parents ou tuteurs.*

“b. *quant au fiancé, la loi du lieu de la célébration par rapport à l'âge requis.*

“*Toute fois si la fiancée a l'âge requis tant par sa loi nationale que par celle du fiancé, la Cour supérieure locale, à la demande des parties, pourra dispenser de l'âge requis par la loi locale, et dispenser du même du consentement des parents ou tuteurs, nécessaire seulement d'après la loi nationale de la fiancée.*

“*En tout cas, la dispense du consentement des parents ou tuteurs en tant que ce consentement n'est nécessaire que d'après la loi nationale de la fiancée, ne sera pas refusé, si la Cour trouve que la volonté de la fiancée est vraiment libre et réfléchie et que la fiancée n'est pas empêchée par l'indigence de retourner chez ses parents ou tuteurs.*

“*Si le consentement des parents ou tuteurs est également nécessaire d'après la loi nationale du mari, ce consentement sera indispensable, sauf les dispositions de l'article 6.*”

As it was intended that, in the case of such a dispensation, the native State of the wife should also recognise the marriage which had been contracted, it would be desirable to add this further rule to the projected legislation, viz.: “*Si la dispense est régulièrement obtenue, le mariage est valable même d'après la loi nationale du mari.*”⁴⁴

It must also be held to be quite immaterial on what grounds the particular impediments to marriage are rested, whether on considerations

⁴² Dispensations from the *Actes respectueux* of French law and from parental consent are, on account of the great distance, provided in a French statute of 28th June 1877, for the cases of New Caledonia and for French possessions in Oceania. See on that point Verger, p. 57.

⁴³ There was a general principle laid down at the outset, that in every case the national law of the husband must be observed. For greater distinctness, it would have been desirable to say:—

“*Quant aux empêchements le mariage ne peut être invalidé que d'après la loi nationale du mari. Pourtant le défaut de l'âge requis pour la fiancée et l'absence du consentement des parents ou tuteurs suivant la loi nationale de la fiancée doivent invalider le mariage.*”

⁴⁴ Lehr (*Jour.* xi. p. 49), along with the Bernese magistrate Garnier, thinks it would be desirable to set up an international tribunal, made up of lawyers of different countries, or an international office, to decide on the admissibility of marriages. I cannot concur with them. Such a thing would only serve to aggravate the difficulties, e.g. if the place where the marriage was to be concluded was very remote.

of political economy, or of morality, or religion, or politics, etc. Apart from the fact that it may very often be matter of dispute what the consideration really was which moved the legislature, it is surely plain that the marriage must be governed by the law of the husband's nationality or domicile. Nothing but confusion can result from the recognition of the marriage in question by another State, on the pretext of philanthropy, or from its permitting it to be celebrated before its officials on any such ground.

Accordingly, a clergyman cannot be allowed to contract a marriage in a foreign country, if, by the law of his own country, his orders constitute a civil disability for marriage.⁴⁵ The case is different when it is only the law of the bride which prohibits such a marriage. Again, any impediments to marriage which rest upon the *status* of the husband will operate in countries in which such distinctions of *status* are unknown. For instance, a member of a reigning house is bound even in foreign countries by the disabilities which the law of his house imposes, and the foreign official must have regard to them.⁴⁶ The same result will follow as to prohibitions of marriage between white and coloured persons. So soon, however, as the foreigner acquires the nationality of the country where the marriage is to be celebrated, or of any country in which the proposed marriage is sanctioned, he acquires also capacity to contract it.⁴⁷ A slave, however, does not need to acquire any new nationality. All the effects of the nationality to which he belongs cease on the moment at which he sets foot in a country that does not recognise slavery, since slavery is no longer a legal institution that has any extra-territorial operation. A slave, then, can marry at once.⁴⁸ Other people must at least have lost the nationality which imposes on them the limitation in question. Provided that the acquisition of nationality without political rights is not made too difficult, no special disadvantages are likely to arise from a recognition of the impediments to marriage which exist in the husband's State. On the other hand, to enter on a marriage irrespective of all such impediments, whether they rest on religious or on political considerations, may infer the most serious complications, because the State to which the husband belongs will not recognise it. Capacity to contract marriage must be tested by the law of the State to which the person belonged at the time when it was contracted. This seems obvious—it has, however, an important

⁴⁵ So Merlin, *Rép. v. Loi*, § 6, note 6; Aubry et Rau, § 31, No. 26, C. de Paris, June 1814 (Sirey xv. i. p. 67).

⁴⁶ Laurent, iv. § 331; Olivi, Rev. xv. p. 223; Westlake, Holtzendorff, p. 64; Weiss, p. 634, are of a different opinion. But the validity of the personal statute on which Weiss so strongly insists cannot be got rid of by such arguments as, "*Le droit public français basé sur l'égalité répugne aux distinctions de race: il ne connaît pas de princes de sang royal.*" On such topics we have to deal with nothing but public law.

⁴⁷ [A Frenchman married to a negress in Louisiana cannot plead the nullity which the law of that State imposes on such mixed marriages. *Roger v. Roger*, Trib. Civ. de Pontoise, 1884, 12, J. p. 296.]

⁴⁸ To the same effect Olivi, Rev. xv. p. 223, with reference to the law of Italy.

application⁴⁹ to the case of a divorced spouse who, by the law of his or her earlier home, the law upon which the decree of divorce proceeds, was incapable of marrying a second time, whereas the law of the State to which he or she now belongs (in cases where the law of the domicile rules, the law of the new domicile) implies capacity for a second marriage.

This supplies us with a test for the case of Bauffremont, which we have already discussed in another connection. The Princess Bauffremont, if she had been regularly naturalised in Prussia, might have demanded, in virtue of § 77 of the statute of the German Empire of 6th February 1875,⁵⁰ for the regulation of the publication of personal *status*—a section which came into force in Prussia after 1st March 1875—that the *séparation de corps* which had been pronounced in France should be converted into a decree of divorce by the competent Prussian court. She was, however, not a Prussian subject, but, if the naturalisation which had taken place was effectual, a subject of Altenburg. But the rule of the 77th section, to which we have referred, which, in virtue of § 79 of the same statute, came into force in Prussia at an early date, was not yet law in Altenburg, nor was there any other statute in force there to a like effect. Even if we were to assume—and it is a very doubtful point—that she had taken up her domicile in Berlin, and that therefore the law of Prussia became applicable to her, the *séparation de corps* of the French court would not of itself, *ipso jure*, be transformed into a decree of divorce which will allow a second marriage. That can only be done by means of a judgment in a suit instituted for the purpose, and no such suit had in this case been instituted.⁵¹

DISPENSATIONS.

§ 162. Many impediments to marriage may be got rid of by dispensations. The authority of the State by whose power the impediment in question operates, is the proper source of such dispensations. As a general rule, then, the sovereign of the country to which the person belongs is the person to give a dispensation. In some cases, however, we require a dispensation from the officials of the State in which the wedding is to be celebrated. In some cases we shall have to obtain a dispensation not only

⁴⁹ Cf. v. Sicherer, p. 139, and the judgment of the Court of Berlin of 24th Feb. 1875 there cited (Iohow, *Jahrbücher für endgültige Entscheidungen*, vi. p. 19).

⁵⁰ “If a sentence of permanent separation of the spouses at bed and board would fall to be pronounced in accordance with the existing law, a sentence of dissolution of the marriage shall be forthwith pronounced.

“If a sentence of permanent separation at bed and board has been pronounced before this statute comes into force, either of the spouses may sue for dissolution of the marriage in a regular process, on the ground of the existing decree of separation, provided that the spouses have not in the meantime come together again.”

⁵¹ Cf. the clear exposition in Stölzel's paper so often cited, p. 59. Bluntschli's and v. Holtzendorff's discussions are based upon erroneous assumptions as to the law of Altenburg at the time, and consequently on a mistaken interpretation of the Imperial statute to which I have referred

from them, but from the official of the State to which the parties belong. (See, however, *supra*, § 161.)

WANT OF CONSENT AS AN IMPEDIMENT TO MARRIAGE.

§ 163. There are, too, impediments to marriage, which have their roots not so much in the incapacity of the person, as in some defect in the expression of consent. Of this kind the most prominent impediments are force and error. We would be inclined in such cases not to apply the personal laws of the spouses, but to some extent the law which prevails at the place of the wedding, *i.e.* where the declaration of intention takes place. This is v. Sicherer's view.⁵² The contract, however, on which marriage is founded is not to be ranked in the same line as an ordinary obligatory contract. It has a far closer relation to the permanent legal position of the person, and cannot therefore very well submit itself to the rule of any other law than that which governs the other personal relations.

As a consequence, the law of the home of the spouses must also regulate the question whether the right of appealing to some defect in the declaration of intention can be renounced with effect. This result is an important one for the protection of a wife who has married a foreigner.

B. FORMS OF MARRIAGE.

RECOGNITION OF THE RULE "*locus regit actum*" IN A PERMISSIVE SENSE.

§ 164. There is a general agreement that a marriage which, in so far as its form goes,¹ is in conformity with the law of the place where it is celebrated, must be recognised everywhere as formally valid,² especially in

⁵² P. 130. On the other hand, see Laurent, iv. § 322.

¹ Of course, it is of importance to define "form" or "formalities" accurately, and to adhere to this definition (see *supra*, § 121). That is very often neglected, and in particular by English jurists. Thus Foote, p. 48, includes in forms the requirement of the consent of third parties, *e.g.* of parents, and according to him the essential and material requirements for a valid marriage are the facts, and the facts alone, on the presence of which it depends whether the parties in question can contract any marriage at all. This distinction, which to some extent owes its origin to the French institution of "*Actes respectueux*," will obviously give rise to the greatest confusion.

² Hert, iv. 10; Cocceji, vii. 24; Hofaker, de eff. § 28; Bouhier, c. 28, No. 59; Hommel, Rhaps. Quæst. vol. ii. obs. 409; Lauterbach, Diss. Acad. iii. 128, c. 9, No. 3; Cochin, Œuvres, i. p. 153; Boullenois, i. pp. 494, 495; Pütter, *Rechtsf.* iii. pt. i. pp. 69-80; Titius, *Jus. Pr.* i. c. 10, § 21; Oppenheim, p. 393; Burge, i. p. 184; Wheaton, p. 115; Schäffner, p. 127; Fœlix, ii. p. 367, note 2. The Code Civil, in its 170th article, recognises the principle; but neglect to publish the marriage in the way which is for all that required by French law may in certain circumstances operate nullity of the marriage in France. (See Fœlix, p. 382, as to the disputed meaning of the latter part of the 170th article, cf. Mittermaier, i. 16; Stephen, i. p. 243.) French jurisprudence is now fixed to this effect, *viz.* that, where there is a failure to make the publication prescribed by art. 170, nullity will attach to the marriage celebrated in a foreign country only if this publication is obviously omitted, in order to

the State to which the spouses belong. In accordance with what we have already said upon the principle of the rule "*locus regit actum*," the rule which comes into play here, we can attribute to this rule merely a permissive force, *i.e.* the parties may legally avail themselves also of the forms of their own country, provided always that in fact that is possible.

This is the common opinion,^{3 4} which *e.g.* undoubtedly lies at the bottom of the provisions of the 165th and following articles of the Code Civil. It would, of course, be possible for the legislature to provide that a marriage celebrated abroad, under the forms of a foreign country, should not be recognised, although such a course would be most unpractical and, as a rule, mischievous.⁵

LAURENT'S NEW THEORY. CRITICISM OF IT. RESOLUTIONS OF THE
INSTITUTE OF INTERNATIONAL LAW.

§ 165. Laurent has recently (iv. § 230 *et seq.*) championed the opposite view. He thinks that this is a question of police regulations, which must be ruled by the sovereign authority of the locality. But what interest could any State, in which two persons of whom it knows nothing accidentally contract a marriage, have in seeing that its forms are observed? Of course, uncertain or defective forms of celebration may be objectionable from the point of view of a censor of morals; but considerations such as this would prove too much, for they would show that no State could suffer marriages contracted in a foreign territory to prevail in its own country, unless they were celebrated according to its own forms as

deprive those who by French law are entitled to object to the marriage from having an opportunity of objecting. See Trib. Seine, 26th April 1887, Jour. xv. p. 476; C. Besancon, 4th January 1888, Jour. xv. p. 90; and Clunet, Jour. xv. p. 91. This result is justified by reason of the connection which exists in French jurisprudence between this right of objection, which is subject to the personal law, and the form of the celebration on the other. The jurisprudence of Spain, as Torres Campos shows at p. 280, recognises in the fullest sense the *lex loci actus*. A marriage is always valid, if it is celebrated in the form of the *lex loci actus*.

³ See, especially, Savigny, § 381; Guthrie, p. 323; Durand, p. 367; Weiss, p. 660. See, too, the judgment of the Supreme Court of Appeal at Dresden, of 21st June 1845, reported by Seuffert, vol. ii. p. 6, by which a marriage contracted in Belgium between two subjects of Saxony, was held a legal marriage, although the Belgian regulations as to the celebration of marriages before a civil official, and the registration of the same, were not observed; because, although the rule "*locus regit actum*" is recognised by the practice of the Saxon court, yet the law of Saxony must decide in the case of a legal transaction between two subjects of Saxony, the legal existence of which is recognised by that law, and the legal consequences of which are to be ascertained and fixed for the whole life of the parties interested. For the permissive force as all that can be given to the rule *lex loci actus*, see in recent times D. R. G. (iii.) 27th January 1887 (Bolze, iv. § 18, p. 6), Vesque v. Pittlingen, § 62.

⁴ It is no doubt possible to look upon the failure to observe the form which prevails at the place of celebration as casting doubt upon the reality of the consent, *e.g.* in cases where the law of the country to which the parties belong allows marriages to be contracted without any particular form.

⁵ A former Bavarian ordinance declared all marriages contracted abroad by Bavarian subjects null.

well. That would, however, contradict Laurent's own theory. Further, it is entirely unhistorical to require absolutely for a marriage some solemn act⁶ before an official charged with such affairs: it is trite that almost the whole world has long recognised the rule *consensus facit nuptias*.⁷ The official of the State does not, in celebrating a marriage, as Laurent no doubt thinks, exercise an act of sovereignty in the highest sense, but only performs the function of a privileged witness to a solemnity. The true ground, however, of Laurent's theory is his aversion to the religious shape of the ceremony of marriage. If his reasoning is correct, even foreigners could never contract a marriage in the religious form in a country in which the so-called civil marriage is recognised as an imperative form; and in particular, if the marriage ceremony in its unalterable essence and nature requires an *actus sollemnis* or the co-operation of the State, then neither Frenchmen nor Belgians could ever avail themselves of the religious form⁸ in a foreign country. *Hinc illæ lacrimæ*. This new theory, which brings Laurent into conflict with other recognised rules of international law, and which, on his authority, has been taken up by others, is calculated to

⁶ Two careful judgments in accordance with each other on the same case (C. d'Aix and C. Cass. 8th July 1886, Jour. xiii. 585) are as much opposed to this new theory of solemnity as to the notion that the rule "*locus regit actum*" has anything more than a merely permissive force. Proof of a marriage between two persons of French nationality was made out by mere private records of it, because at the time of the marriage no registers of such matters were kept at the place where the marriage was celebrated: and, on the other hand, the Court of Cassation expressly declined to take proof as to foreign law, on the ground that the observance of the law of France is all that is required to evidence a marriage and to found a family. A more emphatic rejection of Laurent's entirely capricious theory, the adoption of which would be a calamity for the citizens of all nations that are fond of travel or of enterprise, is hardly conceivable. As against Laurent, see, too, Olivi, Rev. 15, p. 230; but particularly the trenchant criticism of Durand, p. 321, "*En un mot il (Laurent) arrive à imposer à tout le monde la loi française. C'est la une source d'insolubles conflits.*"

⁷ It is recognised in the United States in this sense,—that their jurisprudence does not impose nullity of the marriage as a consequence of the failure to observe the formalities prescribed in any State for the celebration of it; any such nullity must be expressly enacted by the law of that State. See Beach-Lawrence, iii. p. 323; judgment of the Supreme Court of the United States, rep. J. v. p. 541. In truth, the rule *consensus facit nuptias* is recognised. It is noticeable that Dudley Field (§ 548) attributes to this rule an absolutely obligatory force in regard to the marriage ceremony, of course without any demonstration. An author who casts a text-book in the shape of a statute book or code very easily encounters the risk of confusing what he thinks desirable or suitable with what is recognised law. See, too, Field's remark on the transactions of the Institute of International Law, Ann. 1887, 1888, p. 93. On the other hand, see the remark of the president v. Bulmerincq at the same place.

⁸ The opposite position, it may be noted, obtains in one State—the Argentine Republic—where the ceremony of marriage is regarded as an exclusively religious act. Here, however, every marriage celebrated in the form of the country in which it takes place is recognised as formally valid, even although the spouses have gone abroad in order to withdraw themselves from the form which the law of their own country prescribes. On the other hand, however, every marriage concluded in the forms of the Catholic Church—without any civil wedding—although it may be invalid by the *lex loci actus*, is treated as valid by the Argentine Republic. (Cf. Daireaux, Jour. xiii. p. 292.) See, too, the express provision of the treaty of the Spanish-American States in 1878 (*übers. Zeitschr. f. d. ges. Handelsr.* xxv. p. 547, §§ 7 and 9). § 9 provides: "A marriage contracted according to the spiritual law of the Catholic Church has civil effects within the State, even although it would not have had such effects in the country in which it was celebrated."

create great confusion, the prejudicial effects of which have already shown themselves in the proceedings of the Institute at Brussels in 1885. We shall return immediately to the question of ecclesiastical forms. We need only in the meantime note, that of course it may seem desirable, from the point of view of the lawgiver who has adopted the principle of a compulsory civil marriage, to put down altogether marriages *in facie ecclesiæ*, even when these are exclusively confined to foreigners. This result, however, may be attained in a very simple way by a law which forbids clergymen, under a specified penalty, from performing marriages unless they have been preceded by a civil ceremony. Such a penal provision, of the same kind as is contained in the Code pénal, § 199, and in § 67 of the statute of the German Empire dealing with the publication of status, is quite sufficient; whereas the absolute prohibition of ecclesiastical marriages even in other countries may work most prejudicially for the legislator's subjects abroad.

However, it may be noted that the 41st section of the German statute of 6th February 1875, at least in its literal interpretation, and in the meaning which v. Sicherer (*Personenstand*, p. 346) puts on it, oversteps the limits of the legislative authority conceded by international law to a State.

It runs thus: "Within the German Empire a marriage can only be validly concluded by an official charged with matters of status."

If, then, for instance, marriages without any particular form, or marriages contracted before private witnesses, are recognised as valid by the jurisprudence of the United States, and if two subjects of the States contract within the German Empire an informal marriage, or a marriage before private witnesses, this rule of law, read literally, directs the German judge to declare that marriage invalid, even if the validity of the marriage should be a preliminary question for the decision of some other legal claim, *e.g.* a claim of succession. That is altogether absurd. The statute, correctly read, must run: "In so far as the validity of a marriage depends on the law of the German Empire, or of one of the States of that empire, it can only be concluded within the empire before an official charged with matters of status."⁹

Finally, the Institute of International Law, in the resolutions taken at Heidelberg in 1887 (cf. Ann. 1887, 1888, p. 101), assigned to the rule "*locus regit actum*" a compulsory character: this was a perverse proceeding of the same kind, and its object apparently was to force civil marriages upon the subjects of other States. Its effect is, at the same time, to place the subjects of such States as have a sound system of legislation on *status*, in the most serious predicaments in other countries.¹⁰

⁹ It might have been more shortly expressed thus; "Marriages of German subjects within the German Empire can only be concluded before civil officials." That expression would, however, have made it necessary first to deal with the question whether domicile or nationality was to rule.

¹⁰ The questions were, no doubt, properly stated with reference to the divergent views:—

(1.) "*Suffit-il pour qu'un mariage soit valable partout, d'observer les formes du lieu de la célébration?*"

(2.) "*Est-il nécessaire, pour qu'un mariage soit valable partout, que les formes du lieu de la*"

CELEBRATION OF MARRIAGES BEFORE AMBASSADORS OR CONSULS.¹¹

§ 166. That the rule "*locus regit actum*" has no more than a permissive force, is the only juristic explanation of the validity which is universally conceded to a marriage celebrated by foreigners before their own diplomatic agents or consuls, and according to the forms of their own country,¹² a form of marriage for which provision is frequently made in the statutes¹³ of

célébration aient été observées (sauf les exceptions à admettre pour les mariages diplomatiques ou consulaires)?

(3.) "*Est-ce qu'un mariage est valable, si les deux parties appartiennent à la même législation et que les formes de cette législation soient observées?*"

The first question was quite properly answered in the affirmative; but by answering the second also in the affirmative, and the third in the negative, the legislative sketch previously worked out by the Institute was crippled. It is altogether impossible for any legislator to expose his subjects in a foreign country, as a matter of compulsion, to forms which may be at variance with their religious convictions; and what, again, is to be the result if at the place of celebration the recognised forms are informal marriages, or marriages *in facie ecclesie*? In that case the view which was in the minds of many members, to force the French civil marriage on the whole world, would certainly not be attained.

In the report given in the *Annuaire*, p. 101, the legislative sketch under the name "*Bar et Brusa*" is described as a radical system. Exactly the reverse is the truth. The majority desired to impose Laurent's "*acte solennel*" in disguise upon the whole world. Can any one really suppose that countries, in which strict forms of celebration *in facie ecclesie* are still recognised, could be induced to declare a marriage so celebrated by subjects of their own in a foreign country to be null, if no marriage but a civil marriage was recognised at the place of celebration? If, however, you say no to this question, then the resolutions of the Institute bring us to this, that the marriage will be good in the country to which the spouses belong, but bad in all foreign countries. But that result is just what is so undesirable. On the modifications of the Heidelberg resolutions made at the conference at Lausanne in 1888, see the remarks at the close of § 190 of the text.

¹¹ See the excellent discussion by Stocquardt, *Rev.* xx. p. 261, which I was not in a position to avail myself of, but the results of which agree with the views adopted in the text. See an excellent paper by the same author in the *Rev.* xx. p. 260: "*Le privilège d'extraterritorialité dans ses rapports avec la validité des mariages célébrés à l'ambassade ou au consulat.*" His views largely coincide with my own, and he gives an accurate account of the laws of France and Belgium.

¹² Thus Weiss, p. 664, very rightly says, "*Le droit d'agir des agents diplomatiques et des consuls étrangers repose sur la faculté de leurs nationaux à renoncer au bénéfice de la règle 'locus regit actum' pour revenir à leur loi personnelle.*"

¹³ See the *Code Civ.* § 48; "*Tout acte de l'état des Français en pays étranger sera valable s'il a été reçu conformément aux lois françaises par les agents diplomatiques ou par les consuls.*" See, too, a French ordinance of 23rd October 1833, promulgated to carry out this provision. As regards England, see 4 *Geo. IV.* c. 91, and 12 and 13 *Vic.* c. 68, and the commentary of Westlake Holtzendorff, §§ 24 and 28; he deals also with the marriages of English soldiers abroad by army chaplains [see also 53 and 54 *Vic.* c. 47, and 54 and 55 *Vic.* c. 74, *infra*, p. 375]. Statute of the German Empire as to proclamation of status, 1875, § 85, and statute of the North German Union (now of the Empire) of 4th May 1870, as to the marriage and proclamation of personal status by subjects abroad. Belgian statute of 24th May 1883 (*J. xii.* p. 46). Of course, the diplomatic representative or consul must have obtained from his own State the authorisation required by the law of the foreign State to which he is accredited. See, too, the interesting rules by Wharton (*J. xiii.* pp. 666, 667) on the instructions given to the diplomatic agents of the United States as to marriages. According to these, the consular powers are restricted to cases of necessity, the most important of which are marriages in non-Christian or half-civilised countries, or where there is some other form of compulsoriness to interfere with religious convictions. In all other cases the *lex loci actus* is to be observed as much as possible.

different States, and which requires for its constitution no sort of recognition in a treaty with the State in which the diplomatic agent or consul lives. For the general recognition of marriages concluded in this way is by no means to be referred to the so-called extra-territoriality of the ambassador's hotel, or of the consular residence.¹⁴ These buildings are not extra-territorial in the sense that they can be regarded as parts of the territory which the ambassador or consul represents. They are subject to the laws, to the jurisdiction, and to the police of the State within the limits of which they lie, and enjoy only certain exemptions and privileges. On the other hand, the possibility of such marriages is not in any way connected with the proper diplomatic character of the agent: the consul need not, in order to celebrate a valid marriage, enjoy the personal privileges of extra-territoriality which belong to an ambassador. Again, as a general rule, the marriage is not good unless both parties belong to the State from which the agent's authority is derived.¹⁵ If the legislation of any State goes beyond this bound, and allows ¹⁶ marriages between a subject of its own and a subject of a foreign country to be celebrated in this way, the matter becomes very serious,¹⁷ especially if it is the husband who belongs to the foreign country, and the marriage, therefore, need not be recognised in the country in which it is to subsist, and on the legislation of which it substantially depends. If the spouses are debarred from availing themselves of the forms which prevail at the place in which they happen to be, on grounds of religion, or because these forms are the forms of some entirely different stage of civilisation, then, if they are at a great distance from their native civilisation, there will be hardly any other course open to them except to submit themselves to a double marriage, one before the envoy or consul of the bridegroom's country, one before the envoy or consul of the bride's. That again leads to difficulties, if the diplomatic representatives of these two States are not to be found in the same place; besides that, the criticism occurs that the matrimonial consent is not declared in a formally binding fashion by both parties simultaneously. If any protracted time intervened between the two declarations, there would be some reason, on general legal principle, for doubting the validity of such a marriage. After these considerations,

¹⁴ As against its connection with extra-territoriality, see Fiore (J. xiii. p. 307). See, too, Calvo, iii. § 799.

¹⁵ Cf. Aubry et Rau, § 168, note 12; Lehr (Jour. xii. p. 657); Weiss, p. 661; Fiore (Jour. xiii. pp. 304, 305); Trib. Civ. Seine, 2nd July 1872, 21st July 1873; Trib. d'Anvers, 4th August 1877; Sup. Ct. of Austria, 17th August 1880 (Jour. i. p. 71, viii. pp. 84, 171). See a despatch of the Foreign Office of the United States in 1874, and a despatch of the French Minister of Justice in 1878, in Fiore *ut sup.*

¹⁶ As 12 and 13 Vict. c. 68, and § 10 of the statute of the German Empire, of 4th May 1870. But now English diplomatic agents must explain to the parties that they can only count upon the recognition of these mixed marriages within the territory of the British Empire, cf. Fiore, *ut sup.* [The decision of the Supreme Court of Austria, referred to in the last note, was a case of a marriage between an Austrian subject and an Englishwoman.]

¹⁷ The Belgian statute of 24th May 1883, § 3, is more prudent in restricting the competency of such marriages to the case of Belgian husbands and foreign wives. Besides that, the competency is made to depend on special authority given to each particular diplomatic station (Jour. xii. p. 46).

we should be almost inclined to pronounce the view which has been accepted by German legislation, or at least that which has been adopted by the Belgian statute already referred to, to be a good practical solution, if not absolutely correct in theory. By the former, the competency of diplomatic agents is extended to the case where one of the parties is a foreigner; by the latter, to the case where the woman is. Such a view, in order to be recognised, needs, of course, to be positively sanctioned by legislation. In the State which passes such a law, the marriage is at once recognised: it is doubtful whether its validity will ever come to be questioned in another State. However, since positive legislation must in any case be appealed to, the position may perhaps be more satisfactorily settled in the following way. Let us confine ourselves to the more limited rule of the Belgian law, by which the diplomatic agent or consul of the man's country is competent, and let us give the woman a right within a certain time to declare, by an unilateral but formal act, before a notary and witnesses, or before an ambassador or consul of her State of origin, that this marriage, which was celebrated in this way, neither according to the forms of the place of celebration nor those of her national law, is invalid. In other words, let the defects of form be supplemented, as far as the wife is concerned, by her tacit consent, evidenced by the fact that within a certain time she has made no attack upon these informalities. It looks as if a more general international agreement might be reached on such a basis, and that even the native State of the woman might treat such a marriage, which she had not impeached as defective, as completely valid. Without this simple means of releasing herself from the bond of wedlock, which had been tied without the forms of her own country being observed, forms which perhaps constitute an excellent protection to the inexperience of the woman, it would be a serious matter for the State to which the woman belongs, to hold her directly or indirectly to a marriage which had been hastily contracted, and had turned out unhappily. The State could hardly hold out its hand on any other terms to accept a marriage *simpliciter*, which has not been celebrated according to the forms of the place of celebration, or according to the forms required by the law of the wife, *i.e.* a marriage which may be an open contravention of its own formal regulations, which in their nature are compulsory upon all its subjects.¹⁸ It is

¹⁸ Particularly as these forms are often intended for the protection of the parents, *e.g.* where, as in the law of England, the want of the father's consent is merely an *impedimentum impediens*, which is got rid of by the marriage. On this the old practice of Gretna Green marriages proceeded. Since in Scotland a marriage did not require to be celebrated before any authority of the Church or of the State, which would insist on the production of the necessary consent, the lovers fled to the first spot on Scottish territory, and there before witnesses interchanged matrimonial consent. The smith of Gretna Green was always to be had for the purpose, for a suitable gratification: he kept a kind of office. A statute of 1856, 19 and 20 Vict. c. 96, known as Lord Brougham's Act, made an end of this practice. According to it, all marriages celebrated in Scotland are null, unless one of the spouses has his or her domicile in Scotland, or has lived for at least twenty-one consecutive days there before the marriage. That gives parents and guardians time to overtake the runaways. See, on this subject, Beach-Lawrence, iii. p. 291; Westlake Holtzendorff, § 20; Weiss, p. 643.

with this view that the sketch, of which mention has already been made which was laid before the Institute in 1885 by Brusa and the author contains as its fourth article the following provision, viz. :—

“Sont de même valables [partout], quant à la forme, les mariages célébrés selon les formes légales, prescrites ou en usage dans le pays auquel le mari appartient comme citoyen, et les mariages célébrés en pays étranger conformément à la législation nationale du mari, devant les autorités diplomatiques ou consulaires [de l'Etat] du mari.

“Toutefois, dans ce cas, et sauf les effets d'un mariage putatif, l'épouse pourra invalider le mariage dans le délai de deux ans des la célébration.

“L'invalidation se fera par déclaration solennelle devant notaire et témoins ou devant l'autorité diplomatique ou consulaire de l'épouse; elle sortira son effet dès qu'elle sera notifiée au mari ou si la notification n'est pas possible, après quelle aura été publiée en bonne et due form. Les législations régleront cette publication; s'il n'était pas possible de s'entendre sur un règlement général, il suffira d'observer la loi nationale de l'épouse, ou celle du mari ou celle du dernier domicile des deux époux.”

§ 167. We must point out, however, that this power of envoys and consuls to celebrate marriages, in which the wife alone belongs to another State, is by no means without risks of its own. It will supply a means of evading certain restrictive statutes of the country—especially if these import no *impedimentum dirimens*, but only an *impedimentum impediens*—in a simple way, and without making it necessary to leave the territory. Such a power should therefore only be given in case of necessity, and should by no means be a general, obvious, and natural method. If we do not limit it in this way, every State will be setting up within its neighbours' territories a number of officials, whose business it will be to open a door for the evasion of the law of the locality.¹⁹ One can hardly believe that any government or State would ever accept such a denial of the principle of territorial sovereignty.²⁰ The legislation of the German Empire, and the Belgian statute, therefore prudently confine themselves to

¹⁹ After the Institute in 1885 had recommended, in a very general and indefinite way, the universal introduction of consular marriages, it amended its resolution at Heidelberg in 1887 to the following effect :—

“Il est désirable d'admettre à titre d'exception et même entre pays chrétiens, la question des capitulations étant réservée, la validité des mariages diplomatiques et consulaires, dans le cas où les deux parties contractantes appartiennent au pays de qui relève la legation ou le consulat.”

This is prudent, but it is not adequate to the necessities of the case, since the cases, in which the parties belong to different States, are not touched. The resolution taken at Brussels in 1885, by which consuls in all countries were to have powers of celebrating marriages, even although the man only belonged to the consul's own country, was altogether untenable.

²⁰ The despatch of the Belgian Foreign Minister on 1st July 1882, on the subject of this Belgian statute (rep. by Picard, Jour. xii. p. 51), warns the diplomatic and consular representatives of Belgium properly and prudently to direct the attention of the intending spouses, *“combien il importe . . . de recourir aux autorités locales. Ce n'est qu'après avoir constaté que ce recours est impraticable ou n'offre aucune des garanties nécessaires, qu'il peut y avoir lieu de poursuivre la voie exceptionnelle, admise par le législateur dans le double intérêt des familles et de la morale.”*

dealing with the competency of giving such powers to the ambassador or consul. And in the "*motifs*" of the latter statute (Jour. xii. p. 50) it is expressly said that the power should only be given to envoys and consuls in countries or localities, in which the organisation of the law of personal *status* does not supply proper guarantees, *e.g.* in Mohammedan countries, in China, etc., or where there are no forms but religious forms. A more general recognition of the marriages of subjects of different States, before the envoys or consuls of the husband's country, can only be attained, if the wife, who may, in so far as marriage is concerned, be acting without deliberation, is allowed the power of attacking the defects in form within a certain time in some simple way.

MARRIAGE IN A FOREIGN COUNTRY *in fraudem legis*?

§ 168. Shall a marriage, which has been celebrated in a foreign country in the forms recognised there as binding, be recognised all the world over, and particularly in the country to which the parties belong, if they have betaken themselves on purpose to evade their native law, *i.e.* *in fraudem legis*, to that foreign country?

This question becomes of special importance, if, as in the case in the jurisprudence of the United States, we give the *lex loci actus* a force which shall regulate the capacity of the parties. The more modern jurists of the States, and in particular Wharton (§ 181), are inclined to say that such marriages shall not be recognised, and the same rule seems now to hold in England.²¹ We must assume as beyond all doubt that the native legislation can by express provision declare all marriages, which are concluded abroad *in fraudem legis*, null; while, on the other hand, a *bona fide* domicile at the place of celebration, a domicile, the essentials of which will very probably not be closely criticised, will be enough to exclude all challenge on the ground of fraud against the law.

According to the general principle which we have already adopted (cf. § 122), it is thought that there can be no difficulty in holding such marriages valid,²² in so far as the question is really one as to pure forms in the sense we have already explained, § 121. In cases, for instance, in which people have gone to another country, because they can be married there with less expense, or with more speed, or without certain ceremonies which are distasteful to them.

²¹ Westlake Holtzendorff, §§ 21, 22. The older view (see Burge, i. pp. 192, 193; Story, §§ 123A *et seq.*) was in favour of the marriage. The Royal Marriage Act, which made the validity of marriages by members of the Royal House dependent on the assent of the sovereign—as is for the most part provided by family statutes upon the continent—may very well have the force of rendering null marriages of that class, even when contracted in another country, which have not that sanction. (Cf. Westlake Holtzendorff.)

²² Cf. especially the very elaborate reasoning in the judgment of the Supreme Court at Berlin, of 15th January 1855 (Dec. vol. xxix. p. 300).

But in the ceremony of marriage there may be some forms that have a deeper meaning. They may serve to ensure a certain recognition of the wishes of third parties, although the law hesitates to allow these third parties a power of annulling the marriage. For, when the marriage has actually taken place, and the spouses have actually lived together, the consequences cannot be undone, and it would be a serious calamity for the spouses themselves, and possibly for their posterity, if these consequences were to be disregarded, and nullity of the marriage imposed as a penalty. There is thus much to be said for the possibility of acting *in fraudem legis* in connection with marriage, if the observance of the forms of a foreign country makes it impracticable to plead impediments, which depend on the wishes of third parties. On this account French jurisprudence lays it down that the want of the *Actes respectueux*, which according to the rules of French law must be paid in certain cases, does not as a rule make a marriage of French persons, which has taken place abroad, a nullity, but that it will have that effect if the French subject has contracted a marriage of set purpose and secretly in another country, under the forms of that other country only, which do not require the *Actes respectueux*.²³

In spite of this, however, legal logic compels us to pronounce in favour of the view, which regards a marriage, even when it is contracted under these conditions in a foreign country, all the forms of that country being observed, as a valid marriage.²⁴ The legal character of a mere *impedimentum impediens* is, that it recognises as a fact what has actually taken place: a marriage which has been celebrated in a foreign country, on purpose to evade the restrictions imposed upon it in its own country, belongs to this class of facts. Of course, the legislator (*i.e.* the legislator of the country to which the parties belong) may expressly declare the nullity of such marriages, because it is too easy for his subjects to avail themselves of the foreign forms, or he may declare them null in certain circumstances. The mistake of any such declaration of nullity, unless it is attached to circumstances and conditions that are easily understood, is very apparent, if we reflect that doubts as to the validity of a marriage may ruin the happiness of entire families. The law of England, therefore, in its measures to put down Gretna Green marriages, laid down plain conditions which should infer nullity.

MARRIAGES *in facie ecclesiæ* OR BY STATE AUTHORITY.

§ 169. The diversity of different legal theories, as to the forms of celebration of marriage, may perhaps proceed from the fact that in one State marriage is an ecclesiastical matter, and in another it belongs to muni-

²³ See judgment of the C. de Paris, December 1873 (J. i. p. 243); Trib. civ. Seine, 21st December 1877 (J. v. p. 43); C. de Paris, 28th February 1881 (J. viii. p. 364); Trib. Seine, 7th July 1881 (J. ix. p. 308); C. de Paris, 24th February 1882 (J. ix. 309): the intention of withdrawing from the other forms prescribed by French law does not found a nullity. Trib. Civ. Seine, 29th December 1886 (J. xiv. 67).

²⁴ See Stobbe, § 34, note 10.

cipal institutions. Is this any ground for a difference in international treatment? On general principles, the answer to this question must distinctly be in the negative.²⁵

In international law we know no laws but those of States; churches are more universal institutions which have no territorial limitations. If we were to propose to set the law of the individual State on the same line of comparison as the law of the individual church, we should be comparing two things which are entirely incommensurate. In international law we can only regard the ecclesiastical law that is recognised in a State, as part of the law of that State. The result is what we have just stated. In so far as State A, in which marriage is a mere affair of municipal law, is concerned, the ecclesiastical ceremony, which obtains in State B, is a mere affair of municipal law: the clergyman who officiates is, *quoad hoc*, a civil servant.²⁶ In so far, however, as State B is concerned, where ecclesiastical ceremonies prevail, it is worth while to observe that, according to Catholic as well as Protestant ecclesiastical law, the marriage ceremony was originally not connected with any particular form; matrimonial consent was all that was necessary. If there are, for instance, to take the case of the Catholic Church, districts in which the decree of the Council of Trent, as to the necessity of a ceremony of marriage before the competent clergyman and witnesses, has never been published, then, in so far as ecclesiastical law goes, a marriage may be well contracted without any ceremony at all.^{27 28} If, then, the Church recognises such informal marriages, how much more must a State, whose legislation is no doubt based on that of the Church, recognise informal marriages contracted in another country? and how much more, again, must it recognise marriages in a foreign country, when certain specified forms, although these are not prescribed by the Church but by the State, are observed? The general opinion has long taken this direction.²⁹ In particular, since the Reformers regarded marriage as a civil ordinance, the Protestant Church has no

²⁵ A peculiar view is to be found in Muheim, p. 192. He thinks, but gives no reason for thinking, that an ecclesiastical marriage ceremony does not belong to the class of forms, but is a part of material law. The result is far from satisfactory, for in Switzerland and in the German Empire, for instance, Russians and Hungarians—putting aside the possibility of being married before the diplomatic representatives of their own country—could not be married at all.

²⁶ Cf. in this sense Trib. Seine, 14th March 1879; C. de Bruxelles, 10 Nov. 1880 (J. vi. p. 547, and paper by Van der Rest in Rev. xvi. p. 141). For the recognition of a purely religious ceremony in accordance with the *lex loci actus*, see C. de Bourdeaux, 21st December 1886 (J. xiv. p. 600). See also Trib. Avignon, 14th December 1880 (J. viii. p. 516).

²⁷ See Richter-Dove, *Lehrbuch des Kirchenrechts*, 7th ed. § 282, note 23.

²⁸ This is completely overlooked in the essay of Olivi so often cited, and in the protest which Saripolos read at the meeting of the Institute of International Law in 1885 (Ann. viii. p. 78). He objected to the Institute dealing with the question of marriage, because marriage had a religious aspect. Olivi, too (Rev. xv. p. 230), takes the odd position that a State, which has none but weddings *in facie ecclesie*, cannot recognise a civil marriage entered into by its subjects abroad.

²⁹ See J. H. Boehmer, *Jus eccles. Protest.* iii. lib. iv. tit. 3, § 42, and the citations there given. As regards the Catholic Church, see the decisions of the *congregatio concilii* cited by Richter-Dove.

reason for looking on a civil marriage contracted in a foreign country as invalid.³⁰

A new element of confusion has been introduced into the subject by Savigny's theory of coercitive law.³¹ A law which requires weddings to be *in facie ecclesiae* has, thinks Savigny (§ 381, Guthrie, p. 324), a basis in religion and morality. We may concede that, and yet not reach the conclusion he desires, since, as we have already shown, the whole theory of coercitive laws, with its indefinite application, seems to be untenable. And are we to be more strict now than the old theologians and teachers of ecclesiastical law were? How will the interests of morality be better promoted, if, by requiring the observance of formalities of "morality and religion," which frequently cannot be observed at the place where the parties reside, we cast obstacles in the way of persons who desire to marry, or even make it impossible for them to do so, and thus bring serious misfortune upon whole families? Or why should we exalt the importance of these formalities above all reasonable measure?

If a rule of law requiring celebration *in facie ecclesiae* had that coercitive force, then foreigners who, already married, settle in our country, must be regarded as invalidly married, if their marriage has been a civil ceremony in conformity with the law of the country to which they once belonged. Indeed we could not allow foreigners, who were only temporarily in this country, to live together as man and wife. For a law of such a coercitive character, like the prohibition of slavery, not merely prevents the relation of which it disapproves from coming into existence within its territory, but has the effect of making its continuance impossible.

It is natural that the adherents of a civil marriage (*i.e.* of the exclusive celebration by some civil officer of the State) should exaggerate the importance of this form. Laurent (iv. § 126) regards this civil marriage, which makes its appearance with the Code Civil, as one of the primitive legal institutions of mankind. Without an *acte solennel*, marriage is to him no marriage. He thinks also that the subjects of a State, which knows no marriage but one *in facie ecclesiae*, cannot be married in France by a

³⁰ Cf. *e.g.* Art. Smalcaldici, *de potestate*, quoted by Hase, *Libri symbolici*, p. 355, and the thorough exposition in the judgment of the Supreme Ct. of Berlin already cited in note 22. By it an informal marriage concluded at Gretna Green was recognised as formally valid, although the laws of the domiciles of the spouses required marriage *in facie ecclesiae*.

³¹ I am sorry to remark that Thöl, § 80, Gerber, § 36, No. 6, Unger, p. 210, are instances in which men have been confused by this new train of reasoning. Olivi (Rev. xv. p. 237) reaches the same result, and in particular this mischievous conclusion, that subjects of a State, which recognises none but an ecclesiastical marriage, can never be married in another State, where none but civil marriages are recognised. He establishes this in a way that is unworthy of a lawyer. A *célébration religieuse*, he thinks, is a *nonsens juridique*. But the State to which the parties thus invalidly married belong may regard the marriage as "*simple fait*," and on this footing force them to go through a marriage in accordance with its own forms. Wherein this power of compulsion consists, and how it is to be worked out if the spouses remain abroad and perhaps die there, Olivi does not say. Even the Spanish Code of 1862, art. 50, which he cites, and which makes sufficient concessions to the Catholic religion and to piety, expresses itself more prudently. It does not say that the marriage is null or a simple fact, but that the spouses must again go through the marriage *in facie ecclesiae*, if they return to Spain.

clergyman of their own church, because he is not a civil official of the French Government. But he proposes in the same way to refuse to citizens of the United States, who by their personal law may contract a marriage without any form at all, the possibility of doing so in France. Durand has supplied us with a trenchant refutation of this fanaticism for civil marriage. He says that Laurent's desire is simply to impose the law of France on the whole world.³² We shall not go wrong if we suppose that in this case, as in others, dislike of the Catholic Church has guided the pen of the famous Belgian jurist. We can only deplore that, as was made plain at the meeting at Brussels in 1885, every one has not paid sufficient attention to Durand's refutation of Laurent's misleading words.³³

NOTE H ON §§ 156-167.

FORM OF THE MARRIAGE CEREMONY, CAPACITY TO MARRY, AND
MARRIAGES IN PRESENCE OF AMBASSADORS AND CONSULS.

[The laws of Scotland, England, and America all hold that a marriage celebrated in accordance with the *lex loci actus* is a valid marriage. But the rule is limited to the case of Christian marriage, and is not to be extended to the case of a ceremony such as is in use among savage or unchristian races. As Lord Brougham remarked in Warrender's case (1835, 2 Cl. and Fin. p. 488), if there are two different things which in two different countries pass under the common name of marriage, the law will not invest the institution of the foreign country, which is essentially different from its own, with the same attributes and effects, merely because of the identity of its name. This doctrine was applied in a case where an Englishman, living in Bechuanaland, had gone through a ceremony with a native woman and lived with her for several years. The ceremony was one that was practised by the savage tribe to which the woman belonged, and did not confer on the woman the same *status* or rights as are conferred by marriage in Christian countries. It merely recognised her as a chief concubine. The man had not, however, taken any other wives or concubines. The English court, after the man's death, refused to recognise the union as a marriage, to the effect of legitimating offspring (*Bethell v. Bethell* and *Hildyard* 1888, L.R. 38 Ch. Div. 220). But in a recent case (*Brinkley v.*

³² In our view persons, in whose own country ecclesiastical marriage prevails, validly contract a marriage before a clergyman of their own church, in another country, where civil marriage is the law. In truth, in that case, the clergyman is simply a privileged witness. If the parties could conclude their marriage before private witnesses, if their own law provides for this, why not also before a witness who happens to be a clergyman? Finally, the only question of importance is whether the State to which the family belongs recognises the marriage. Fiore (§ xiii. p. 302) and Clunet (*ibid.*) take a different view.

³³ § 171 of the Code Civil has made this useful practical provision, that marriages of French subjects which have taken place abroad shall be entered upon French registers. On such a matter international arrangements might very well be made. (See Pierantoni's proposition in the *Annuaire*, viii. p. 77, and art. 3 of the resolutions of the Institute at Lausanne.) The 171st section to which we have referred is, however, a *lex imperfecta*: it wants the necessary compulsitor on the spouses to make the entry (see on the different theories, Weiss, p. 652).

Att. Gen. 1890, L.R. 15 Prob. Div. 76) it was explained that by the term "Christian marriage" is to be understood not any particular religious ceremony, but a contract, the effect of which is to bind one man to one woman exclusively. Such a ceremony may take place in a heathen country, as in the case in hand, in Japan.

In England, then, the marriage ceremony, if valid according to the *lex loci actus*, is valid everywhere (Harvey v. Farnie, 1882, L.R. 8, App. Ca. 43). The doctrine has been thus expressed by Lord Campbell in the House of Lords: the forms of entering into a contract of marriage are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*: if these essentials, by which his lordship seems to mean the capacities of the parties, are contrary to the law of the domicile, the marriage, although duly solemnised elsewhere, is void (Brook v. Brook, 1861, 9 Cl. and Fin. 193).

But, on the other hand, in contrast with the author's doctrine, the laws of England and America go so far as to refuse validity to a marriage celebrated in conformity with the forms of the domicile, but at variance with the *lex loci actus*, unless it has been celebrated in some country the forms of which cannot be observed by Christian people, or in the hotel of the ambassador of the nation to which one of the parties belongs (Westlake, § 17, p. 55, and cases there cited).

The law of Scotland holds that a marriage is well celebrated if celebrated according to the *lex loci actus* (under the same limitation as to uncivilised countries as exists in England), and Lord Fraser (Husband and Wife, p. 1309) goes so far as to say, "The forms and ceremonies prescribed by the law of the place where the marriage is entered into must be observed; and if they are, the marriage is valid; if they are not, it is invalid, although the ceremonies actually followed were those of the place of domicile." No authority, however, is cited for the proposition that observance of the *lex loci actus* is imperative, and it is thought that the law of Scotland would not refuse to recognise a marriage celebrated abroad in such a fashion as would suffice to constitute a marriage in Scotland, in cases where both husband and wife were Scots people, *i.e.* domiciled in Scotland. The law of Scotland requires no form of marriage: it recognises fully that *consensus facit matrimonium*, and requires nothing more than trustworthy evidence of the interchange of that consent. That evidence may either be supplied by regular certificates of marriage or the testimony of witnesses, or may be rested on presumptions, derived either from the cohabitation of the man and woman with the habit and repute of married persons, or from a promise of marriage formed by *copula*. The last method requires a declarator of a competent court, and does not, with absence of such declarator, *per se* constitute marriage. The marriage contract being in Scotland so purely a matter of consent, and so entirely independent of form, it would seem, with all deference to Lord Fraser's authority, to savour of absurdity to hold that Scots persons must, if they desire to enter into their contract abroad, go through the forms prescribed by the law of the foreign country. Is it to be

said that, while the interchange of consent openly before witnesses in Edinburgh will constitute a marriage, the same consent cannot be interchanged before the same witnesses in Paris, and that the Scots court will refuse to uphold the same contract proved in the same way? Lord Fraser cites no authority in support of his dictum, and principle seems to be against it.

In further illustration of the same point, one may enquire whether, in the case of a marriage proved by the cohabitation of the man and woman with the habit and repute of married persons, that cohabitation must be in Scotland, and whether evidence of such cohabitation had in another country will be rejected. If Lord Fraser's doctrine is correct, the whole course of life, which is to be adduced to prove the existence of a marriage, would have to be in Scotland, and evidence of the same kind of life abroad would be inadmissible. But we find, in the case of the Countess of Strathmore (1750, *Elchies Vocc. Proof*, and Paton, 6 H. of L. 684), that proof was allowed of cohabitation in Holland as man and wife, in an action of declarator of marriage, and the President of the Court (Dundas) referred to two precedents in which proof of cohabitation in countries other than Scotland had been allowed. No doubt, in these cases, the matter that was sent to proof was the conduct of the parties, which was said to be evidence of a consent previously interchanged in Scotland. But the final question to be settled in such cases must always be, was there consent? If there was, the consenting parties are married, and geographical or political boundaries cannot alter this fact. The law of one country may draw a different inference from the fact of consent from what the law of another country does: one law will say it makes marriage, another will say that no one shall be held to so permanent and important a contract as marriage without some more solemn ceremonial. Now, in the case supposed, the Scots courts are to consider whether a consent was given: they find sufficient evidence of that fact. They must then hold that the parties, both of whom are, *ex hypothesi*, Scots, consented to be married, *i.e.* made a contract to that effect. Any other contract so entered into would be valid if it accorded with Scots forms. Why should this contract, proved as the law of Scotland requires it to be proved, not receive effect? A Scotsman is surely not to be allowed to break his contract, of which there is ample evidence, because he made the engagement which constitutes it in another country. If there is insufficient evidence of consent—and part of this evidence might, no doubt, consist in proof of his knowledge of the forms of the foreign law, and of their accessibility and his deliberate rejection of them—then there is no contract, and no marriage. But, given proof of the *consensus*, the fact of its being given in another country, does not seem sufficient to warrant repudiation of it in Scotland.

The same kind of proof that was allowed in the Strathmore case, *i.e.* of residence abroad as man and wife, was allowed in the case of *Napier v. Napier* (1801, Hume's Reps. 367), although there, after consideration, it was rejected as insufficient to prove habit and repute. Again, in the Breadalbane Peerage Case (*Campbell v. Campbell*, 1867, Ct. of Sess. Reps.

3rd ser. vol. v. (House of Lords), p. 115), proof was led and considered as to cohabitation in England.

Under another class of marriages, viz. marriages inferred or presumed from a promise of marriage *subsequente copula*, the same reasoning would apply, and is put by Lord Westbury in the case of Longworth v. Yelverton (Ct. of Sess. Reps. 3rd ser. vol. ii. (House of Lords), p. 49, Lord Westbury, at p. 67). In that case it was held that it was necessary for the pursuer to show that both the promise and the *copula* took place in Scotland, but that was because the pursuer was an Englishwoman and the defender an Irishman, the law of Scotland being therefore invoked as the *lex loci contractus*. That being so, the whole transaction must necessarily take place in Scotland. The decision would have no application to the case of two Scots persons.

Just as the law of the domicile may be observed by Christians in a heathen country, the courts of the United States have recognised the validity of a marriage celebrated between two Indians in Missouri according to Indian customs, under the superintendence of an agent of the United States Government (*Boyer v. Dively*, 58 Miss. 510).

Scotland and the United States determine all questions as to the capacity of the parties by the *lex loci contractus*, and that even although the parties may have resorted to the country where the marriage is celebrated for the express purpose of evading the restrictive laws of their domicile (Fraser, 1300, 1301). England, on the other hand, regards the capacity of the parties as a matter to be ruled by their personal law, *i.e.* the law of their domicile, and has refused to sanction an English marriage between Portuguese subjects who were first-cousins, and therefore by the law of Portugal incapable of marriage. This decision was pronounced by the Court of Appeal reversing a judgment of Sir R. Phillimore (*Sottomayor v. Barios*, 1877, 3 P. D. 1). The principle seems to be that quoted above as enunciated by Lord Campbell in Brook's case, viz. that for the essentials of the marriage you must look to the law of the domicile. But where some requirement which is demanded by the law of the domicile as a mere *impedimentum impediens* is unsatisfied, the result is otherwise. Thus the courts of England have recognised Gretna Green marriages between English subjects without the preliminaries required in England, and have also recognised a marriage in England between French subjects without the consent of their parents, an omission which would be fatal to its validity in France (*Simonin v. Mallac*, 1860, 2 S. and T. 67, and 29 L. J. Mat. 97). This decision is reconciled with that pronounced in the case of *Sottomayor*, by holding the consent of parents to be part of the ceremony, and not a matter affecting the capacity of the parties.

Belgium and France require in certain circumstances publication and registration of marriages, and the performance of what are known as *actes respectueux*. The English courts have recognised marriages of French people without observance of these requirements (*Simonin v. Mallac*, *ut sup.*), just as they had recognised Gretna Green marriages. But the French

courts, although they do not pronounce such marriages void, hold that they are, in the discretion of the court, voidable (Cibeins, 1886, J. xiii. p. 334; Cruyppenine, 1890, J. xvii. p. 487; see, also, J. xiv. p. 475, xv. p. 90, and xvi. p. 641).

If the marriage has been celebrated abroad *in fraudem legis domesticæ*, and in order to avoid publicity, then it will be annulled (d'Alinegro v. Louis, 1876, J. iv. 43, d'Imécourt v. Musurus Bey, 1882, J. ix. p. 308). If false representations be made to the authorities of the country where the marriage takes place, this will raise a presumption of nullity, as being proof of a desire for secrecy (Berthaut, 1879, J. vi. 486). On the other hand, where there is no evidence of a desire for secrecy, where, for instance, parties contract marriage abroad to avoid the delays consequent on publication, being desirous of emigrating to America speedily, or where parties are resident in Brazil, and have no opportunity of observing French forms, while their conduct shows an absence of any desire for concealment (Paumier v. Jouard, 1879, J. vi. p. 281), and generally, where there is *bona fides*, the marriage so informally celebrated *secundum legem loci contractus* will be allowed to stand (Desaye v. Clement, C. de Cass. 1880, J. ix. p. 85; Lebon, 1879, J. ix. p. 205). For instance, where the parties have lived openly as husband and wife, neither they nor their parents can attack the marriage, even although it has been celebrated abroad *in fraudem legis* (Rouet, 1886, J. xiv. p. 66): acquiescence by the parents will import consent, and will bar one of the spouses from founding on the absence of it (Bonné, 1883, J. xi. p. 67). The omission of the *actes respectueux* cannot be pleaded by collaterals (Goux, 1881, J. ix. p. 531). The want of registration and publication, as required by French law, can only be pleaded by third parties who have an interest in reducing the marriage: a husband who has lived with his wife as if they were married persons cannot plead this, his own fault or fraud (Bonné *ut sup.*; Gouzène, 1881, J. ix. 534; Beaufils, 1877, J. v. 43).

That the fiction of the ambassador's hotel being part of the territory of his country is not carried to its legitimate conclusions, is proved by the judgments of the courts of Austria and of France, to the effect that marriages celebrated between natives of the country to which the ambassador is accredited, or between one native of that country and a woman of the same nationality as the ambassador, in the chapel of the embassy, according to the forms of the ambassador's country, are not recognised as valid, although if they had really been celebrated in his territory they would have been recognised. An Austrian married an Englishwoman in English form in the chapel of the English embassy in Vienna; that marriage was held null by the Supreme Court of Austria, 17th August 1880 (J. viii. 171), and similarly a marriage between two French people, in the hotel of a foreign ambassador, was held null by the Tribunal de la Seine, 2nd July 1872. (The judgment is given at length by Fraser, Husband and Wife, p. 1539; see also J. i. p. 71. The same judgment was repeated by a French court, 1889, J. xvi. p. 836.)

No doubt English courts have held that marriages celebrated in the

residence of an ambassador of England, where only one of the parties is English, are valid, and that has been by the legislature declared to be the law in cases where a marriage is celebrated between a foreigner and a British subject before a British consul duly authorised to perform such marriages (4 Geo. IV. c. 91, expounded by Dr Lushington, in *Lloyd v. Petitjean*, 1839, 2 Curteis, 251; see also 12 and 13 Vict. c. 68, and 31 and 32 Vict. c. 61); but a statute of the British Parliament can never make these marriages valid in the country where they are celebrated, and the necessity of passing statutes to legalise them in England is an additional indication that the fiction of the ambassador's house being the territory of his country is not internationally accepted as sound. The result of these statutes is that a marriage, which is good in England, will not be recognised anywhere else. (See Dr Lushington's opinion, *ut supra*.) By a statute of 1890 (53 and 54 Vict. c. 47), it is declared (§ 1) that marriages celebrated in the houses of British ambassadors abroad, "between parties of whom one at least is a British subject," shall be as valid as if celebrated in the United Kingdom. By the 4th section the same declaration is made as to similar marriages celebrated on board a Queen's ship on a foreign station. The remark just made on the old statutes applies equally to the provisions of this Act, viz. that the result is that such marriages will be good in England and nowhere else. By the 9th section it is provided that Her Majesty may prohibit or restrict the exercise of the powers conferred by the Act or the previous Acts on ambassadors, etc., "where the exercise of these powers appears to Her Majesty to be inconsistent with international law or the comity of nations, or in places where, in the opinion of Her Majesty, sufficient facilities exist without the exercise of those powers for the solemnization of marriages to which any British subject is a party."

Another statute was passed in 1891 (54 and 55 Vict. c. 74) to regulate marriages celebrated by British ambassadors and consuls abroad, and contains various provisions to ensure the *bona fides* of the parties, and to prevent any abuse of the power of these officers. *Inter alia*, by § 8 an official shall not be required to solemnise a marriage, if he thinks that to do so would be inconsistent with international law or the comity of nations. His refusal, however, may be reviewed by the Secretary of State on appeal.]

C. DECLARATORS OF NULLITY.

§ 170. It is plain that, if an action is raised for annulling a marriage, an offence against the law of any of the States concerned will warrant decree, just exactly according as the observance of that law was necessary for the constitution or existence of the marriage.¹ Impedi-

¹ To the same effect Brocher, i. § 91; Weiss, p. 698. We cannot discuss exhaustively the questions on this point which arise for consideration, until we reach the subject of the competency of courts in matrimonial matters. No doubt a defect in the form of the celebration, like any other ground of nullity, may be subsequently cured, e.g. by *possession d'état*. That may depend upon the subsequent personal statute of the spouses, while the question as to form must for itself be tested by the *lex loci*.

ments, therefore, of a resolute character are always good grounds for annulling the marriage, if the law of the country to which the husband belongs affirms their existence in the particular case. But if it is only the law of the wife's country which so describes the facts of the case, then there is not, according to the view I have adopted, good ground in every case for a declarator of nullity.² We must remember that by the law of the United States, a scientific partisan of which, remarkably enough, is now to be found in Switzerland³ in the person of König,⁴ an action for annulling a marriage can only be raised on a plea of nullity which is recognised as sound, not only by the law of the country to which the spouses belong, but by that of the country where the wedding took place.⁵

² It is, besides, to be noticed that the action for setting the marriage aside can, as a rule, only be instituted in the courts of the country to which the spouses belong, or to which the husband belongs (see *post* discussion on the competency of the courts). Since the question will generally be one as to the right to plead some alleged impediment to marriage in such an action, the view by which the *lex fori* is the only law that can be applied comes to the same result as we have reached in the text. Most authors have no special discussion of the subject of actions of nullity; they speak only of actions of divorce.

³ We have here to consider the provisions of § 54 of the Federal Constitution of 1874, which are not very clearly conceived, and are rightly held by Brocher to be very dangerous (*Nouv. Tr.* p. 113). These are: "*Sera reconnu comme valable dans toute la Confédération, le mariage conclu dans un canton ou à l'étranger, conformément à la législation qui y est en vigueur*;" the 54th article of the law as to civil status, of 24th December 1874, is in these terms: "*Un mariage contracté à l'étranger, ne peut être déclaré nul que lorsque la nullité résulte en même temps de la législation étrangère et des dispositions de la présente loi.*" Brocher (p. 166) very properly says that the legislator, in making these enactments, has yielded too far to his desire to ensure marriages against challenge.

⁴ See König's propositions, §§ 6 and 7 *ad fin.* (Ann. de l'Institut, viii. pp. 72-74). On the other hand, see Muheim, p. 191 and note, with the Swiss jurists there cited.

⁵ A peculiar case was decided on 12th February 1882, by the Supreme Court of Illinois (Madelaine Roth v. Ehnmann *et al.*). R, a subject of Würtemberg, married Madelaine Roth in 1855 in Chicago; the spouses afterwards returned to Europe, and lived together as man and wife in Würtemberg. In 1873 the marriage was declared null at the husband's instance in Würtemberg, on the ground that it had been concluded without the man having obtained a special permission to be married abroad, which was at that time, by an ordinance of 1808, the law of Würtemberg. R married on 27th November 1873 Amalie S., and on 28th March 1874 concluded a marriage contract with her, on the lines generally of a community of goods during their joint lives, the longest liver to enjoy all, except certain provisions to children and a few legacies. R died in 1876, leaving a considerable landed estate in Illinois. Madelaine, the first wife, claimed, as lawful widow of the deceased, a share of this estate in the courts of Illinois. Since the first marriage was undoubtedly good by the law of the place of celebration, she maintained the invalidity of the decree of nullity, at least in Illinois.

The Supreme Court of Illinois refused her claim, because the spouses at the time of the decree of nullity were by force of their domicile subject to the courts and to the law of Würtemberg, and therefore the decree, as one affecting their status, must be valid all the world over. Two judges however, dissented, and Justice Walker laid down that the Court of Würtemberg had no jurisdiction to declare null a contract concluded under the law of another country, *i.e.* the first marriage: that the judgment of the Court of Würtemberg was directly counter to the law of America; if it were to be recognised, the result would be that a statute of Würtemberg could provide *cum effectu* that subjects of Würtemberg could not acquire land in America without permission of their own sovereign. (Pamphlet published at Chicago, Beach Barnard 1882. I have to thank the kindness of Messrs Rosenthal & Pence for bringing it under my notice.)

In one respect we must certainly concur with the judgment: it is not the courts of the

If this proposition, or anything like it, were really to become international law in Europe, the smallest of the European States would have it in its power to render the matrimonial legislation of all the Great Powers a mockery, by introducing some lax legislation of its own; or at least would enable anyone who could pay for an excursion or return ticket, and the charges of a stay of a few weeks or months on its territory, to set his own law at defiance. An international matrimonial office might be set up at Monaco, just as there now exists there an International Gambling Bank.⁶

It is very proper that jurisprudence should strive to lay down, as far as possible, principles which can carry the motto "*hic et ubique*," that is to say, we should, as far as possible, avoid the melancholy predicament that one and the same marriage is valid by the law of one State, and invalid by the law of another, perhaps an adjoining, State. With this end in view, one is inclined to recommend to the legislation of each State a [certain measure of concession, or, as one might say, a rounding off of the corners of its own system, in the case where a marriage has been concluded abroad, and has substantially to subsist abroad. This consideration was at the bottom of the sketch which Brusa and I laid before the Institute of International Law in 1885, especially in so far as it dealt with impediments to marriage existing by the law of the wife's country. But there is a long way between this and the recognition of a territory for international marriages, within which each and every kind of marriage, which is forbidden elsewhere, abductions, etc., may be legalised, so that the native State of the spouses, or the State in which they are for the future to live, will have to accept the most open neglect and contempt of its laws. I cannot believe that it would prosper, and I doubt if the Great Powers of Europe would be inclined to tolerate the sovereignty of every little State that chose to take up this position.⁷

D. BETROTHAL.

§ 171. It results, from the same reasoning as proves that the personal

country in which the disputed marriage took place that are competent to pronounce decree of nullity, but those of the State to which the spouses belong at the date of the action. They have subjected themselves to these latter.

⁶ My respected colleague König certainly did not fully consider the perils to European States which would arise from his system.

⁷ If the laws of particular States (cf. Code. Civ. art. 88) invest certain military officials, in an army stationed in foreign territory, with the functions of civil officials charged with matters of *status*, it is questionable whether they can celebrate marriages between soldiers and foreign women. Verger, pp. 133, 134, says Yes, and refers to French jurisprudence. (See, however what was said above, as to the competency of ambassadors and consuls.) He is, however, right in holding that such marriages, between soldiers and foreign women, can be celebrated by the officials of the occupied territory. For the territorial sovereignty which has hitherto existed, and the consequent right of these officials, are not suspended by the military occupation.

law of the husband should be the legal test of marriage, that betrothal, which does not subject the woman to the personal statute of the man, and under which both parties still face each other with full rights the one against the other, must be tested by the personal law of both.¹

It is only in so far as the form of the betrothal is concerned, that the rule "*locus regit actum*" is to be applied, and it is obvious that the judge must reject any suit founded on a betrothal, which is regarded by the law of his country as improper or indecent.² But it does not at all follow that betrothals generally are subject to the law that prevails at the seat of the court.³ This cannot be deduced from the attribution of a coercitive character to the law that prevails there. The application of the rule "*locus regit actum*," is, in the case of a betrothal⁴ above all other cases,

¹ If, therefore, there is a case of a real conflict of law, the decision must be in the defender's favour. *E.g.* suppose that by the bridegroom's personal law the betrothal is invalid, but valid by that of the bride. If either raises a process, founding on the betrothal, the action must be dismissed. Cf. Duplessis, Consult. 20 (Œuvres, ii. p. 115). See judgment of the Supreme Court at Stuttgart, 28th June 1853 (Seuffert, vi. § 306). "By the provisions of the marriage law of Würtemberg, a valid betrothal can only be dissolved by a sentence of the Consistorial Court; this provision is a law of a positive coercitive character, resting on reasons of morality, from which a woman, who, as a native of Würtemberg, is bound by it, cannot withdraw herself, on the ground that she has entered into a contract of betrothal with a foreigner, with a view to carrying out her contract in another country." See, too, Ct. of the Empire, iv. 2nd March 1885; same Ct. 7th July 1887; and Ct. of the Empire, ii. 21st October 1887 (Bolze, *Praxis*, i. § 43, v. § 10); the bridegroom lived in the territory of the common law, the bride in the territory of the Prussian Allgem-Landr. The Prussian Landr. is not, as a matter of course, held decisive of the question, whether the bridegroom can sue for damages, apart from any question of form which must be settled by the common law; the point to be settled rather is, to what law did the parties intend to subject themselves? (This form of expression seems innocent.) It is at the same time, says the judgment, to be taken into account in what country the marriage was intended to be celebrated (carried out?).

² *E.g.* by art. 45 of the Austrian General Statute Book.

³ Unger, p. 192, is of a different opinion.

⁴ A judgment of the Supreme Court of Appeal at Celle, on 3rd February 1816 (Seuffert, v. No. 36), proceeds on the opposite theory. By the legal system of the Principality of Calenberg in Hanover, in matters of marriage and betrothal, of date 5-16th January 1733, it is necessary, to constitute a contract of betrothal that can be sued upon, that it should be preceded by the sanction of the parents on both sides, or of the grandparents or guardians, as the case may be, and that the betrothal should take place before two persons of repute, of whom one, in country places, is to be the clergyman of the locality. The judgment referred to lays down that the legality of betrothals of inhabitants of Calenberg is to be tested by the rules of that system of law, as positive rules, even in cases in which the betrothal takes place in another country, and the marriage is intended to subsist in another country. See, on the other hand, the judgment of the Supreme Court of Wolfenbüttel, of 8th March 1858 (*Zeitschrift für Rechtspflege im Herzogthum Braunschweig* 1859, No. 2, p. 28), which applies the rule "*locus regit actum*" to a betrothal of a Brunswicker and a foreign woman in a foreign country, and declares it good, although the law of Brunswick has special forms for betrothal, with requirements of its own, which must be observed, and the omission of which is threatened with punishment; and these ceremonies were of course omitted in this case. See, too, Court of the Empire, iv. 4th March 1885 (Bolze, *Prax.* i. § 43, p. 10). See, too, an interesting judgment of Ger. Imp. Ct. (ii.), of 27th October 1887 (Dec. xx. p. 333), by which the law of the place of the intended domicile of the marriage is held to be regulative, as being the true place for the fulfilment of the promise which has been given.

imperative, unless good faith and confidence are to be wantonly abused.^{5 6 7}

E. PERSONAL RELATIONS OF THE SPOUSES DURING MARRIAGE.

§ 172. No one will doubt that the personal relations of the spouses must be determined, while the marriage lasts, by the national law of the husband.¹ A change of nationality, or of domicile, as the case may be, gives rise at once to the rule of another law.² We cannot look at the matter as if it were a mere contract, although no doubt the entering into a marriage is a kind of contract. The parties may marry or not, as they please: so far they are free: but if they do marry, they are not free to adopt some of the consequences of the married relation, and reject others; the law itself, in truth, determines these consequences directly, and it certainly desires that the marriages of all who are its permanent subjects shall be regulated by its own provisions, irrespective of whether the parties may have at some past time belonged to some other State and its law.

What I have just said applies to the capacity of the wife to act, which is variously dealt with in different legal systems, applies to her capacity to sue without her husband's concurrence, to the possibility of her being invested with a general power to that effect by her husband (*Codice civ. Italiano*, art. 134), etc. There can be no doubt that this is so in cases in which the national (or domiciliary) law, differing from the law of the transaction in question, gives the wife wider powers.³ But it is also the law, as the general consensus of opinion on the Continent of Europe rightly holds, in the converse case, where a wider capacity is accorded to her by the law of the place of the transaction than she enjoys by her domestic law.⁴

We must however remark, in the first place, that the husband can only put in force any measures of personal constraint upon his wife, in so far as the law of the place of residence will allow. If, for instance, their domestic law allows him to lock her up, or to do so under certain conditions, he does not enjoy this power, if it does not exist by the law of the place of the wife's residence at the time. If our law forbids such a measure of force, and sets a higher value on personal liberty, it will regard force of

⁵ The law of betrothal is often passed over in expositions of private international law. Stobbe, § 34, note 1, agrees with the text.

⁶ An action for solemnisation of the marriage is only competent if the betrothal has this effect both by the *lex fori* and by the domestic law of both spouses. Stobbe, § 34, 1, and Muheim, p. 183, speak only of the *lex domicilii* of the defender, and of the *lex fori*. But if the pursuer is, in any case you like to take, not himself bound, the defender cannot be.

⁷ On the import of betrothals in Germany, there is a gross error in Beach-Lawrence, p. 306.

¹ Phillips, § 24, p. 189; Wächter, ii. p. 185; Weiss, p. 670.

² See, in particular, Stobbe, § 34, note 7.

³ Laurent, v. § 61; Weiss, p. 674.

Fiore, § 110; Weiss p. 675; C. de Chambéry, 9th January 1884, Jour. xii. p. 180.

that character as *contra bonos mores*, and our legal system can never hold out its hand to realise, what it regards as *contra bonos mores* or degrading.⁵ On the other hand, however, a husband can never claim a higher right of compulsion over his wife, than his personal law gives him. If his personal law regards the married life rather as an affair of freedom and of good manners, the system of law of the place of residence has no reason for introducing, in the shape of constraint, a new element into the married life of two foreigners; and all the less can it do so, as even by its own provisions it is left to the humour of the spouses to introduce that element into their life or not.⁶

The second remark we have to make is, that whatever the law of the place of residence regards as the bounden duty of mankind as between spouses, must be recognised by them, so long as that residence endures, irrespective of any different rule laid down by their personal law. This rule is specially to be kept in view in questions as to aliment. If a man was released from his obligation to maintain his wife, because his personal law knew of no such obligation, or ignored it in the particular circumstances of the case, a foreign wife would now and again require to be supported at the expense of the poor's box.⁷ It is true that this obligation ceases so soon as the husband quits the territory. But, on the other hand, the measure of it, where it does exist, is at the least the extent to which the personal law of the husband recognises it.⁸ There is no ground on which the law of the place of residence should hinder the operation of a more extensive duty of support sanctioned by his personal law.

NOTE I ON § 172. PERSONAL RELATIONS OF THE SPOUSES.

[The French courts hold that the personal relations of the spouses are determined by the law of the husband's domicile (*Caro v. Caro*, 1875, Jour. iii. p. 182). In other judgments there had been a question whether the law of the husband's nationality or that of his domicile should prevail in such matters (*Bronski v. Bronski*, 1876, Jour. iv. p. 237); but the final decision, and the law accepted at present, is in favour of the law of the domicile, and an exception is made to the ordinary French rules of jurisdiction, by which suits between foreigners are not entertained, so that a wife can sue in France upon personal rights given her by French

⁵ Laurent, v. p. 110; Story, § 189; Weiss, p. 672. See, too, *Civilprozessordnung des Deutschen Reichs*, § 774, Div. 2.

⁶ Laurent, v. p. 113; Weiss, p. 672.

⁷ Laurent, v. p. 185, takes a different view; Brocher, i. p. 297; Olivi, Rev. xvii. p. 55. See on the other hand, and in agreement with the text, Aubry et Rau, i. p. 82; Fiore, § 109; Weiss, p. 677. Thus the courts of a country in which a foreigner is residing are competent to decern against him for aliment. Trib. Seine, 31st August 1878; C. Paris, 3rd August 1878 (Jour. vi. p. 66), agrees with our conclusions. Clunet (Jour. vi. p. 67) has very sound observations on this point.

⁸ To the same effect, Weiss, p. 678.

law, where there has been an intention of making a home in France, that intention being indicated by the establishment of a business in France (Camous *v.* Ghisla, 1878, Jour. v. p. 610). In that case the place of the matrimonial domicile was held to determine all the personal relations of the spouses; and in the later case of Kowalski *v.* Kowalski (1879, Trib. Civ. de la Seine, Jour. vi. p. 550), in which the husband was by nationality a Pole, the same inference—viz. of an intention to submit the regulation of their rights to French law by making France the home of the marriage—was drawn from the facts of a French marriage to a French wife, a French marriage-contract, and a residence in France, and jurisdiction was accordingly exercised by the court to determine the husband's liability for aliment. Equity has established in such cases a legal category of matrimonial domicile, so much invoked in cases of divorce both in Scotland and the Continent, to do justice between parties who might otherwise find their rights indefinite, and the remedy for infringement of them beyond their reach. (Cf. *infra*, p. 399 *et seq.*)

In the law of England (Westlake, p. 61) and in that of Scotland (Fraser, p. 1318) the personal relations of the spouses must be determined by the law of the *forum*, in so far at least as such rights are of the description dealt with in the text. According to Story, § 198, the domicile of the marriage, or, if that is not clear, the domicile of the husband will rule. The result in practice will probably be found to coincide pretty much with the doctrine of the text, because wives claiming aliment or demanding protection will resort to the *forum* of the place of residence, while these courts will not determine any question of rights so as permanently to affect the marriage relations unless they have jurisdiction *ratione domicilii*.]

F. DIVORCE.

§ 173. Divorce, and that permanent judicial separation, which in many respects is equivalent to it, recognised by those systems of law which have no real divorce to the effect of completely dissolving the marriage tie, are subject to the national law, or the law of the domicile of the spouses. It can never be the purpose of any system of law to determine whether a marriage subsisting between foreigners is dissoluble, or to say on what conditions it may be dissolved.¹ But while the law of any country where an action is brought may refuse to pronounce a divorce as contrary to morality, if it be asked to do so upon grounds which it pronounces to be inadmissible, so, conversely, every ground of divorce which the law of the country approves must be unconditionally applied by the judge who has cognisance of the case, since the maintenance of the marriage tie, in spite of these grounds for separation, must be held to be

¹ Burge, i. p. 689; Stobbe, § 34, note 11; Wharton, § 223; Fiore, § 131; Brocher, i. § 96; Weiss, p. 705; Laurent, v. § 119.

just as much an offence against morality.² This conflict, according to which the law of the nationality or domicile would be applied on the one hand, while the *lex fori* is applied on the other, is solved by the consideration,³ that in actions of divorce—unless there is some express enactment to the contrary—the judge of the domicile or the nationality is the only competent judge,⁴ while we cannot allow the parties the option of submitting themselves to the law and to the courts of another country, since it is not in their power to deal as they please with the relation which is the subject of the action.⁵ A decree of divorce, therefore, pronounced by

² Walter, § 42; Schäffner, p. 159; Savigny, § 379; Guthrie, p. 299; Story, § 227. Cf., too, the judgment of the Court of the Empire, iii. Sen. of 22nd April 1884 (*Entsch.* xi. p. 29); according to § 77 of the Imperial statute of 1875, German courts can only decree dissolution absolutely, and not separation *a mensa et thoro*, even although by the native law of the parties the latter is the only known form of interfering with the marriage. (Judgment of the Imp. Ct. 19th June 1883, *Entsch.* ix. 192.)

³ Cf. Durand, § 175; Bard, § 147; v. Martens, § 72, who, however, under note 9b, makes an exception of which we shall take notice.

⁴ Although a decree of divorce cannot be pronounced by a court whose laws do not recognise divorce, a decree of divorce pronounced by a competent foreign court must have its proper consequences, even in a country whose courts have no such powers. Accordingly, in such cases, the foreign judgment may be declared executory. See App. Ct. of Rome, 1884 (*Jour.* xiii. p. 620), and Clunet, *ibid.* p. 622, who cites a judgment of the French Court of Cassation of 22nd February 1860.

⁵ Wheaton, i. § 111. Gand, No. 390, and the practice of French courts: see, for instance, a judgment of the Court of Cassation, 14th April 1818 (*Sirey*, xix. 1, p. 193), 27th November 1822 (*Sirey*, xxiv. 1, pp. 48-52), Cour Royale de Paris, 26th April 1823 (*Sirey*, xxiv. 2, p. 65), Cour Royale de Metz, 25th August 1825 (*Sirey*, xxvii. 2, p. 192). That is the rule of French law. See, too, Asser-Rivier, § 53. (Attention is here called to the fact that a decree of divorce does not, like other civil judgments, merely declare existing rights, it intends to create a new condition of things.) See, too, *e.g.* Trib. Civ. Seine, 1st December 1877 (*Jour.* v. p. 45). Féraud Giraud (*Jour.* xii. pp. 383, 384). Trib. Seine, 9th February 1882 (*Jour.* ix. p. 89): absolute incompetency of foreign courts to pronounce a decree of *séparation de corps*, if the spouses are French. But, on the other hand, it is illogical for French practice (see C. de Par. 5th August 1886, J. xiii. p. 584, and Demangeat, J. v. p. 450) to hold this incompetency cured, if the defender does not timely take the objection of no jurisdiction. In laying down this rule, a certain arbitrary discretion is reposed in the court, which may reject the suit altogether. Demangeat in such a case pleads *Ordre public*. But with the help of such a plea we can, as we have repeatedly noticed, justify the absolute exclusion of the personal law. It is a much sounder view to hold, with a judgment of the Trib. de la Seine (*Ch. i.*) of 16th July 1886 (J. xiii. p. 707), that the refusal to exercise jurisdiction or declaration of incompetency is imperative (*s'impose*), if a judgment in the matter, submitted according to the personal law, could not be given without contradicting the principles of the *droit public* of France. According to the theory which requires a plea of no jurisdiction to give rise to a declinature by the court, the court will be competent in every case in which the defender does not appear (Trib. civ. Seine, 20th December 1886, J. xiii. p. 710), Günther, pp. 731, 732. By the law of Baden, L.R. §§ 234, 102, the courts of Baden have no jurisdiction over the matrimonial suits of foreign spouses, unless they have obtained leave from the Government to take up their domicile in the country, and have done so, and thereby have the privilege of exercising all the rights of citizenship equally with natives, so long as they continue to reside there, or unless the case shall fall under one of the exceptions provided for in the 63rd paragraph of the Baden regulations as to marriage. In this paragraph it is provided: "If the wife shall acquire for herself a domicile in this country, that shall not give rise to any right to obtain judgment in matrimonial suits with her husband; the dispute must be referred to the tribunal of the husband's domicile, unless he, with the approval of his Government, shall consent to prorogate the jurisdiction of the courts of this country." In Baden the rule is now given by § 568 of the

any other judge than a judge of the domicile or nationality, is to be regarded in all other countries as inoperative.⁶ If a different view were to

Deutsche Processordnung, which declares the German Court of the domicile competent for foreign spouses. The revised statutes of Massachusetts of 1835, chap. lxxvi. §§ 9, 10, 11, declare that their courts shall on no account pronounce decree of divorce, unless the parties have lived together in Massachusetts as married persons. Further, no divorce shall be entertained by reason of any circumstances that have taken place in another country, unless the parties have lived together in Massachusetts as husband and wife before their occurrence, or unless one of them at the time of the occurrence of such circumstances was living in Massachusetts. By the 39th section, a divorce obtained in some other State by an inhabitant of Massachusetts, on the ground of some fact which took place in Massachusetts, and while the spouses were living there, is invalid, if the said fact would not be ground for a divorce by the law of Massachusetts. The statute of 1843, cap. 47, provides that decree of divorce may be pronounced on account of facts that have taken place in a foreign State, if the pursuer has resided for five years in Massachusetts before raising his action, Story, p. 257, note 1. Westlake Holtzendorff, § 39; Piggot, p. 280. (The application of the *lex domicilii* and the exclusive competency of the *judex domicilii* are the doctrines of modern English law.) Olivecrona (J. x. p. 359) holds that the courts of Sweden are competent to divorce foreigners who have been married in Sweden, because the law of Sweden looks upon the marriage as a contract guaranteed by the State. Olivecrona, however, likewise reports that the king in council has lately (16th December 1881) declared himself to have no such jurisdiction. Validity of a decree of divorce of an Austrian couple pronounced by a foreign *judex domicilii* at Berlin, affirmed by the Probate Division of the English High Court of Justice, 2nd July 1881, J. xv. p. 277 [Ingham v. Sachs, R. 56, L. T. 920]; see Pittlingen, § 59, Oesterreichisches Hofdecret, 23rd January 1801; see, too, Savigny as cited. This principle is in no way transgressed if a different tribunal from that of the domicile is declared to be competent within the territory of the same State, that State having one system of marriage law. The other principles which regulate the operation of decrees pronounced abroad are excluded from consideration here.

⁶ Judgment of the Cour d'Appel de Paris, 11th February 1808 (Sirey, viii. 2, p. 86). Trib. Seine, 7th February 1882 (J. ix. p. 89), Féraud-Giraud (J. xii. p. 248) declares in favour of the competency of the French courts, if the foreign spouses have acquired an authorised domicile in France. But in our view the incompetency of non-national tribunals does not rest on the fact that the spouses have no *droits civils*, but rather on the proposition that the regulation of family relations is exclusively an affair for the national law and national tribunals of the spouses. Laurent (iv. § 56 *et seq.* particularly § 60) says that the courts of Belgium hold themselves competent, if the spouses have their domicile there. He defends this manfully against the entirely different view which prevails in French law, and mainly on the ground that the Belgian courts would not put into execution any judgment pronounced in another country, which is the State to which the spouses belong: as Belgian courts will not recognise such decrees, there would, he argues, be a real denial of justice if they referred suitors to these foreign courts. This argument seems to result in curing one error of Belgian law by committing another. The sentence of divorce is by French law recognised as a declaration of personal *status*, and needs therefore no special declaration to render it executory in France, if it is pronounced by the courts of the country to which the parties belong. The alleged denial of justice does not take place. See Trib. Civ. Liège, 13th June 1885 (J. xiv. p. 491), in harmony with Laurent. This judgment, as a matter of principle, applies the national law of the parties to test the grounds for divorce. See Burge, i. p. 690, who says: "It seems scarcely compatible with the respect which States owe and render to the laws of each other, that the tribunals of one should afford assistance to the subject of another State in withdrawing himself from the operation of a law which is obligatory on him. Nor is it required by any considerations for the supremacy of its own laws, that such assistance should be afforded." The courts of the different States of the Union in America refuse to recognise decrees of divorce pronounced in other States, if the parties were not domiciled there, Burge, i. pp. 691-693; Story, § 229a; Wharton, *ut cit.* The statute of Massachusetts cited in the last note makes that special provision.

The Courts of Scotland, whose practice has varied, have in some cases held that they had

be taken, the subjects of a State could easily defeat the law by which they are absolutely bound.^{7 8}

On the other hand, the place in which the marriage was celebrated is of no importance.⁹ The other view,¹⁰ which proposed that the law of that place should rule, held divorce to be a contract right of the spouses. If this opinion were correct, no law to regulate divorce could apply to marriages contracted before its promulgation.¹¹ But marriage, although it rests upon the intention of private parties, is a part of *jus publicum*, and the spouses are absolutely subject to the *jus publicum* of the place in which they are domiciled.

From this the next step is, that the nationality or domicile of the spouses at the date of the action, and not that at the date of the marriage, or of the event on account of which divorce is sought, must rule.^{12 13} Some English judges [once] contended that a marriage concluded in England could only be dissolved by English law; in later times, however, there seems to be an inclination rather to take the view that the acquisition of

jurisdiction although the parties were not domiciled in Scotland—they have been inclined to regard a mere temporary residence as sufficient. The argument specially urged in favour of this view, that residence in any country gives right to the protection of the law and the courts of that country, can never, considering the really permanent character of marriage, give jurisdiction to sever this enduring relation definitely, but merely confers power to separate the spouses temporarily, by provisional regulations, with a view, for instance, to protect the wife against the cruelty of her husband. [Scots law goes no further, see below, p. 399 *et seq.*] See Gand, No. 424; judgment of the C. de Cass. 27th November 1822 (Sirey, xxiv. i. pp. 48-52). There is just as little reason for referring to the event on which the action proceeds. No doubt some grounds for divorce, such as adultery, may be held to be delicts also; but the question whether these acts can dissolve the marriage, is quite distinct from the question by what law the delict is to be judged, Burge, p. 680. [For the present state of Scots law on this subject, see note at the end of paragraph 180, p. 399.]

⁷ Schäffner, p. 160.

⁸ The court of the domicile, or even of the place of residence, in cases of necessity are competent to lay down provisional rules, *e.g.* to regulate a provisional separation to protect the wife from cruelty, or to make temporary provision for her aliment, to restore for a time at the husband's instance the *domicile conjugal*. French practice recognises this. See Féraud-Giraud, J. xii. p. 392.

⁹ A peculiar principle obtains in the Argentine Republic. The law of the Catholic Church, which does not permit divorce, is there recognised as being absolute to such an extent, that a decree of divorce pronounced at the home of both spouses will not be recognised, if one of them subsequently comes to the Argentine Republic. But, on the other hand, so much respect is paid to the sovereignty of the *lex loci actus*, that if the law of the place where the marriage took place permits divorce and the re-marriage of the parties to other persons, this rule is recognised in the Argentine Republic.

¹⁰ Pütter, *Rechtsfälle*, iii. Th. 1, pp. 80, 85, 86. But, on the other hand, see Foote, p. 59.

¹¹ Burge, i. pp. 683, 684; Story, §§ 221, 222.

¹² Burge, i. pp. 682-688; Gunther, *ut cit.*; Savigny, § 379; Guthrie, p. 299; Story, §§ 222, 228, 329. See the Massachusetts statute of 1843 (Story, p. 257), *supra*, note 5. Laurent, iii. § 302. By a judgment of the Trib. de Brux. 12th May 1877 (see Rev. xiii. p. 61), the wife of one who by naturalisation has become a Belgian, cannot found on the fact that by the law of the country to which she formally belonged divorce is not recognised.

¹³ A judgment pronounced by a court which is incompetent will not be rendered competent by the subsequent acquisition of nationality by the divorced persons in that State. (Sup. Ct. of Austria, 9th December 1885, J. xiii. p. 475.)

a *bona fide* domicile¹⁴ in the country where divorce is sought is necessary, and is all that is necessary.¹⁵

The place, too, in which the act which is said to constitute the ground of divorce was committed, is, as we think, of just as little consequence.¹⁶ We are not here concerned with any question of criminal law, but with an alteration of personal *status*.¹⁷ If, then, something took place which is no ground for divorce by the personal law of the spouses at the time, but is a ground for it by a personal law which they afterwards acquire, and if the thing which took place had no continued existence, happened once for all—if, for instance, by the earlier law simple adultery by the husband is not a ground on which the wife can sue for divorce, but must be accompanied by some other qualification (Code Civ. 230),¹⁸ while by their subsequent law simple adultery is enough—a change of nationality [or domicile] cannot elevate to the rank of a ground for divorce the circumstance which took place under the dominion of the former law. We may say that if the spouse must put up with this conduct, without being able to raise an action of divorce, it is regarded, so far as the marriage is concerned, as non-existent.¹⁹

WHERE SPOUSES HAVE DIFFERENT NATIONALITIES OR DOMICILES.

§ 174. It is true that the wife shares the nationality or domicile of her husband:²⁰ but if the husband abandons the place of their common residence, by the law of which the wife is entitled to divorce, she cannot be denied the privilege of raising her action of divorce there, so long as

¹⁴ By *bona fide* domicile, English jurists understand a domicile *animo remanendi*. According to the terminology of the common Roman law, there is no such thing as a domicile without this *animus*.

¹⁵ Story, § 216; §§ 219 and 226c. Lord Brougham, too, has expressed himself to this effect in more modern times. See note to Story, § 226. Cf. Schöffner, p. 160, also Harvey v. Farnie, 1882, L.R. 8, App. Ca. p. 43.

¹⁶ See judgment of Ct. of Celle and of the German Imp. Ct. (iii.) 19th June 1883 (*Entsch.* ix. No. 48, p. 191) and 12th January 1886 (*Entsch.* xv. No. 40, p. 188).

¹⁷ A. M. v. Martens, § 72 *ad fin.*; he declares the court of the place of the delict competent.

¹⁸ Otherwise by the French statute of 29th July 1885 (Barelay in the Law Quarterly Review, July 1885).

¹⁹ To this effect Weiss, p. 706, and Ct. of Emp. 27th May 1886 (Bolze, iii. No. 24), a judgment founded on the provisions of the Prussian Allgem. Landr. as to the conflict of statutes in time.

Apparently to a different effect Imp. Ct. (iii.) 22nd June 1886, a judgment founded on the strictly coercive character of the law of divorce. Bolze, *ut cit.* No. 25, and *Entsch.* xvi. No. 28, p. 138.

²⁰ Accordingly, she cannot raise an action of divorce before the courts of her original home. On this ground, for instance, the Dutch courts have declared themselves incompetent in a case in which a woman, who had been a Dutchwoman but had married a foreigner, raised such an action. [So, too, the Courts of Scotland in the case of a Scotswoman, who had married an Englishman, and after being deserted by him, had returned to Scotland. Redding, 1888, Ct. of Sess. Reps. 4th ser. vol. xv. p. 1102. Again, in the case of Low v. Low, 1891, Ct. of Sess. Reps. 4th ser. p. 115, the doctrine that a wife's domicile follows that of her husband is affirmed for all cases, except, perhaps, where the spouses are judicially separated. See *supra*, pp. 117, 118, and notes.] See Hingst, Rev. xiii. p. 411.

she does not actually follow her husband to his new residence *animo remanendi*.²¹ The fact upon which she founds gives her a right to dissolve the marriage, and at the same time a right to choose a special residence for herself. The former right depends, however, upon the latter, and thus, if she should follow her husband to his new residence, the law of that country will rule her rights also.²² If the wife is refused this privilege, then the husband will be able at his pleasure to put an end to any just claim for divorce.²³

What are we to say, however, to the case where one spouse only obtains naturalisation in a foreign country, and has himself divorced there? If, as is the case in France, the law does not provide that the naturalisation of the husband affects the wife *ipso jure*, such cases will occur not unfrequently. Laurent (v. § 147) thinks that such a conflict, supposing that the personal law of the other spouse does not allow divorce on the same conditions, is, from the point of view of positive law, insoluble. He thinks, however, that the State to which the one spouse has gone over, must give him or her a divorce with all its consequences, and as a matter of fact judgments to this effect have been pronounced both by the courts of first instance and by the Appeal Court at Brussels (12th May and 31st Dec. 1877, J. v. p. 513). Opinions to the opposite effect are given by Labbé (J. iv. p. 22), Lehr (*ibid.* p. 120), Weiss, p. 188, and Pilicier, p. 289.²⁴ Their reason is that the wife, in entering into the contract of marriage, acquires a right which cannot be taken from her without her consent, to

²¹ Cf. Trib. Seine, 4th February 1802 (J. ix. p. 544): a French wife may apply to the French Courts for *séparation de corps*, if the husband, with the view of obtaining divorce, has had himself naturalised abroad, and has obtained a decree of divorce there. See, too, C. de Chambéry, 27th August 1877 (J. v. p. 164). On the other hand, a deserted wife who acquires a new domicile cannot convene her husband in the courts of her new residence. So rightly decided by the English High Court of Justice, 1876, *Lesueur v. Lesueur*, J. iii. 191 [L.R. 1, P.D. 139].

²² Story, § 229a. *Quid juris* in the case of a wilful desertion, where the wife does not know where her husband's domicile is? See Richter, Kirchenrecht, § 269 *ad fin.* [In Scotland see case of Redding, *supra*, p. 385, note 20.] The decree of divorce must in such a case be recognised even at the new domicile of the husband: the marriage law of a State can bind none but the citizens of that State, and the courts of this country can only pronounce decrees against their own citizens. If, therefore, only one of the persons in question belongs to the State, while the other is, by the law of her domicile, freed from the matrimonial tie, the view which would refuse to regard the subject of the one State as a single person would, by consequence, require a foreigner to submit to its rule, since marriage consists in a union between two persons. If both spouses change their domiciles, the court of the former domicile ceases to be competent. Story, as cited.

²³ See Fœlix, i. pp. 362, 363.

²⁴ See, too, de Nobele's paper (J. xiv. p. 575, especially p. 583), and the judgment of the C. de Bruxelles of 31st Dec. 1866, cited by him, which seems to lay down that a wife who has remained in a foreign country need not appeal to the Belgian courts in a process of divorce against her husband, who has been naturalised in Belgium, if her own country (cf. art. 52 of the Belgian law of 1876) will show reciprocity in matters of the kind. But the Belgian courts cannot in this way decline jurisdiction, because the divorce involves at the same time a question of *status* for the Belgian husband, and therefore in the nature of the thing the courts of Belgium must be competent. Without such competency in the Belgian courts, the right of the husband to divorce would, in the circumstances of the particular case, be rather a mockery.

be protected against any divorce save in conformity with the law to which she submitted herself when she was married. I cannot follow this reasoning. If sound, it would establish that a new statute, introducing divorce for the first time, could not be applied to existing marriages except with the consent of both parties. In the one case, as in the other, it may be said that the spouses were wedded on the faith of the laws which then ruled marriages exclusively. But there is no such thing as a contract right not to be divorced, just as there is no contract right to be divorced. The State, into which the one spouse has been received, will simply, as a matter of logical necessity, apply to this spouse the new personal law under which he has fallen, and dissolve the marriage in accordance with its own law, instead of maintaining a matrimonial relation which has in its view become untenable. Whether the State in which the other spouse has remained is in this event also to regard the marriage as dissolved, depends on whether it looks upon marriage as necessarily a bilateral relation, or, in conformity with the conception of the Catholic Church, treats it as a sacrament which unconditionally binds the individual.

We may further refer to Nobelet's paper (J. xiv. p. 575): "*De la conversion en divorce d'une séparation de corps à l'étranger entre étrangers*," and that of Humblet on the same subject (J. xv. p. 461), for a discussion of the question as to what is to be the result where the spouses have different nationalities, or where they change their nationality.

We are prepared to go thus far with the results of the former paper, that it is only a person who has become naturalised in a country who can transform a *séparation de corps* into a true divorce under the rules of his or her new personal law, and that a mere change of domicile at least cannot have that effect, if we follow French or Belgian law. But putting aside altogether the consideration that we can by no means admit that processes of naturalisation, which are alleged to have been gone through *in fraudem legis*, are to have no validity, we do not believe that the wife, who has remained in what used to be her husband's country, can stop the divorce of that husband, who is now domiciled in Belgium, simply by leaving the citation in the process unanswered, or disputing the competency of the court. The question at issue is a question of the *status* of a naturalised Belgian, and the courts of Belgium must be competent. Certainly this objection to competency cannot be raised under any of the numbers 1-10 of the 52nd article of the Belgian statute of 25th March 1876, which deal with the competency of Belgian courts in questions with foreigners. But the primary question in such a case is not so much the foundation of the action against a foreign wife who has remained in her own country, as of the release of a naturalised Belgian from the matrimonial bond. The question whether the wife who has remained abroad is still bound by the marriage can only be regarded as a question dependent upon that as to the *status* of the husband, at least in any Belgian court which is invited to determine that *status*. In our view, the wife who remains abroad has herself the right of transforming the separation into divorce in the courts

of her own country, and according to the rules of its law, and to cite the naturalised Belgian to appear there. From the point of view of international law, this citation seems simply to be an opportunity afforded to the defender of informing him or herself of the proceedings. Although the party cited makes no use of this opportunity, the question will, all the same, be brought to a decision, and the *status* of the subject of the country determined. Humblet's paper is too much based upon the details of the French and Belgian legislation, to merit a thorough examination here.

NATURALISATION IN ANOTHER STATE WITH THE OBJECT OF BEING DIVORCED.

§ 175. What are we, however, to say to the case of two spouses, who, for the very purpose of evading the law of the country to which they belong, which either forbids divorce altogether, or makes it impossible for them in the particular circumstances of the case, get themselves naturalised in another country, obtain a divorce there, and at once return into their former country? Is a divorce so obtained, openly *in fraudem legis*, a nullity?

The law of England and the United States says it is null,²⁵ and so does that of France.

If, as is the case in the law of England and in the United States, we take domicile and not nationality as our basis, there is no doubt of the correctness of this solution. If a man merely makes a show of changing his domicile, he has in truth not changed it at all (see *supra*, § 68): the court of this pretended new domicile had therefore no jurisdiction, and with its jurisdiction stands or falls all claim that the decree of divorce could make to international recognition. But, in so far as French law is concerned, the matter stands otherwise. It regards naturalisation no doubt as a formal act, but has not yet been able to shake itself entirely free from the old domicile theory; but if we consider the logical consequences of holding naturalisation to be a public formality, into which no *reservations mentales* can, or indeed in the public interest will be allowed to enter, the divorce must be pronounced to be valid. We can refuse the spouses the power of regaining their former nationality, and, if their residence in the country, by reason of their open contempt of its law, creates a scandal, we can expel them. This is a sounder method than the refusal to recognise the decree of divorce pronounced abroad, because such a refusal will often lead to a contradictory treatment of the family relations of the same persons in different countries, which may be highly prejudicial even to third persons. If the legislation in question (*e.g.* the French) makes it

²⁵ Wharton, §§ 228, 223; Westlake-Holtzendorff, § 41; Westlake, § 45, *note*, says: "The remark (by Lord Penzance) on the uncertainty attending the fact of domicile, suggests the question whether the British legislature would not be wise in enacting, in accordance with the modern tendency, that political nationality shall, as far as possible, be the criterion for personal law and jurisdiction."

very easy to reacquire the lost French nationality, there is, then, every inducement to uphold the theory of the invalidity of the naturalisation, because of its having taken place *in fraudem legis*.

Again, a law which permits its citizens to have a sentence of separation *a mensa et thoro*, which has been pronounced at some earlier period, transformed into a true divorce, has reference to subjects who have become its subjects subsequently to the decree of separation. From this springs the controversy, which for a time was much debated, as to the so-called Transylvanian or Klausenburg marriages in Austria.²⁶ The Austrian, *i.e.* Cisleithanian law, in cases in which one of the spouses is Catholic, allows only separation *a mensa et thoro*; the law of Transylvania, on the other hand, being a Protestant law, recognises complete divorce. Spouses who have been separated in Austria, one of them being Protestant, had themselves naturalised in Hungary and divorced in Transylvania, in order that they might contract a new marriage there. The validity of such a divorce, and the validity, therefore, of the second marriage, cannot be reasonably questioned, if both spouses were naturalised in another country, in Hungary in the case on hand. (If we take domicile as the principle which is to regulate the marriage law, of course domicile must be substituted for naturalisation.) This is the overwhelmingly preponderant view in Austrian jurisprudence. In the opinion of Lyon-Caen, the result will be different if only one of the spouses changes his or her nationality, because one spouse cannot at his or her pleasure turn what was an indissoluble marriage into one that can be dissolved. But this is not a proper way in which to put the difficulty, because the question of the dissolubility of the marriage depends upon the nationality; the nationality cannot be made dependent upon the character of the marriage. It is much more correct to say that the question is precisely the one which was raised, and discussed by us already (§ 66) in the Bauffremont case. And, as in Austria it is law that a husband by naturalisation in another State at once naturalises his wife in the same State, in Austrian law the only case which can raise a difficulty is the case of a wife being naturalised in a foreign country. If, in such a case, we start from a strictly Catholic point of view,²⁷ we reach the result that the husband who has remained in Cisleithanian Austria will not be able to marry again. But if, on the

²⁶ See, on that subject, *Vesque v. Püttlingen*, § 65 *ad fin.*, and in particular Lyon-Caen, *Jour. vii.* p. 268; Weiss, p. 706; Rittner, *Jour. xii.* p. 152. The reason why they chose to be naturalised in Hungary and divorced in Transylvania is explained by the fact that this is more convenient for Austrians. Any other country might have been chosen if the Protestant law of marriage, or a marriage law resting on Protestant notions prevailed there, or in some division of it. Since, by the law of 1879, five years of domicile is as a rule required for naturalisation in Hungary, the course of Transylvanian marriages in Austria is not so easy as it was.

²⁷ On the difficulties which arise, according to ecclesiastical law, from mixed marriages, see Richter-Dove, *Kirchenrecht*, § 290, note 28. The peculiar tendency of modern French jurisprudence on the question is explained as being the result of a strictly Catholic view of marriage.

other hand, we start from the natural idea, dictated by no ascetic rules of religious belief, that marriage is a bilateral relation,²⁸ and that, therefore, it ceases to be binding on the one side when it has ceased to be binding upon the other, the result is that by the divorce pronounced in a foreign country, if the spouse obtaining it has validly made himself or herself a foreigner, the other party at once acquires the capacity of being married again.

COMPETENCY IN ACTIONS OF NULLITY.

§ 175a. The same principles which regulate the competency of the courts in matters of divorce, are to be applied to suits directed to declaring marriages null, with this exception only, that, if the wife has not yet in fact followed her husband to his domicile, the action can be raised with effect in her domicile. For under these circumstances the action for nullity implies the contention that the wife has retained her former domicile.²⁹

SECOND MARRIAGES.

§ 176. Lastly, it is debated what law is to decide as to the possibility of the divorced spouse contracting a second marriage.³⁰ Several French authors, proceeding on the assumption that the question is one as to personal capacity, have laid it down that the law of the place where the divorce was obtained cannot be pleaded, and have referred exclusively to the law recognised at the subsequent domicile of the party. We have already remarked that almost all rules of law are capable of being expressed in the form of a deliverance upon the capacity or incapacity of a person, and therefore we cannot, from the mere use of the terms capacity or incapacity, infer that the *lex domicilii* should be applied, except where we find the definite conception of incapacity to act and to enjoy rights.³¹

²⁸ For this view and the deduction that is drawn from it in the text, see Folleville, *De la naturalisation*, p. 481, and Demolombe, *Droit Civ.* i. § 101.

²⁹ Demangeat on Fœlix, i. p. 368, loses sight of the conditions which I have required: so, too, Gand, § 390; Clunet, Jour. i. p. 74; Gentet, p. 112; Phillimore, § 490.

³⁰ Here, again, the question arises, Is it enough that the divorced husband is permitted by his own personal law to marry again, or must the law of the woman who proposes to marry such a person also permit marriage with a divorced person? The Cour Royale de Paris, 30th August 1824 (Sirey, xxv. 2, pp. 203, 204), took the latter view. (See, too, Fœlix, i. p. 68.) The Cour Royale de Nancy, 30th May 1826, took the former.

³¹ See *supra*, §§ 135, 136. In any case, the term is not applicable to single men who propose to marry divorced women, as is laid down by the decision reported in the preceding note.

But, as a matter of fact, to refuse to recognise the capacity of one who had obtained a decree of divorce in a competent foreign court to marry again, would be to deny the validity of that divorce. We may therefore lay down that there is capacity for a new marriage if that is allowed by the law which rules in the court that has competently pronounced decree of divorce,³² and that even in countries which recognise no divorce. And it is also true that the subjects of a country in which divorce is not recognised may, on a sound view of the law,³³ contract a valid marriage with a person who has been divorced by a competent foreign tribunal.³⁴

At the same time, it is only for its own citizens that the law of any country lays down bars to marriage, and not for persons who were citizens but have passed into the citizenship of another State. We must, therefore, recognise the capacity for a second marriage, if that is the law of any new domicile that may be acquired, although it may not be the law of the place of divorce; such a case would occur where by the law of the place of divorce the guilty party was forbidden to marry again till the other party died, while the subsequently acquired personal law made no such prohibition. The practice of the United States is to hold a marriage valid if the spouses were capable of a valid marriage by the law of the place where the new marriage was celebrated.³⁵ But it would seem indispensable that these persons should have acquired a *bona fide* domicile at this latter place.³⁶

³² So, too, the practice of the United States. Wharton, § 132, and in the same way the more modern French practice (Ct. of Cassation, 28th February 1860), and the great majority of authors; Demolombe, i. p. 114; Laurent, v. p. 259; Asser-Rivier, § 54; Fiore, § 133; Durand, § 177; Weiss, p. 635; Pilicier, p. 271. But Demangeat on Fœlix, i. § 32 (p. 68, note *a*), is of a different opinion. This view cannot be justified either by referring divorce to the sphere of *jus publicum* or asserting that it concerns public order (Demangeat on Fœlix, i. pp. 68, 69), for the possession of this character does not necessarily exclude the application of foreign law. Esperson now (Jour. vi. p. 329) has come over to the opinion maintained in the text, although formerly (*Principio de nazionalita*, p. 79) he took a different view. In favour of our view, see C. de Rome, 29th October 1884 (Jour. xiii. p. 620).

³³ The Supreme Court of Austria holds that an Austrian Catholic subject cannot marry a foreign woman who has been divorced. (Judgment of 6th December 1881, Jour. xiii. p. 469.) This view, however, depends not so much upon international law as upon a conception of the law of the Catholic Church which is adopted by Austrian law, although in principle it is very open to attack. Cf. Richter-Dove, § 295, note 35.

³⁴ It is entirely unsound to determine the capacity of a foreign woman, who has been divorced, to marry a native subject, according to the law of the place in which the marriage was celebrated, a course recently taken by the Supreme Court of Austria, 30th November 1880 (Jour. xiii. p. 471), under reference to § 36 of the Austrian statute book. Such a decision could only be justified by adopting the theory of the United States, which is repudiated alike by the legislation and the practice of Austria. § 36 of the statute book speaks merely of the substantive provisions of contracts, not of capacity to contract. The latter is dealt with by § 34, and according to it the personal law of the foreigner rules.

³⁵ Story, § 89; Wharton, § 135, and especially Seymour van Santvoord (Jour. viii. pp. 138-145).

³⁶ Seymour refuses to allow this limitation if the law does not expressly provide for the nullity of the marriage otherwise. As to the position of clergymen and officials whose attendance is desired at a marriage of which their law disapproves, see *supra*, § 159.

LAW OF DIVORCE IF THE COURT OF THE DOMICILE IS DECLARED
COMPETENT. IS IT DESIRABLE TO DECLARE IT TO BE COMPETENT?

§ 177. We have laid down the principle that none but the courts of the country to which the spouses by nationality belong are competent in cases of divorce.³⁷ But some legal systems take a different view, and make the *forum domicilii* also competent.³⁸ In that case it must be taken to be certain that the State, to which the spouses by nationality belong, will at the most only recognise a divorce pronounced by the courts of another State,³⁹ if the grounds on which it is pronounced are good by its own law also. It must, of course, like the law of England and of the United States, and like the general practice of the common law of Germany, allow the law of the domicile to govern the process not merely as regards form, but as regards its merits. It can then only be determined by a careful revision of the decree, and of the process by means of which this decree has been reached, whether the personal law which is to govern has been transgressed, if not in the letter, yet perhaps in the spirit.⁴⁰ Such a revision, however, simply implies non-recognition of the judgment already pronounced as *res judicata*. In truth, the revising court in such a case pronounces a new decree, in which it may no doubt use the materials collected in the former process, in so far as that is allowed by the rules that guide the process, *e.g.* the principles by which oral procedure is governed. That shows how mistaken⁴¹ the whole theory is. The parties have obtained a decree of divorce, and know not whether their own State,

³⁷ See, too, judgment of the Supreme Court of Austria, 18th October 1884 (Jour. xiii. p. 472), which declared that a decree of divorce obtained by an Austrian subject in Prussia, where the divorced husband had at that time his residence, was null.

³⁸ To this category belongs the *Civil Processordnung* for the German Empire, § 568 (see Struckmann and Koch, Commentary on this section, No. 2), and Wach (*Handb. des Civilproc.* i. § 39). Judgment of the Court of the Empire (i.), 4th January 1881, and (iii.) of 19th June 1883 (*Entsch.* iii. p. 27, and ix. p. 191).

The former judgment of the Imperial Court, sound *de lege lata*, has, in obedience to § 77 of the German statute for the regulation of personal *status*, destroyed the validity of what was in truth a correct proposition of the 3rd section of a law of Saxony of date 4th March 1879, which ran thus, viz.: "The invalidity and the dissolution of a marriage, if the husband is not nationalised either in Saxony or in any other State of the German federation, can only be declared, provided that the judgment is recognised as effectual by the law of the State to which the husband belongs."

³⁹ Cf. Weiss, p. 709. The resolution (vi.) of the Institute in 1887 (Ann. ix. p. 129) is, peculiarly enough, to a different effect.

⁴⁰ Even if, on the merits, exactly the same result would have been reached by both laws in the particular case. It might, possibly, be matter for consideration that the process proceeds quickly in the one country, but slowly in the other, in order that the spouses may have an opportunity for reconciliation. See the instructive conclusions of the public ministry in the interesting case reported in Jour. xii. p. 548. The judgment of the Trib. Seine of 4th June 1885 avoided this disputed point, and on another ground pronounced against the recognition of the foreign decree of divorce, which had not been obtained *in fraudem legis*.

⁴¹ It is still worse if, as is the case with the German legislation, no attention at all is paid to the question.

where they have their home, and in which that decree will principally operate, will recognise the same. For this reason, up to the present time, the 56th article of the Swiss Federal law as to civil *status*, of 24th December 1874, which makes the question of the competency of the tribunals of Switzerland, for suits for divorce and for nullity of marriage, dependent on the question whether the decree of the Swiss court will be recognised by the State to which the spouses belong, has had a limited and uncertain operation.⁴²

§ 178. It cannot, however, be denied that to refer the spouses to the courts of the State to which by nationality they belong, if this happens to lie at a great distance, creates under certain circumstances serious and prejudicial difficulties in obtaining justice. That is the reason why in modern times, in the French and Franco-Swiss schools of jurisprudence, we find an increase in the number of those who think that the *forum domicilii* should be sanctioned as well as the *forum originis*, i.e. the *forum* of the State to which the parties by nationality belong. Amongst these are Demangeat (on Foelix, i. § 158, p. 332, *note*), Gentet, p. 95, Gerbaut, § 392, and Pilicier.⁴³ The last named, who (pp. 20 and 242) discusses the question very thoroughly, insists, like Gentet and Gerbaut, most energetically on the exclusive application of the national law of the spouses in matters that concern the dissolution of the marriage, which he regards as questions of *status*. But he is of opinion that the court in such matters need not exclusively apply the *lex fori*, and again, since the State must do justice to foreigners as well as to its own citizens, and the natural judge between the parties is the *judex domicilii*, the courts of the domicile⁴⁴ are competent to determine

⁴² So, too, Brocher, Jour. vi. p. 96; Barillet, Jour. vii. p. 347. How is evidence as to this recognition to be obtained? Rittner, Jour. xii. p. 152; Lehr, Jour. xii. p. 464, attempted to controvert Barillet, but, as I think, unsuccessfully. See, too, Martin, Rev. xiii. p. 598. As to the Swiss statute, see Orelli, Rev. xii. p. 261, and very lately König, *Abänderung einiger Bestimmungen des Bundesgesetzes vom, 24th December 1874, betr. die Ehescheidung*, Bern. 1888.

⁴³ To the same effect, too, Gianzana, ii. § 215, in regard to suits of nullity. Italian courts at least should entertain them, if the marriage was celebrated in Italy. But Gianzana, § 216, finds fault with a judgment of the Appeal Court at Ancona, of 22nd March 1884, which pronounced a decree of divorce in accordance with the domestic law of the parties, although at the time the law of Italy did not recognise divorce. We agree with him in thinking that the *jus publicum* of the Italian kingdom should have prevented such a result, but it is plain that under certain circumstances the court of the domicile may find itself driven to refuse to do justice. In the case Gianzana himself puts, that court must also have refused to entertain a divorce suit.

⁴⁴ The view, which requires (in French law) a domicile authorised by the State to make the courts competent in such matters, stands or falls with the proposition that no foreigner, unless he have such a domicile, is entitled to invoke the protection of the courts. It has found some favour in Franco-Belgian jurisprudence (Civil tribunal of Lüttich, 21st March 1886, Jour. xiv. p. 215), but it does not present the advantage of facilitating the prosecution of such suits, since it is inapplicable to the numberless cases in which there has been a domicile, but one not authorised by the State, for years. Very recently the right of the courts of a foreign domicile to divorce French spouses has been recognised by a judgment of the Civil Tribunal of the Seine, declaring the sentence of the foreign court enforceable in France (2nd August 1887, Jour. xv. p. 86). We may look forward with interest to a judgment on the subject by the higher courts when the case arises again.

matrimonial questions between foreigners. The difficulty is solved by holding that the *judex domicilii* shall take the *loi nationale* of the parties to guide him, and thus the State to which they belong will have no excuse for refusing to recognise the sentence of the *judex domicilii*.

It would, he argues, be an evil which should by all means be avoided in matrimonial matters, and suits affecting *status*, if such a judgment was not to be recognised, as it might not be if the *judex domicilii* applied his own rules of law exclusively.⁴⁵ Two reasons, however, must be stated against this theory, which, no doubt, is entitled to serious consideration. In the first place, it will be difficult to convince the court that the law of divorce is not pre-eminently a part of the *jus publicum*. The legislature, which refuses to recognise divorce altogether, or will only do so under certain fixed conditions, will look in the one case on all divorces, in the other on divorces under more easy conditions, as a procedure which on moral grounds cannot be approved. A decree of divorce may indeed be recognised, if it has been procured before a competent foreign court, but it can never be right to set the courts of this country in motion to work it out, unless violence is to be done to our own views of the social relations involved in marriage. Conversely the State, which in this or that case allows divorce, would run counter to its own theories, if, on the ground of some foreign law, it refused the spouses the liberty they desire. General usage, too, is on this point against Pilicier, with the exception, perhaps, of some judgments of the Swiss courts, which are under the influence of the exceptional Swiss statute of 1874. One restriction which Pilicier himself (p. 269) makes, really destroys his principle, viz. that the judge of the domicile shall refuse to exercise his jurisdiction, if the interests of social order and public morality seem to make it his duty to decline. In the practice of most States, the jurisdiction of the courts of the country to which the parties belong, which Pilicier admits as concurrent with the other, is found to be the only one which in fact can be recognised.⁴⁶ The German Imperial Court holds it to be inadmissible, since German law recognises only divorce, and knows nothing now of a permanent separation from bed and board, to pronounce a sentence to this latter effect even in the case of foreign spouses;⁴⁷ and I am not aware, to take the converse case, that a court, by the law of which divorce is incompetent, ever divorced a foreign couple. But, in the second place, there seems to be no likelihood that the country to which the parties belong will recognise the judgment of a foreign court as a true *res judicata*, i.e. will refrain from examining it on its merits, even although the foreign

⁴⁵ This hardship is used as a specially forcible argument against the jurisdiction of French courts in matrimonial questions affecting foreigners, in the grounds of judgment of the French Court of Cassation, of 23rd July 1855, cited by Pilicier, pp. 52, 53.

⁴⁶ See, to the same effect, Gentet, p. 95, and the judgment of the Swiss Federal Court, of 24th December 1878, reported by Pilicier himself (p. 143). This goes the length of pronouncing a provision of a statute of Geneva, of 5th April 1876, § 125, to be invalid.

⁴⁷ On the doubts in modern French jurisprudence, see Jour. xii. p. 154; see, too, Ct. of Brussels, 30th May 1885, Jour. xiv. p. 214.

court may have intended to apply nothing but the domestic law of the spouses.⁴⁸ It is a familiar fact, that in applying foreign rules of law mistakes are easily made, and it is not so easy to avoid these in the domain of matrimonial law, as in that of the law of obligations, since in matrimonial suits both parties have frequently the same interest in the long run, and will try to lead the judge astray. In the law of marriage, too, we find that practice has more to say than precise enactment. As an instance, we may recall the fact that the grounds of divorce recognised by the Protestant Church have in different German States undergone a very different development. It is not, therefore, pure logic alone which in this department of law prescribes to the different courts what their decision should be. The leading error in all Pilicier's treatment⁴⁹ (see especially p. 5) consists in this, that he makes an absolute separation between questions of the applicability of foreign law, on the one hand, and the jurisdiction of foreign courts on the other, and allows the latter to rule the former. Whereas, as a matter of principle, the applicability of different legal systems is the primary question for determination, while questions as to the jurisdiction of the courts are only secondary. They stand, however, in intimate mutual relations to each other. A judgment of the Swiss Federal Court, of 4th August 1879, cited by Pilicier himself, for the purpose of being subjected to criticism, gives a very sound exposition of this view.

Moreover, the propositions adopted by the Institute of International Law during their meeting at Heidelberg in 1887, with reference to this subject, propositions which in part reproduce the scheme of König, are entirely illogical. After providing, in the first sentence of the seventh resolution on the law of marriage, to which we have frequently referred, by a perfectly sound deduction from the Oxford resolutions on the *loi nationale* in questions of *status*, that—

“*La question de savoir si un divorce est légalement admissible ou non dépend de la législation nationale des époux ;*”

⁴⁸ See, too, Asser, p. 118. Pilicier's attack upon Asser (p. 22) is not successful. Asser by no means maintains that the judge whose law recognises only divorce, and not separation from bed and board, must divorce “*tout le monde*.” What he does maintain is, that if that judge is actually to consider the question, he can only have divorce in view, and cannot entertain a question of separation. That is sound. The argument used by Laurent, and adopted by Pilicier, to the effect that Asser's theory, which is the same theory as I supported in my first edition, first pronounces divorce to be a *statut personnel*, and ends by treating it as a *statut territorial*, is a mere sophistry. Nothing can be deduced from such a terminology, as I have shown already (see §§ 29, 30). The fact is simply this: the law of divorce is no doubt dependent on the personal law, but at the same time unquestionably belongs to “*ordre public*,” and thus a court may be prevented from bringing foreign law directly into play.

⁴⁹ On the other hand, Pilicier's attack upon French practice, and in particular that of the Court of Cassation, by which the merits of any action of divorce will be tested by French law, if the parties have a domicile authorised by the Government in France, is very well justified. In this matter French practice abounds in illogicalities and contradictions. We cannot give an absolutely clear exposition of the points raised in this connection, until we come to the discussion of the competency of the courts of different nations. See Chavegrin, Jour. xii. p. 154, and Pilicier, pp. 34-91, on the details of French jurisprudence in this connection.

The second paragraph proceeds thus:—

“Mais une fois le divorce admis en principe par la loi nationale, les causes qui la motivent doivent être celles de la loi du lieu où l'action est intentée.”

The court, then, before which an action for divorce is brought, must ask itself this question, viz.: Does the national law of the parties permit divorce under any conditions at all? If this question is answered in the affirmative, then it simply applies the *lex fori*. That is, of course, a simplification of procedure which will be very pleasant for the court, since the question we have put may, as a rule, be answered without any trouble, whereas very serious difficulties may arise in attempting to say whether some particular fact is, by the domestic law of the spouses, a sufficient ground for divorce. But this must be kept in mind, that it is not divorce *in abstracto* that is the important matter: the question of much greater importance in practice is, what are admissible grounds for divorce?⁵⁰ Compare for a moment the strict law of divorce which obtains in England with the lax principles of the Prussian Allgemeines Landrecht, which permit divorce by mutual consent, and it will be conceded that it is just when one looks at the particular grounds for divorce that the fundamental differences of social theory are brought out. We cannot possibly proceed, therefore, on the footing that the State to which the parties belong, whose recognition of the divorce is as a matter of fact of most importance, will have no interest in the grounds of the divorce, no interest beyond seeing that there is agreement between the two systems on the abstract question of principle. On the contrary, it is highly improbable that the legal systems of different countries will allow the subsistence of the marriage ties of their subjects to be dependent on the laws of a foreign country; and thus this proposition, which is in juristic illogicality almost without precedent, will operate as an actual impediment against the general adoption of the Heidelberg resolutions.

No doubt the rule will have a less extensive importance, if the competent tribunal, which is spoken of in the third paragraph of No. vii., is to be exclusively or generally that of the State to which the parties belong. Then the last proposition of the Heidelberg resolutions, in itself highly desirable, will be realised, viz. :—

“Le divorce ainsi prononcé par le tribunal compétent sera reconnu partout.”

On the question of competency, the Institute has not as yet given any deliverance, and has not adopted the rule of König's scheme, according to which the competent, and only competent, judge shall be the judge of the domicile.^{51 52}

⁵⁰ If we proceed upon the omnipotence of the legislative authority, which may assume, too, a judicial character, a type of which character in this very matter of divorce may be found in the divorces granted by the legislative authority of the English Parliament, we may go the length of asserting, although it would no doubt be something of a refinement, that divorce *in abstracto* is not excluded by any system of law.

⁵¹ In König's scheme the 12th article bore; *La question de savoir si un divorce est légalement admissible ou non dépend de la législation nationale du mari. Mais une fois le divorce admis:*

When the resolutions on the law of marriage, which were adopted at Heidelberg in 1887, were revised at the meeting of the Institute at Lausanne in 1888, the seventeenth and eighteenth paragraphs of the regulations finally adopted were thus expressed, viz:—

“(17.) *La question de savoir si un divorce est légalement admissible ou non dépend de la législation des époux.*

“(18.) *Si le divorce est admis en principe par la loi nationale, les causes qui le motivent doivent être celles de la loi du lieu où l'action est intentée. Le divorce ainsi prononcé par le tribunal compétent sera reconnu valable partout.*”

As the question of jurisdiction is entirely reserved, the meaning of these propositions is left completely undefined.

AN INTERNATIONAL TRIBUNAL FOR MATRIMONIAL QUESTIONS?

§ 179. Lastly, we must say that a proposal of Lehr (J. xi. p. 49), in favour of which Weiss has pronounced (p. 717), is not satisfactory. He proposes to set up a general international court to decide matrimonial suits in which questions of private international law are involved. In the form in which it is put forward, this suggestion seems somewhat vague. This much, however, is certain, that an international tribunal of the kind would mean, owing to the enormous distances at which parties might be from the seat of the court, a complete denial of justice. Again, the decisions of all courts on questions of private international law must in practice rest primarily on the legal principles of their own country, but, since in every case that came before this international court there would probably be a majority of judges belonging to countries different from that to which the case belonged, there would be imminent danger that the law of that country would not be respected. We could hardly, therefore, expect the

en principe par la loi nationale, les causes qui le motivent doivent être celles de la législation du domicile du mari; le juge compétent sera celui du domicile.” The theory thus put forward by König may be looked upon as a modification of what was proposed by Barillet (J. vii. p. 361): the Swiss judge (*judex domicilii*) shall apply no law but his own (*lex fori*). Pilicier, p. 98, shows very clearly the serious consequences of this view, if the State to which the parties belong does not recognise such divorces, as *e.g.* would be the case with Italian subjects.

⁸² Very recently König has again modified his opinion (see opinion cited above with reference to the alteration of the law in Switzerland). He refers to the authority of Rossi, and his new proposal is “that in divorce suits by foreigners, whose law allows divorce, the tribunal of the domicile be generally recognised as the proper tribunal, and that divorce may be granted on grounds which are recognised by the law of Switzerland as well as by the law of the country to which the spouses belong.” In this way a probability approaching certainty is attained, that the Swiss decree will be recognised and executed abroad. In one respect, this is no doubt much less serious than the proposal of König which was formerly adopted by the Institute of International Law. But practice may well show that very great difficulties will be involved in keeping two different systems of matrimonial law in view at once. For instance, what is to be said of the *res judicata*, if the action is thrown out? Does this dismissal of the action take effect *de plano* in the country to which the spouses belong?

legislative powers of the different States to hold out a helping hand to any such arrangement, and all the less so, as in matrimonial law the differences of opinion are differences as to social and moral problems. The case,⁵³ cited by Lehr as an illustration of his proposal, rests in part simply on an error in the legal system of one of the countries concerned, viz. the error of the law of Hungary in refusing to apply the familiar rule "*locus regit actum*" to cases where there is a conflict between religious and so-called civil forms of celebration of marriage. Where errors like this exist in legal systems, the necessary result is that the courts will fall into erroneous conclusions. But, again, the official at Zürich who celebrated the marriage fell, as is pointed out in the judgment of the Federal court, into error. He gave no thought to the possibility of the rule "*locus regit actum*" not being recognised by the law of the country to which the parties belonged. Now, is it intended that this international tribunal, whose very name seems to many to guarantee relief to all the evils known to the law, shall have power to amend and alter laws? We do not mean to say that a decision pronounced in accordance simply with sound reason—a course which Lehr points at for the case on hand—would not, where you find a foreign law that is contrary to all good sense, be preferable in the long run to the decision of the Swiss Federal court, which follows too closely the letter of the statute. But it may seem very doubtful whether the Swiss courts had any power to pronounce so broad a judgment.

We must, however, admit an exception to the rule that none but the courts of the State to which the spouses permanently belong have jurisdiction in such matters, in cases in which it would *de facto* lead to a real denial of justice to declare that there was no jurisdiction in the courts of the domicile: and in using the term domicile we may perhaps (?) place in the same category a place of residence for a considerable time.⁵⁴ But such a case cannot be held to arise where some definite foreign nationality or citizenship is patent on the face of the facts, or where the defender pleads such foreign nationality as a ground for urging that the court is

⁵³ J. xi. p. 483 (case of Bacs). A Hungarian citizen married in Zürich a Swiss woman according to the forms of the civil marriage, whereas the law of his own country absolutely forbids civil marriage. The Hungarian consul thereupon declared that the marriage would be regarded in Hungary as non-existent. Upon this the court of Zürich rejected an action of divorce raised by the husband, founding on the 56th article of the Swiss statute, and the Federal court refused an appeal. This determination was sound, for a marriage, which by the law of the parties' own country has no existence, cannot be dissolved, and a divorce which has followed on such a union cannot be recognised by the country of either. The simplest course is to treat the marriage in such a case as *ipso jure* null, and that is the import of the declaration of the Hungarian consul. That is so because the proper ceremony, *i.e.* the ceremony which will be recognised by the parties' own State, has never been observed. The solution given by Muheim (p. 199) is peculiar, but not very scientific. Divorce, in cases in which the law of the parties' own country pronounces the marriage to be altogether invalid, should proceed according to the law of the country in which the marriage took place. The divorce will then simply dissolve the ceremony or form of marriage, the marriage itself having no real existence. See Kittner (J. xii. p. 152) on the Bacs case.

⁵⁴ See Trib. Marseille, 23rd April 1875 (J. iii. p. 186), and Clunet's remarks there, on the most modern French jurisprudence.

incompetent. The courts of France are inclined, in cases in which the interest of foreign spouses are involved, to declare in favour of their own jurisdiction, if the objection to their jurisdiction is not timeously put forward.⁵⁵ This goes too far. In that way jurisdiction will be founded by a voluntary subjection by the parties themselves, and in matrimonial questions in the stricter sense such a voluntary prorogation of a foreign court and its law is forbidden by the general conceptions of the legal systems of all civilised States.⁵⁶

The jurisdiction of the *judex domicilii*, however desirable it may be in itself, is, in our view, as a rule only to be recognised under special conditions, whereby the application of the national law of the parties is really secured, conditions which we shall discuss on another occasion. They can only be provided by means of positive enactment.

DECISIONS UPON BARS OR OPPOSITIONS TO MARRIAGE.

§ 180. A special question of jurisdiction may be raised in such cases as those in which the officer charged with the care of matters affecting *status* refuses to celebrate the wedding, or where some third person raises opposition to the wedding (Cod. Civ. § 172), or where some rectification of a register is desired. The primary question here is as to an act of the public executive, or an order which ought to be given to a public official. The officers and courts of the State, in whose territory and by whose officials the act in question must be done, are alone competent in such matters.⁵⁷ It is, too, the law of this latter State which prescribes what officials and what courts are competent, and they may also prescribe that the courts of this country are competent in the case of foreigners who have a domicile, or even a mere place of residence, in this country. Of course, if the official who is charged with matters of *status* can only perform the act which he is desired to perform, if, for instance, there shall have been a valid judgment pronounced as to the nullity of a marriage, so that this nullity is not to be regarded as a merely incidental or prejudicial point; then this condition precedent to the official's action belongs to the foreign court, provided always that that foreign court would at any rate be the only court competent to decide in this process of declarator of nullity.

NOTE K ON §§ 173-180. INTERNATIONAL ASPECTS OF DIVORCE.

[As regards the grounds on which a decree of divorce may competently be pronounced, so as to be recognised by the courts of other countries, it

⁵⁵ Competency of the French courts, where no definite nationality can be asserted (Trib. Civ. Marseille, C. d'Aix, 3rd July 1873, J. ii. p. 273). This is probably sound. C. Dijon, 7th April 1857 (J. xv. p. 87).

⁵⁶ Cf. e.g. B. C. Rouen, 12th May 1874 (J. ii. p. 356), and the special paper on this subject by Féraud-Giraud in J. xii. pp. 379 *et seq. præ.* 390.

⁵⁷ See Gentet, p. 72.

has been laid down in the House of Lords (*Harvey v. Farnie*, Nov. 30, 1882, L.R. 8, App. Ca. p. 43), that the decision of a competent foreign Christian tribunal, dissolving a marriage celebrated in England between an Englishwoman and a domiciled native of the country where the divorce was pronounced, will be recognised, although that decree proceeds upon grounds that may not be known to the law of England as grounds for divorce, *e.g.* upon desertion as that term is understood in the law of Scotland. This decision disposes of the old notion of the indissolubility of an English marriage, *i.e.* of the notion that a marriage celebrated in England could only be dissolved by English courts and in conformity with English law. It also seems to determine that the law which the competent court is to apply is to be the *lex fori*. This, then, may be taken to be the law of both England and Scotland, *viz.* that the competent court must apply its own law to determine what is or is not a sufficient ground of divorce, and that a determination on this ground will be recognised in England and Scotland.

The important matter for determination in these countries is, therefore, what is the competent court, or, on what considerations is the jurisdiction of a divorce court to be founded? In determining on what principles the courts of any country will sustain their own jurisdiction in divorce or separation, we shall also find an answer to the question what principles the courts of one country, when asked to recognise foreign decrees of divorce, require to be observed in those of the foreign country before they will recognise its sentences. If domicile be required in country A to found jurisdiction, its courts will not recognise a decree pronounced in country B upon an asserted jurisdiction *ratione delicti commissi*. All courts, too, especially those of America, will take care before recognising a foreign decree to see that it was not obtained without due notice and the observance of the regular forms; cf. *Shaw v. Att. Gen.* (1870, L. R. 2, P. and M. p. 156), where the husband had no notice of the suit "except an advertisement which he never saw and was never likely to see;" and a case decided by the Appeal Court of New York (*People v. Belker*, 21st Jan. 1873), where it was held that a decree pronounced in another State against a citizen of New York, who was domiciled in New York, and had been in residence there during the action, could not be recognised.

It will, then, be understood that a court, in exercising its own jurisdiction according to certain rules, implies thereby that it will recognise decrees of foreign courts based upon like jurisdiction.

The only principles of jurisdiction now recognised are nationality, domicile, and what has been called matrimonial domicile, *i.e.* residence of such a duration and of such a nature by the spouses as married persons within any territory, as to justify either of them holding that their matrimonial relations are to be determined by the law of that territory, and that he or she is therefore entitled to appeal to that law against any infringement of these relations by the other spouse. The jurisdictions formerly claimed in Scotland by virtue of a residence by the defender for

forty days, coupled with citation there, and in other cases by virtue of a personal citation in Scotland and the fact of the commission of the adultery there—the *forum delicti commissi*—have now been distinctly abandoned (*Stavert v. Stavert*, Feb. 1882, Ct. of Sess. Reps. 4th ser. ix. p. 519). In this case all the previous authorities on the subject were reviewed, and jurisdiction on these grounds rejected, and it was held that the mere fact of the commission of the adultery in the territory could not give the courts any right to deal with the permanent *status* of the parties.

Domicile, *i.e.* a complete domicile, such as would regulate succession, is admitted as founding jurisdiction for divorce not only in America, Scotland, England, and other countries where domicile is the ordinary ground for founding jurisdiction and determining capacity, but is also accepted as sufficient in France, Belgium, Italy, and countries where nationality and not domicile is the ordinary criterion for determining the status, capacity, and personal rights of every individual, and establishing jurisdiction. The American courts in New Jersey have refused to entertain an action instituted by a Canadian woman, who had been married to an American citizen in New Jersey, his domicile being in another State (*Blumenthal v. Tannenhole*, May 1879, Chancery Court of New Jersey); and have also declined to recognise a divorce obtained in Utah without a domicile or residence being had in that State (Supreme Court of Minnesota, 25th April 1878). A Frenchman who married a Belgian, and afterwards lived for twenty years in Belgium, was held to have acquired a domicile there, and therefore to be entitled to divorce according to the law of Belgium, in spite of the fact of his French nationality at the date of his marriage (*Viminet, C. de Bruxelles*, 1877, J. v. p. 513.) In this case there was complete *bona fides* in the residence in Belgium, an important consideration, as we shall see. The domicile in such cases is always the domicile of the husband, which is imputed to the wife. (In England, *Rateliff*, 1859, 1, S. and T. 467; *Wilson*, 1872, L. R. 2, P. and M. 435. In Scotland, *Warrender v. Warrender*, 1835, 2, C. C. and Fin. 488; and 2, S. and M'L. 154; also *Low*, 1891, Ct. of Sess. Reps. 4th ser. xix. p. 115.) In France the nationality of a wife has in the same way been held to be sunk in that of her husband so as to entitle him to divorce her, being a Frenchwoman, in his own courts abroad (*Van Overbecke*, Trib. Civ. de la Seine, 1880, J. vii. p. 303). A suit in Austria at the domicile of the husband was held competent, although the wife, who brought the action, was living at the date of the action, and had lived for the greater part of the married life, with her husband in Italy (Supreme Court of Austria, 1872, J. v. p. 386).

There is also accepted, as a ground for founding jurisdiction in cases of divorce, a domicile of somewhat less completeness than is required for the purposes of succession. In Scotland it has been the opinion of eminent judges that "there may be a residence or domicile founding jurisdiction such as would not regulate succession, as where a husband and wife have been for years resident in Scotland as married parties, but where the husband, from being a foreigner, and only in Scotland on the public

service, may never have acquired a domicile of succession in this country" (per Lords Neaves and Mackenzie, in *Jack v. Jack*, 7th Feb. 1862, Ct. of Sess. Reps. 2nd series, 467). "The impossibility of resting jurisdiction in divorce exclusively on the domicile of succession, is obvious from other considerations equally cogent and conclusive" (per Inglis L. J.-C. in same case). This has since been recognised in Scotland as sound law, but Lord Westbury, in the House of Lords, in giving judgment in a Scotch appeal (*Pitt v. Pitt*, 4 Macq. 627), indicated a distinct opinion that this "matrimonial domicile," as it has been called, is not a good ground on which to rest jurisdiction. It was not, however, necessary for the decision of the case that this view should have been expressed; it has not been put in force in any Scots judgment, nor is it consistent with the law of England as stated by the highest authorities (see *infra*). Inglis, L. P., thus states the present state of the law in the case of *Stavert v. Stavert* (cited *supra*): "Now, a very important question arises in some such cases, whether the domicile necessary to found jurisdiction is the same as that which would regulate the intestate succession of the husband, or whether it is not sufficient that Scotland has been the settled home of the marriage for some period with no intention of leaving the country, where the spouses have settled down to live, where the household gods have been set up for the time, and which, if a separation, judicial or otherwise, has been arranged, would be the place where one party owes the duty of returning for the restitution of the conjugal relations. . . . It has not yet been decided in the court of last resort" (*i.e.* the House of Lords) "whether it is so, and I merely notice the matter in passing. If the answer depended on the decisions pronounced by this court, it is pretty clear what it would be." His lordship indicates that the theory formerly adopted in Scotland of the sufficiency of such a domicile would still be applied by Scots courts, but his brethren, Lord Deas and Shand, in the same case, held that a complete domicile would be necessary. In the subsequent case of *Low* in 1891 (see *supra*), the doctrine of matrimonial domicile is rejected.

In England there seems to have been the same question, and the same hesitation as to the sufficiency of any domicile short of a complete domicile; but the law, as it stands at present, is thus stated by Mr Westlake (p. 75): "When the husband, being either petitioner or respondent, though not domiciled in England, is resident there, not on a visit or as a traveller, and not having taken up that residence for the purpose of obtaining or facilitating a divorce, the court has authority to grant a divorce wherever the adultery was committed, or, if the husband be respondent, wherever the adultery and cruelty or desertion were committed" Cf. *Niboyet*, 1878, L.R. 4, P.D. 1, the tendency of which decision is to make residence and not domicile the ground for jurisdiction. In *Detchegoyen's case* (1888, L.R. 13, P. and D. 132), Sir James Hannen says: "Apart from the events which have since happened, I should strongly incline to think that, where a man leaves his wife, returning to her from time to time, that is the place of the matrimonial home." In that particular case, England was found to be the true domicile of the husband, and therefore of both spouses, but

a "matrimonial home," which would give the court jurisdiction, appears to be recognised as something distinct from domicile.

The necessity of recognising in such matters some special ground of jurisdiction, less stringent than the personal law of the husband, be that the law of his domicile or the law of his nationality, has been indicated by the following decisions of Continental courts:—Such a domicile can be acquired without the loss of a foreign nationality (Cour de Cassation, 11th July 1855); it was held to be acquired by a foreigner who had married a Frenchwoman, and who had lived in France for several years and carried on a trade there (*Klötz v. Klötz*, Trib. Civ. de Marseilles, 1875, J. iii. p. 185); domiciled foreigners will, in the discretion of the court, be allowed to sue in French courts for *séparation de corps*, the French law not sanctioning divorce, if neither party objects to the jurisdiction, if public order and morals are not offended, and if the French court is *forum conveniens* (*Mazy v. Jolly*, 1878, C. de Nancy, J. v. p. 371); in Switzerland, domicile will confer such jurisdiction without naturalisation (App. Court of Geneva, 1876, J. iii. p. 227), and by a diplomatic convention of 1869, French and Swiss courts have conceded to each other mutual jurisdiction of this character. This has been observed in the Swiss decision just cited, and by the Court of Cassation in France (*Benweguen*, 1878, J. v. p. 450). This doctrine of "matrimonial domicile" has also been applied by the French courts to this effect, that a woman who has lived with her husband for a considerable period in France, or who has been married in France, with a French marriage contract, is entitled to appeal to the French courts for a separation, although the husband has gone abroad; the object of his departure being to withdraw himself from French jurisdiction and to embarrass his wife in the pursuit of her remedies (*Ramondenc*, C. de Cass. 1875, J. iii. p. 183; *X. Cour. de Chambéry*, 1877, J. v. p. 164; *Mullier*, 1886, J. xiii. p. 349); and even where a man has been naturalised in a foreign country, if this has been done with the object of obtaining a divorce under a foreign law, which may operate prejudicially to the law of the home of the marriage to which the wife is entitled to look for protection, he will not be heard to plead that the French courts, to which his wife has had recourse, have no jurisdiction, Agoust, 1882 (J. ix. p. 544).

The laws of England, Scotland, and America will also sanction the establishment of such a separate domicile by the wife, in order to prevent the husband from taking advantage of his own wrong (*Fraser*, p. 1289; 4 Phill. 349; *Wharton*, § 225; *Elder v. Reel*, American Reports, 414). That separate domicile, it would appear, however, must be in a country in which the marriage has subsisted and the parties have lived as man and wife. A deserted wife cannot, by returning to her *forum originis* and acquiring a domicile there, the marriage never having subsisted in that country, thereby raise up a right in herself to convene her husband before the courts of that country, in a process of divorce (*Redding*, 1888, Ct. of Sess. Repts. 4th ser. xv. p. 1102).

The law of Italy recognises the competency of its courts to dispose of questions of divorce raised by persons who have a home or settlement in

Italy, which does not amount to a true domicile (Trib. Ancona, 1882, J. xi. p. 553).

This temporary residence or matrimonial domicile (or, it may be, naturalisation in countries where nationality is a ground of jurisdiction) must, however, be genuine, and not acquired collusively (Westlake, *ut supra*); but, if a true domicile is acquired, it matters not, in Scotland at least, that one of the causes which induced the acquisition of it was a desire to take advantage of the divorce law of the country in which it is acquired (Carswell, 1881, Ct. of Sess. Reps. 4th ser. viii. p. 901). To prevent collusion, and to protect public morals, the Minister of Justice in France will intervene (Raunheim, 1875, Trib. Civ. de la Seine, J. iii. p. 363); where a French couple fraudulently acquired Swiss nationality in order to obtain divorce, neither of them having ever left Paris, a second marriage contracted by one of the spouses was reduced by the other on the ground of the divorce having been obtained *in fraudem legis*; his or her own participation in the fraud is no bar, or even if it were, the Minister of Justice has a title to pursue (Vidal, C. de Paris, 1877, J. v. p. 268). Another case of the same kind is reported, where a Frenchman, already separated from his wife, obtained Swiss nationality in December 1874, and was divorced in the Swiss courts in January 1875; he married again in February 1875; he had never left Paris, and it was shown that his foreign nationality had been obtained solely in order to further his second marriage; this was annulled at the instance of the French Minister of Justice (Gravelle Des Vallées, 1878, Trib. Civ. de la Seine, J. v. p. 602). The Belgian courts have decided to the same effect, in the case of a Frenchman who had married a Prussian, and acquired Belgian nationality for the purpose of obtaining a divorce (C. de Bruxelles, 1877, J. v. p. 513); and in the case of the Princess Bauffremont, the French and Belgian courts concurred in holding that a woman who had been married to a Frenchman, and separated from him in France by decree of the French court, could not, by acquiring a foreign nationality in a country where divorce was sanctioned, thereby convert her *status* into that of a divorced woman, so as to enable her to marry another; it was held as proved that her intention in adopting the new nationality was to enable herself to marry again. In Austria it has been held, without any allegation of fraud, that the marriage of a woman, herself a Catholic, and married in Austria to a Catholic, is indissoluble, and that she cannot, by residing in another country and embracing Protestantism, escape a decree of nullity of the marriage contracted by her abroad, if she should again return to the jurisdiction of the Austrian Courts (Supreme Court of Austria, 1871, J. iv. p. 77).

Again, in 1885, the same court held that without a change of nationality an Austrian subject could not validly have his marriage dissolved by a foreign court (J. xiii. p. 471). In this case the husband had renounced the Catholic faith, while the wife had not, and a second ground of judgment which suggested itself to the court was that, so long as one of the spouses remained true to the Catholic faith, her marriage must be indissoluble; if

the marriage was indissoluble as regarded one spouse, it must be so as regarded the other. These judgments, in treating Austrian marriages, celebrated according to the rites of the Roman Catholic Church, as indissoluble, seem to be tainted with the same error as at one time prevailed in England, viz. that an English marriage was not liable to be dissolved under any circumstances whatever. Where the spouses are, both or either of them, Protestants, the Supreme Court of Austria recognises a divorce pronounced by the court of their domicile (J. xii. pp. 157, 158). French law, although it knows nothing of divorce, accepts liberally foreign judgments, where there is jurisdiction. Thus the courts of France will still recognise the effect of a divorce pronounced in a foreign court having jurisdiction, where one of the parties is French, and will allow the spouse returning to France to marry again, just as if he or she were single. This holds in cases in which the marriage was celebrated in France; and although, from the fact that jurisdiction for divorce is generally founded on domicile, the cases that have occurred have all been cases where the husband, whose domicile is the domicile of the marriage, was a foreigner, and the wife French, the principle would equally apply where a Frenchman by nationality had obtained divorce abroad after a *bona fide* residence of some duration (Brune de Mans *v.* Guillamnin, Trib. Civ. de Nogent-le-Rotrou, 1878, J. vi. p. 277; Plaquet *v.* Maire de Lille, Cour d'Amiens, 1880, J. vii. p. 298; two French persons divorced in Belgium, Lufert *v.* Roquet, 1887, J. xv. p. 86, see p. 279; and Plaquet, Cour de Cassation, 1878, J. v. p. 499. The last case was several times before the French courts, but was finally determined in a sense favourable to the recognition of the foreign decree). The Cour de Paris (1872, J. i. p. 31) decided that a foreign divorce was good in France, but, by an anomalous restriction of that recognition, required a delay of six months before the parties could validly marry again. In 1887 the Tribunal of the Seine went so far as to recognise the decree of a Belgian court divorcing two French people (J. xv. p. 86). But the soundness of this decision seems to be questioned by French lawyers (J. xv. p. 279).]

G. RELATIONS OF THE SPOUSES AS REGARDS PROPERTY.

THE PRINCIPLE. THE PERSONAL LAW, GENERALLY SPEAKING, THE RULE.

§ 181. Private international law contains under this head a long list of important and difficult questions.

Let us assume, in the first place, for simplicity's sake, that the spouses before marriage belong to the same nation, that there is no difference in their domiciles to call more than one law into play, and still further, that their domicile and the place of the celebration of the marriage are identical. Now, the oldest of all debated questions, which has been discussed since the days of the Postglossatores, at once arises: Does the law of property, applicable to the case of married persons according to the legal system of the domicile of the spouses, extend to real property which lies beyond

that territory, or is the *lex rei sitæ* the exclusive rule?¹ Jurisprudence has been much occupied with this question in particular, viz. whether a community of goods established by the law of the domicile of the spouses attaches to real estate which is situated in another country. Moveable property has always been treated under the rule "*mobilia personam sequuntur*," and thus moveables situated in another country have been subjected to the personal law of the spouses.

In the Middle Ages the application of the *lex rei sitæ*² was always defended on the ground that the laws which are concerned with the property of married persons speak of things only, and not of persons. We need not spend much time on this illusory and purely scholastic reasoning, any more than on the argument that the authority of the lawgiver is confined to his own territory.³ Lastly, we cannot appeal to the argument that it is contrary to the principles of sovereignty that foreign statutes should have any effect upon real property in another country.⁴ If this were so, all questions of capacity to act, or of obligations, would have to be settled by the law of the place where the subject was situated, if that subject happened to be a right to real property. This much, and this much only, is true, that if, in accordance with the *lex rei sitæ*, some definite real right to such a subject cannot be constituted at all, or must be constituted in a particular form, then obviously the law of the domicile of the spouses will also pronounce that no such right can exist, or can only exist if the particular form prescribed shall be observed, as the case may be.⁵ But this does not affect the question before us.

The recognition of the *lex rei sitæ* is even at the present day the only rule known to the practice of England and the United States,⁶ and is generally adopted, too, in that of France.⁷ In England, however, there is an inclination towards the view that the *lex domicilii* is universal: the theory of English writers certainly leans in this direction, and to some extent also the practice of English courts.⁸

The opposite theory, which had even in more ancient literature a considerable number of representatives, regards exclusively the personal law of the spouses. At the present day it may be said to hold absolute

¹ All agree that the place of the celebration of the marriage does not decide. See Savigny, § 379; Guthrie, p. 292; Story, §§ 191, 199; Mævius in *Jus. Lub. Proleg.* qu. 4, §§ 19, 20.

² Argentræus, § 31; Burge, i. p. 617; Wheaton, i. p. 113; Massé, ii. § 63.

³ Gaill, *Observat.* ii. 124, No. 4.

⁴ See Story's Citations, § 148.

⁵ This is no doubt the meaning of the 3rd art. prop. 2, of the Code Civil. Cf. Demangeat on Fœlix, p. 214.

⁶ See Wharton, § 191.

⁷ See citations by Weiss, p. 692, note 2. It is the old statute theory which is followed here.

⁸ Cf. Westlake Holtzendorff, § 31, and Lord Meadowbank's dictum there quoted. ["The legal assignment of marriage operates without regard to territory." *Royal Bank of Scotland v. Ass. of Stein, Smith & Co.*, Jan. 20, 1813, F.C.] Phillimore, iv. § 340.

sway in Germany,^{9 10} and the new Italian school of course adopts this view. It takes different ground, however, on which to place it, and deduces different results from it. Some writers regard the law of married persons' property as the direct outcome of national customs and arrangements. In that view, of course, the rule must be given not by the domicile, but exclusively by the law of the nationality to which the husband belongs, for it is this law which prescribes generally the organisation of the family.¹¹ Others, again, treat the law of married persons' property as a product of the free will of the spouses. We must infer this will from the circumstances, and it must besides have an universal and an extra-territorial operation. The result of this theory is to leave us hesitating to some extent between the national law of the husband,¹² the law of his domicile at the moment when the question arises,¹³ the law of a domicile which the husband means to acquire so soon as the marriage takes place,¹⁴ and possibly even the law of the place where the marriage is celebrated, especially in cases in which the spouses have lived a considerable time before the celebration of the marriage in this latter place.^{15 16} This last

⁹ Seuffert, Comm. i. p. 237; Walter, § 46; Reyscher, i. § 82; Bouhier, cap. 26, § 3; Eichhorn, § 307; Mittermaier, § 350; Göschel, i. p. 112; Holzschuher, i. p. 84; Wening-Ingenheim, § 22; Günther, p. 731; Mühlenthal, i. § 72 (who founds on Dig. de jud. 5, 1, l. 65, a passage which, however, speaks merely of the competency of the court, and not of the application of the local law). Stobbe, § 34, No. v.

¹⁰ It will, of course, be understood that at the present moment the domicile theory is the prevailing theory in the subject of married persons' property. But to determine such questions by the law of the domicile, lands us at once in difficulties. Is the domicile of the husband at the time the marriage was entered into to decide, or is it to be the domicile which he intends to take up immediately after the marriage? A decision of the Reichsoberhandelsgericht, of 26th March 1876, takes an alternative position on this question. Brocher, too, *Nouv. Traité*, § 225, calls attention to the doubts to which the principle of domicile gives rise. There are many cases in which the spouses themselves could give no definite answer to the question, where they propose to fix their domicile.

¹¹ So Fiore, § 325; Lomonaco, p. 96; v. Martens, § 73, p. 313; so, too, Féraud-Giraud (J. xii. p. 386). In Austria-Hungary, Vesque v. Püttlingen, p. 238; Revised Statute Book for the Canton of Zürich, § 3, and in addition Schneider Comm. In Zürich there is a very proper recognition of the connection between the law of married persons' property and the law of succession as a factor in this question.

¹² E.g. Laurent, v. § 66; Weiss, p. 693; Durand, p. 338; C. de Bourdeaux, 2nd June 1875 (J. iii. p. 182, and Clunet, J. iv. p. 237); also C. de Paris, 5th February 1887 (J. xiv. p. 190).

¹³ So e.g. C. of Aix, 12th March 1878, J. v. p. 610.

¹⁴ So frequently in French practice. See citations in J. viii. p. 148, and Folleville, p. 508. So, too, Dutch judgments in 1878 (Hingst, Rev. xiii. p. 411). On the other hand, for the law of the nationality (except in the case of real property), see C. of Cassation, 4th Ap. 1881, J. viii. p. 426; see, too, J. ix. p. 81. C. d'Aix, 7th February 1882, J. xii. p. 188.

¹⁵ French jurisprudence generally holds, in cases in which a foreigner marries a French woman in France, that the French law as to the property of married persons may be presumed to be that which parties have chosen. Cf. Trib. Marseilles, 12th February 1885 (J. xii. p. 558) and Clunet's note.

¹⁶ The futility of considerations of that kind is plainly to be seen in J. xiv. p. 334, in a judgment of the civil tribunal of the Seine, of 5th April 1887, which at last in despair has recourse to the law of the spouses' nationality.

view is in truth the same as the old theory, by which, failing a marriage contract, the fiction of an implied contract between the parties was set up.¹⁷

IMPLIED CONTRACT.

§ 182. Argentræus¹⁸ long ago rightly declared against the assumption of any implied contract.¹⁹ At the bottom of the assumption of a tacit contract we find the mistake which we have already noticed, by which the rules of law that adjust these relations are held to be merely expressions of what may be presumed to be the will of the parties.²⁰ If there were a tacit contract as to the property of the spouses implied in every marriage, persons who undoubtedly have the capacity of contracting marriage, but not of binding themselves by any special contracts as to their property, could never come under these statutory provisions; and against this tacit understanding, as against every other understanding which expresses itself in acts, there would be rights of reduction and restitution. But neither of these results is recognised. But again, as a matter of history, it is a mistake to base the origin of the law on any theory of absolute freedom of contract. As a matter of history, the origin of the law is much more in a theory of absolute subjection to some particular national law. The law of most civilised nations in modern times goes a long way, no doubt, in allowing parties to withdraw themselves from the operation of this law and to substitute some other rule for it. This is specially the case with the law of France, which, as a rule, is inclined to look upon the Code Civil as the fundamental and natural law of all civilised nations. The possibility of the parties substituting a law of their own seems obvious to French law. But still the foundation of the law of the family and of succession is always to be found in the positive law of the land; it is upon that law that the exercise of the power of the parties to substitute another really proceeds. What is to be the result, if the national law, let us say of the husband, distinctly forbids deviations from this national law on certain points? Fiore justly remarks that a dualism which goes so far as to deal with the marriage itself on the principles of the national law of the parties, while the law of their property is to be determined by the law of the domicile, would be intolerable.^{21 22 23}

¹⁷ So *e.g.* Molinæus; J. Voet, *de stat.* §§ 18-20; Abraham a Wesel, *De commb. bon societ.* Tract i. §§ 115-119; Cochin, *Œuvres*, ii. p. 47.

¹⁸ § 33; see, too, Thol, § 44.

¹⁹ See, for instance, Haus, § 119, on the theory of a tacit contract.

²⁰ See Teichmann "on the applicability or non-applicability of the matrimonial law of property," in opposition to the theory of a contract, and especially the French legal theory which was formed under the influence of the constructors of the Code. Stobbe, § 34, note 12.

²¹ If the legal rules affecting the disposal of the property of married persons are to be traced to a tacit contract, and based on such a contract, the inclination will be to apply the law of the domicile which the husband intends to acquire immediately after the marriage is

The only theory which is then left upon a sound basis is that which is insisted on by Italian jurists with special force, and which sees in the law of the property of married persons simply a deduction from the law of marriage of the nation to which the parties belong.²⁴ This conception differs little, except in form of expression, from that which I adopted in my earlier edition of this book. It may be urged against it, that it not infrequently makes it possible for the parties concerned to be misled, since the law of their domicile is more familiar to them than the law of their nationality, when they are entering on their marriage. We may concede that people may be so misled, and frequently are. But then the opposite view leads to the greatest uncertainty in the judgments of the courts, as is shown by the division among the adherents of the domicile theory. Against these more or less arbitrary doctrines of the courts²⁵ there is no remedy, except in an actual contract of marriage, to regulate the property of the spouses, while the fact is that such contracts are not the fashion everywhere, or from considerations of delicacy are not entered into. On the other hand, any man who has a definite sentiment of nationality will, in all questions of family law, if he thinks on the subject at all, as a general rule think and feel in the spirit of that nationality.

LIMITATIONS ON THE PERSONAL LAW. REGARD PAID TO THE *lex rei sitæ* IN EXCEPTIONAL CASES.

§ 183. We must, however, note a certain limitation, which must be imposed both in the cases in which the law of the nation, and those in which the law of the domicile, is taken as the ruling law. The subjection

concluded, provided always that he has sufficiently revealed his intention to the wife or to her guardian. But this theory, which has often been stated, becomes untenable if the theory of a tacit contract is rejected. That being so, if the law of the domicile is taken as the rule, it must be the domicile which really existed at the time of the marriage, or the domicile which the parties last had, as the case may be.

²² The Institute for International Law, on the subject of the marriage law, in their resolutions at Lausanne in 1888 adopted, in article 14, the theory which prevails in the existing French system. The law of the first matrimonial domicile is to be applied, unless the circumstances clearly disclose some other view in the view of the parties.

²³ I may remark in passing that I did not, as Clunet (J. iii. p. 182) certainly thinks, in my first edition incline to commit the judgment of the matter to *lex domicilii*. The terminology of the subject is not yet fully established, but I have used the term *lex domicilii* as equivalent to the personal law.

²⁴ The German *Juristentag* (Trans. xviii. 2, p. 141) pronounced in favour of this view.

²⁵ See Teichmann's excellent discussion (p. 16) on the uncertainty of these conclusions, which contradict each other, and trench on each other's authority. Teichmann, however, proposes to take not nationality, but the first matrimonial domicile, as the basis for the law of married persons' property. See, too, the projects of law in Switzerland, reported by Teichmann, p. 43. In the Journal xv. pp. 95, 96, we have judgments of the C. de Paris, of 5th December 1887, and of the C. d'Aix, of 14th December 1885 (affirming a judgment of the Trib. Civ. Grasse). In these judgments the national law of the spouses, or of the husband, as the case may be, is regarded as the primary rule, but a door is left open for holding that, in the circumstances of any particular case, there has been a tacit subjection of the spouses to another law.

of real estate, which lies beyond the territory, to the personal law of the spouses, presupposes that the personal law itself holds the theory of the unity of the assets that make up the property of the married persons. If each individual asset constitutes a separate estate, the fate of which is absolutely apart from that of all the rest of the person's estate, we can scarcely in such a case hold that the personal law intended to regulate property beyond the territory, in dealing with the law of the property of the spouses. According to the principles of the Germanic law, it is not maintained that each particular thing constitutes a separate estate, and indeed the moveable property is regarded as a whole. But each separate piece of real estate is recognised as a special aggregate of property, to which different rules of succession, for instance the feudal rules, may be applied, while the moveable property descends in another channel. By older German law, and by the law of England at the present day, in which these principles are retained, the right of married persons in their property is looked upon as an acquisition of rights in separate things, excepting always the moveables, which represent the personality of the husband in quite a peculiar sense, and are therefore conceived as present at his domicile.²⁶ In accordance with this theory, real estate follows the *lex rei sitæ*, moveables the *lex domicilii*, whereas, according to Roman law, where all property, without distinction between real and personal estate, constitutes a *universitas*, both constituent parts of the estate are subjected solely to the *lex domicilii*. In this way we account for the practice of the English common law, and for the circumstance that the older French authors, who have concerned themselves specially with the conflict of law in the matter of matrimonial property, fall into two classes. The one class keeps in view the *coutumes* with the Germanic conception of property, and supports on that account the general application of the *lex rei sitæ*; the other class, more familiar with the Roman law, rests upon the *lex domicilii*.²⁷

We cannot, however, infer from the fact that a system of law, in dealing with the subject of matrimonial rights in property, draws a distinction between moveable and immoveable estate, that the Germanic idea of property is at the bottom of this system. The introduction or retention of this distinction may very likely be nothing more than an anomaly which is justified by practical considerations. For instance, it may be that all the moveable goods, which the spouses had before their marriage, fall under the *communio bonorum*, while real property does not, just because the former can so easily be brought together in the household of the spouses, and for this reason, as a matter of fact, cannot easily be separated one article from another.

²⁶ "*Mobilia personam sequuntur.*"

²⁷ Thus *e.g.* the practice of the Parliament of Rouen was in favour of the *lex rei sitæ*, that of the Parliament of Paris in favour of the *lex domicilii*; Argentræus has the *Coutumes de Bretagne* and their feudal principles primarily in view, while Bouhier, as president of the Parliament of Dijon, follows the orders of the Roman law. Cf. Boullenois, i. p. 798; Bouhier *ut cit.*; Demangeat in his note to Fœlix, i. p. 211.

The true test is rather to look at the theory of the law of succession.²⁸

When the law of succession sets up an universal succession,²⁹ the Roman conception of the property as a whole has penetrated deeply, and this conception is no more disturbed by the fact that some, or, it may be, all the real estate is subjected to a special treatment by the law of matrimonial property, than it is in Roman law by reason of the special treatment accorded to the *Fundus dotalis* in contradistinction to the moveable subjects, which are given to the man *in dotem*. Thus, for instance, in the law of France, although in the Communauté there is a line drawn between moveable and immoveable things, we find proof of the existence of that theory, according to which the personal statute supplies the rule, just as it does in the Preussisches Allgemeines Landrecht.

But, in order to justify the application of the personal law of the spouses to foreign real estate, it is indispensable that the personal statute and the *lex rei sitæ* should both hold the doctrine that the estate must be treated as an unity. If the former knows nothing of this doctrine, it will lay down no rules that will affect foreign heritage; and if the *lex rei sitæ* does not recognise it, it will treat the right of property given by marriage as a real right in the particular thing which is subject to the *lex rei sitæ* and to no other law.³⁰ It is therefore quite impossible to decide the dispute in a way which shall be universally applicable.^{31 32}

²⁸ See below on the law of succession.

²⁹ The law of married persons' property is, however, neither by the law of Rome nor by the German law, an universal succession. Savigny, § 379; Guthrie, pp. 292, 293.

³⁰ The decision of the Court of Cassation at Paris on 30th January 1854 (reported by Demangeat in his note on Fœlix, i. p. 216), which seems to take a different view, is explained by the fact that by the law of France the Communauté only takes place in cases in which the spouses have not for themselves validly come to some other determination. We cannot, therefore, hold that there is a community of goods, when an Englishman acquires an estate in France, nor even if he should be naturalised in France; for as this community has once been validly excluded, it cannot afterwards be touched by a change of domicile.

³¹ The same principles regulate the special provision which by many systems of law are made for widows, and are certainly distinct from rights of succession (*Vidualicium, Dotalicium, Douaire, coutumier, Dower*). In this connection the *lex rei sitæ* is recognised by many authors who in other respects pronounce in favour of the *lex domicilii*. Boullenois, ii. pp. 57, 58; Burgundus, i. pp. 50, 51. The latter, no doubt, excepts the case of the law of the domicile applying to all property *ubicunque sita*. Rodenburg, ii. p. 2, c. 5, § 5, and J. Voet, 23, 24, § 27, decide for the *lex domicilii*, but only in cases in which the law of the domicile has not confined its own operation to real estate situated in its own territory, a result which does not differ from our own view. Cocceji, *De fund.* vii. 19; Burge, i. p. 635, favour the universal application of the *lex rei sitæ*; Bouhier, on the other hand, c. 25, § 44, that of the *lex domicilii*.

³² It must further be noted that, if the *lex rei sitæ* prescribes particular forms for the transmission of real rights, rights of the one spouse over the property of the other, which are given by their personal law, can only be made effectual as an *actio personalis* until these forms are complied with. This has been noticed by old writers. Burgundus, i. 15, 16, 37; P. Voet, vi. 3, § 9; Rodenburg, ii. c. 5, § 9; Christianæus, Dec. ii. § 57 (see in the same sense Haus, § 125; Stobbe, § 34, note 16). What has been said is also, of course, true of the statutory hypothec of the wife over the husband's property.

The objection may further be taken, that the regulation of the rights of property of married persons, if, and so far as, in accordance with what we have said, this is to be guided by the *lex rei sitæ*, on the one hand is at variance with what is probably the desire of the parties, and thereby may cause the greatest inconvenience; while, on the other hand, the husband, if he should have the power of alienating landed property, or investing sums of money in such property, will, by reason of the variety in the land laws of different countries, have a dangerous power of settling as he pleases what law is to regulate the property of the spouses, and what rights each is to have in it. The first argument rests upon a circle. Parties are not entitled to hold that the *lex domicilii* is universally applicable if one of the spouses possesses foreign estate, and it cannot be proved that they proceeded upon this assumption; at least, the opposite may be just as easily assumed. The second argument is much more a description of the effect of the rights which the husband originally had in the subjects which he alienates, than of the consequences of our theory as to the conflict of laws. If he cannot by the *lex rei sitæ* alienate landed property, and by the *lex domicilii* cannot change the investments of the funds without his wife's consent, then this dangerous power is fully excluded. If the application of the *lex rei sitæ* is sound, the whole matter stands precisely as in the case where within the territory of one and the same system of law there are particular regulations as to the property of spouses in particular kinds of estate, *e.g.* manorial or peasant holdings. These are treated in such a case as separate estates.

Our view is confirmed by the fact that many authors,³³ who take the *lex domicilii* as the general rule, make an exception in the case where there is some prohibitive statute—*e.g.* a statute whereby the community of goods does not extend to property acquired by inheritance—in force. In the cases contemplated by these authors, the result no doubt shows that the *lex rei sitæ* is to be preferred, but not because the law that interferes is a prohibitive statute. For a statute of that kind can have no other object than the interest of the subjects of the State to which it belongs, so that it does not affect strangers who possess property there; an instance is the Roman law, which forbids donations between spouses.³⁴ The true reason lies in this, that the limitations which these authors have in view have their origin in the older German law, and have no further meaning than to ensure the rights of the nearest heirs in the estate. But no one has ever doubted that this is regulated by the *lex rei sitæ*.³⁵

³³ Bouhier, cap. 26, No. 19; Burgundus, as cited; Boullenois, pp. 753, 796, 797.

³⁴ See *infra*, § 187. Wächter, ii. pp. 362, 198, roundly asserts the application of the *lex domicilii*, because an authoritative statute as to the property of married persons has regard not to things within its own territory, but to persons, and in doubt must be held to take cognisance of none but its own subjects.

³⁵ A judgment of the Court of Cassation of Paris, 4th May 1829 (Sirey, xxx. 1, p. 191), affirming one of the Cour Royale at Rouen, declares the 329th and 330th articles of the Coutumes of Normandy, which only allow a certain part of the *conquêts* of the wife to pass to the spouses, to be real statutes, which are to be applied to foreign spouses who, by the law of

CAN THE LAW OF THE SPOUSES' PROPERTY UNDERGO A CHANGE,
OR CAN IT NOT?

§ 184. What, however, is to be the result if the spouses, after contracting marriage, change their personal law, *i.e.* alter their nationality or domicile, as the case may be? Does such a change carry with it an alteration in the law applicable to their property, in respect that that law is dependent on the personal law?

Practical jurists have busied themselves a good deal over this question as to whether the law of married persons' property changes or does not,³⁶ and there has also been much theoretical discussion of the subject, but there has not as yet been an unanimous answer returned to the question. Those who refer the positive law of married persons' property to a tacit agreement, say that it cannot undergo any change, for agreements cannot be set aside by a change of nationality or of domicile.³⁷ It may be that the expediency of having the law of married persons' property preserved from change has done something to bolster up the theory of a tacit agreement. For, if the law of property as between the spouses is transformed with every change of domicile or of nationality, many difficulties are, in the view of most authorities, at once raised, and the rights of the wife are very apt to be put at the mercy of her husband's caprice.

their domicile, live in complete community of goods. The reasons assigned for this, *viz.* "*Le statut est personnel, lorsqu'il régle directement et principalement la capacité ou l'incapacité générale des personnes pour contracter — le statut est réel, lorsqu'il a principalement et directement les biens pour objet,*" certainly do not warrant the result. Stobbe, § 34, note 14, has attached himself to the view worked out in the text, with full recognition of the exceptions that must be recognised where the *lex rei sitæ* is applicable.

By the law of England, land situated in England is not affected by any other marriage law than that of England; the law of the domicile at the date of the marriage, *i.e.* of the husband's domicile, or of a domicile acquired by him immediately thereafter, which at the date of the marriage he had in view to acquire, will regulate the rights of the spouses in moveable property. This is also the law of Scotland (Fraser, 1323, 1324); and conversely, real estate situated out of England or Scotland, as the case may be, is not subject to any of the rules of English or Scottish law to any effect, and specially with regard to the present topic, is not subject to be affected by the rule of English or Scottish law as to the property or administration of married persons' estate, or the succession of the survivor at the dissolution of the marriage.

It has been held by the French courts that, in determining whether the provisions made by a predeceasing husband in favour of his widow do or do not exceed one-fourth of his whole estate, which is the limit set by French law to his powers, it is incompetent to take into account real estate situated abroad (Leroy de Chaumont, 1879; Trib. Civ. de la Seine, J. vi. p. 549). As to the effect of an English marriage-contract upon the succession of the spouses, when that succession opens in France, *cf.* the case of Noireterre (1881, J. viii. p. 529) decided by the civil tribunal of Albi (see *infra*, note 97, p. 426).

³⁶ See A. Teichmann's monograph on the subject already mentioned. Muheim, p. 205, treats the question most exhaustively, but without any hesitation pronounces for the impossibility of change.

³⁷ No doubt it has been said, on the other hand, that even with a theory of tacit agreement, we may suppose a new agreement at every change of domicile. This suggestion is not, however, very scientific.

At the present day, there is no doubt that the theory which asserts that there can be no change is adopted by the great weight of opinion.³⁸ But there is no want of respectable authority in favour of there being a change in the law,³⁹ a theory which is in particular recognised by the practice of the United States.⁴⁰

As we have seen, the theory of a tacit agreement cannot be invoked to set up the doctrine that the law of the property of the spouses is subject to no change. But, as has been already aptly said by Savigny [§ 379, Guthrie, p. 296], if, and in so far as, the law of the new domicile holds that parties may effect for themselves changes on the common law applicable to their property, this provision can only be applied to the marriages of such persons as, at the time of their marriage, already belonged to the State, whereas the law of the older domicile intended to regulate per-

³⁸ P. Voet, 9, 2, No. 7; Hert, iv. 48, 49; Rodenburg, ii. p. 2, c. 4, § 3; J. Voet, in Dig. 23, 2, § 87; Burgundus, ii. p. 15; Molinaeus, in L. 1, C. de S. Trin.; Hofäker, *Principia*, § 143, *ad fin.*; Seuffert, Comm. i. p. 238; Bouhier, c. 22, No. 21; Alderan Mascardus, Concl. 7, No. 62; Pfeiffer, *Prakt. Ausf.* ii. p. 263; Hagemann, *Prakt. Erört.* 6, p. 142; Reyscher, i. p. 82; Harum in Haimel's Magazine, viii. p. 398; Funk in *Archiv. für Civilpraxis*, vol. 22, pp. 93-126; Boullenois, i. pp. 509 and 802 (where he expounds the older French practice, and shows how it coincides with our theory); Wächter, ii. p. 51; Holzschuher, i. p. 83; Schäffner, p. 137; Savigny, § 379; Guthrie, p. 293; Unger, p. 194; Gerber, § 229; Fœlix, i. p. 214, § 91, and Demangeat in his note to Fœlix, i. p. 216; Puchta Lectures, § 113; Puffendorf, *Observ.* ii. obs. 121, § 2; Mittermaier, § 400; Glück, Comm. xxv. p. 269; Roth, *Bayer. Privatr.* i. § 17, note 54; *D. Privatr.* i. § 51, note 66; Dernburg, *Pand.* § 46, note 10; Stobbe, § 34, note 18; v. Sicherer, p. 41; Westlake Holtzendorff, § 32 (there is a decided want of decisions in the English courts on this point); Phillimore, iv. § 340; Teichmann, p. 24; Asser-Rivier, § 50; Arntz, *Rev.* xii. p. 323; Durand, § 160; Weiss, p. 694. In accordance with this is the more recent practice in Hannover (Grefe *Hannoversrecht*, Hannover 1861, ii. § 20), which is now sanctioned by statute, and has the force of law in Hannover, and so, too, the express provisions of the Prussian A. L. R. ii. 1, § 350. Judgment of the Supreme Court of Appeal at Munich, 3rd November 1841 (Seuffert, i. pp. 155, 156), of the Supreme Court of Appeal at Wiesbaden in 1841 (Seuffert, x. p. 322), at Jena 18th August 1843 (Seuffert, xiv. p. 161), of the Provincial Court of Cassation and Revision in Rhenish Hesse, 1st June 1826 (*Archiv.* 2, p. 289), of the Supreme Court of Appeal at Oldenburg, 1864 (Seuffert, xviii. No. 1), of the Supreme Court of Appeal at Wolfenbüttel, 26th November 1863 (Seuffert, xx. No. 2), of the High Court at Berlin, 29th November 1870 (Seuffert, xxviii. No. 187), of the same court, 17th December 1875 (specially noticeable, because directed against a consistent practice to the contrary in Schleswig-Holstein, which is set out of account as erroneous), of the same court, 28th March 1876 (Seuffert, xxxii. Nos. 103, 104); German Imperial Court (iii. Sen.) 18th April 1882 (*Entsch.* vi. p. 223, and Seuffert, xxxvii. No. 319). See also decision of 7th March 1882 (*Entsch.* vi. p. 394). These latter judgments will probably rule the practice. In the resolutions of the Institute of International Law of 5th September 1885, art 15 (*Règlement international des conflits de lois en matière de mariage et de divorce*), it is in the same way laid down that there cannot be any alterations. "*Un changement du domicile ou de la nationalité des époux ou du mari n'a aucune influence sur le régime une fois établi entre les époux, sauf les droits des tiers.*"

³⁹ See Strube, *Rechtl. Bedenken*, iv. § 13; Hommel, *Rhaps.* 409, § 13 of the Leipziger Facultäts Gutachten, Eichhorn, § 35, note *g*; Runde, *Eheliches Güterr.* pp. 217 and 236; Kierulff, *Civilr.* i. p. 78; Böhlau, i. § 75, p. 481; Beseler, § 39, note 9; Vesque v. Püttlingen, § 66 *ad fin.*; Mommsen, *Archiv. für die civile Praxis*, 61, p. 183. Supreme Court of Kiel, 26th November 1845. Supreme Court of Appeal at Lübeck, 30th December 1859; Supreme Court at Oldenburg, 1864; at Rostock (Seuffert, No. 166; 18, No. 1; 26, No. 288).

⁴⁰ Story, § 187; Wharton, § 196; Field, § 575.

manently the relations of the spouses in regard to their property.⁴¹ It must be held that the only object of the law in the former case is to settle questions of property that arise in the case of marriages of persons belonging to its own country; while, on the other hand, we must concede at least the same enduring force to the statutory provisions which take the place of a contract, as we should undoubtedly be obliged to concede to a contract.⁴² In the opposite view, the relations of the spouses as regards their property would be thrown into the greatest uncertainty, particularly as regards the wife, since the husband has, to a certain extent, the uncontrolled power of altering his wife's domicile and his own.⁴³

If it is urged, in support of the proposal to determine the law of the property of the spouses⁴⁴ by the law of the new domicile,⁴⁵ that on the one hand there is no such tacit contract, and, on the other, if there is no special contract, then the law of the property of married persons is a consequence of the law of the place; and so, when the spouses emigrate to another country, where another law prevails, they must be taken to submit themselves to a new system;—the first statement is, no doubt, correct in itself, but not fit to meet the reasoning of Savigny just quoted; the second is incorrect, because it necessarily involves an assumption which is not proved, and which our previous reasoning shows to be wrong, to the effect that the law of the new domicile will innovate upon rights of property already

⁴¹ See, for instance, the ordinance of Lippe, 1786, § 32 (Kraut, § 199, 1): "A change of the domicile of the spouses, if they betake themselves to a foreign country where the community of goods is not known, cannot alter or abrogate that community—and this is true whether (1) they should effect something of the kind by a special bargain; or (2) some special enactment of the country of their new domicile should forbid that community of goods.

⁴² Gerber, *D. Privatr.* § 229: "It is a necessary result of the relations of the spouses in matters of property, that where we have a marriage recognised by law we have not merely the possibility of the application of particular rules of law, but also a positive and enduring shape given to all the relations of the spouses in matters of property, from which a whole series of mutual rights and obligations arise; these legal relations resulting from a marriage are not subject to the operation of the code of the country in any other sense than every legal relation is, and in particular it does not follow that because they were originally established by the law of the domicile that when the husband shifts his domicile it is transformed into the shape prescribed by the law of that new domicile."

⁴³ We must make a clear distinction between the rights of succession of the spouses to each other, and the effects of the matrimonial law of property subsequently to the death of one of the spouses. D. R. G. vi. 19th December 1887 (Seuffert, xliii. § 196).

⁴⁴ Those who uphold the possibility of a change in the law of property of married persons have not been able entirely to keep themselves from a consideration of the hardships attendant on it. Thus Böhlau, p. 484, after an abrupt attack on the theory of the permanency of the law, ends by laying down that the wife shall have an action to compel the husband by contract to grant her the rights given to her by the law of her first domicile, if by changing his domicile he has prejudiced her rights of property. The distinction is scarcely in that case worth fighting about. Of course, such an action, from the point of view of those who hold that the law may be altered, is nothing but a capricious invention. See Teichmann, p. 26, upon this and other devices.

⁴⁵ Günther, p. 371; Malblanc, *Princ. Jur. Rom.* § 65 *ad fin.*; Ricci, pp. 507, 598; Eichhorn, § 237.

established, and that the law of the former domicile did not intend to fix permanently what the relations of the spouses should be as regards their property.⁴⁶

An intermediate theory proposes to subject all property acquired after the change of domicile to the law of the new domicile, and leaves the law of the former one to rule all property acquired before that change.⁴⁷ In support of this there is cited the doctrine, which we have already refuted, that the permanent dependence of all questions of property between the spouses upon the law of the first domicile can only be justified by the assumption—an erroneous assumption—of a tacit contract; and then those who would make the *lex rei sitæ* the rule, adduce this consideration, that in the eye of the law moveables are always situated at the actual domicile of the party in right of them. But this second consideration does not support the intermediate theory, but rather the second theory, which does not except the property already acquired by the spouses from the law of the new domicile; it is not, however, well founded, for the rule "*mobilia ossibus inhaerent*" merely signifies that in certain circumstances moveables, according to the laws of all civilised peoples, constitute an *universitas*. This intermediate view is, besides, quite unscientific. It forgets that the principle of community of goods extends not merely to the existing estate, but also to what may be subsequently acquired, and in attempting to avoid inconveniences on the one side, this doctrine raises up all the more on the other. *E.g.* the wife has had to share with her husband an inheritance which fell to her, because the law of her domicile at the date of the succession so directed: a succession now opens to the husband: he keeps the *jus quæsitum* he had in the half of the first succession; but, in accordance with the law recognised at their new domicile, the wife gets nothing at all from the succession which has fallen to her husband.

If, in the first place, it is contended, in opposition to the theory we have adopted, that parties contracting with married persons are entitled to rely upon the legal conditions of that relation as recognised at the seat of their existing domicile,⁴⁸ we cannot affirm this contention, unless every marriage which is celebrated in that country necessarily involves the

⁴⁶ A judgment of the Supreme Court of Appeal at Lübeck, on 30th December 1859 (Seuffert, 14, pp. 162, 163), is instructive: it does, no doubt, in itself pronounce the theory attacked in the text to be sound, but proposes still to investigate the question whether the law of the new domicile will really regulate the relations of the spouses as regards their property.

⁴⁷ Huber, § 9; Haus, pp. 31, 32; Kierulff, § 5, p. 73; Burge, i. p. 622; Story, §§ 178, 187. So, too, according to these authorities, the practice of the common law of England and America, and the jurisprudence of Scotland. [See *infra*, p. 419.] See, too, the judgment of the Supreme Court of Appeal at Kiel, 26th November 1845 (Seuffert, 7, p. 162).

⁴⁸ Schmid, p. 82, has declared in favour of this view. Boullenois, i. p. 537; Runde, *Eheliches Güterrecht*, § 166, 8, *ad fin.*; Schäffner, p. 144. The *bona fides* of the creditor will, according to a judgment of the Supreme Court of Appeal at Wiesbaden, 26th April 1825 (Nahmer, ii. p. 474), open the door to the decision of the case by the *lex domicilii*, if that is to his advantage. The treaty of Spanish-American States in 1878, art. 15 (*Zeitschr. f. d. ges.*

statutory relations of that country as regards property, or, if it is celebrated elsewhere, can only continue to subsist in that country under these relations;⁴⁹ or unless there is some special publication required of any modification or exclusion of the statutory legal relations between spouses; and in the latter case, too, the proposed rule would only affect the claims of creditors against the spouses, and not the rights of the spouses against each other.⁵⁰

If the legal relations between the spouses do not take their rise from the date of celebration of the marriage, but are associated with some more remote event, such as the birth of a child, it is the domicile which the spouses had at the date of the marriage, not that which they had when this event occurred, that rules. The marriage was constituted at the former, not at the latter place; and the place at which the condition is purified can be of no more importance here than in any conditional contract.⁵¹

RESTRICTIONS ON THE LEGAL CAPACITY OF THE WIFE NOT TO BE CONFUSED
WITH LIMITATIONS PLACED UPON THE WIFE'S POWER OF DISPOSAL
BY REASON OF THE HUSBAND'S RIGHTS.

§ 185. We must not, however, confuse the invalidity of a transaction entered into by a married woman without her husband's consent—a consequence of the husband's rights over the wife's property—with the invalidity of a legal act, arising from some incapacity of a married woman to act. This incapacity, which as a rule is only partial, may very well take its rise, simply from the fact of marriage, and exist for the married woman only so long as the marriage lasts. We must, then, consider the position

Handelsr. 25, p. 548, and Introduction, p. 568), takes up the principle of the possibility of altering the law of matrimonial property—in accordance with the law of the domicile—in a peculiar fashion, with the object of bringing about an assimilation of immigrant families with native born. But it would not be possible in that case to recognise the validity of contracts concluded abroad, and in all probability the object which is sought to be attained will not be reached at all, but rather will result in confusion when it is attempted to set it in operation.

⁴⁹ In this case the law of the new domicile will be applied (*Wächter*, ii. p. 55; *Savigny*, § 379; *Guthrie*, pp. 296, 297). See, too, the judgment of the Court at Celle, cited in note 1 *ad fin.*

⁵⁰ Cf. judgment of the Supreme Court at Berlin, 26th October 1860 (*Seuffert*, 14, p. 340): "When intimation is required as a necessity, the law of the territory must be recognised to this effect, that so long as this intimation is not given the spouses must be held, so far as their relation to others is concerned, to be living in the ordinary community of goods. This ruling law must also be applied to married persons coming from a foreign country." It is also urged that the judge cannot be expected to know the law of the former domicile. See, on the other hand, *Schäffner*, pp. 142, 143. By the law of Hamburg, contracts of marriage are of no force in questions with creditors, except it should happen that the wife possesses some separate estate acquired from a third party (*Baumeister*, *Hamburg. Privatrecht*, ii. p. 95). As the judgment of the Supreme Court of Germany already cited notes, the necessity for the publication of a foreign marriage law which differs from that of the country is by no means obvious without special enactment. As to the means of giving effect to claims by the wife in case of bankruptcy, see the law of bankruptcy.

⁵¹ *Schäffner*, p. 138.

carefully: Is the legal act ineffectual because of some right in the other spouse, as a rule, the husband, or is it invalid on account of an incapacity to act in the contracting party?

We must not confuse the invalidity of transactions entered into by the wife without her husband's consent, which is a consequence of the right which the husband has over his wife's property, with the invalidity of any transaction which depends upon the incapacity of the woman to act for herself. The former is regulated by the law of the original domicile; but the woman's incapacity, and the statutory guardianship exercised by her husband, must be settled by the law of their domicile at the time the transaction was entered into.⁵² It is to the neglect of this distinction, which has now been sharply brought out in the practice of the German Imperial Court,⁵³ that the origin of many of the divergent theories, to which we have already referred, may be traced.⁵⁴

ENACTMENTS FOR PUBLIC POLICY.

§ 186. It may happen, too, that the later personal law contains provisions for the modification or suspension, as the case may be, of the matrimonial law of property which call for application in the interests of public policy, and especially in the interest of the creditors of the spouses, to each and every married person who has a residence in the country, or who belongs to it as a citizen. The application of such an absolute provision is, of course, not in any sense interfered with by the circumstance that the law of property between the spouses is in itself subject to the legal system of some nationality or domicile which the spouses at some previous time enjoyed. In this way a judgment of the German Imperial Court (ii. Sen.) of 7th October 1884 (*Entsch.* xii. p. 309) found and declared the 1443rd article of the Baden *Landrecht* (*Code Civ.*), whereby any suspension of the matrimonial community of goods was required to be judicial, to be an absolutely universal proposition, applicable to all married persons living in the country.⁵⁵

⁵² So, too, judgment of the Supreme Court at Berlin, 19th December 1859 (*Seuffert*, xiv. No. 4). If we take nationality as the criterion on this matter—the proper course, as I think—we should not regard the courts of the domicile as competent even to give any ratification that might be required to supplement the wife's capacity. (So *Gianzana*, i. § 98.) The rules of jurisdiction of the courts of law would in many cases shut out the possibility of applying foreign law by the courts of the domicile.

⁵³ Court of the Empire (iii. Sen.), 7th March 1882. *Entsch.* vi. p. 395, § 123.

⁵⁴ *Boullenois*, ii. pp. 14, 15, 24, 25; *Duplessis*, *Œuvres*, ii. p. 158; *Beseler*, ii. p. 383. Cf. *Story*, § 136 *et seq.*

⁵⁵ See, to the same effect, *Arntz*: *Rev.* xii. p. 324. *Weiss*, p. 680; and *Beauchet*, *Jour.* xii. p. 39; *Jour.* xiii. p. 723, think, on the other hand, that they find in that article of the code merely a personal statute, which is not to be applied to spouses who have married under a law of matrimonial property to a different effect.

NOTE L ON §§ 184-186. RESULT OF CHANGE OF DOMICILE.

[Lord Fraser (Husband and Wife, p. 1326) thus states the question raised in the foregoing paragraph: "Suppose a husband not entitled *jure mariti* to carry off all his wife's personal estate by the law of the matrimonial domicile, can he, to whom the law gives the power of changing the domicile at pleasure, do so to the effect of subjecting the wife's property to a law by which it is assigned to him? . . . Can her husband change the domicile from England to Scotland, and demand all the personal estate as belonging to him, in virtue of the *jus mariti* given him by the law of the new domicile, and plead that the English statute" (limiting his rights in certain kinds of personal estate) "was a local law which had no extra-territorial force? There is no decision to this effect, and the contrary is maintained by eminent jurists, who are very decided on one point—that if such change of domicile does enlarge the husband's powers over the wife's property, this will apply only to property acquired by her subsequent to the change, and will not divest her of property which had been held by her in her own right under the law of the matrimonial domicile." By the phrase "matrimonial domicile" in this passage is meant the domicile of the husband at the time of the marriage, or the domicile adopted by the spouses immediately after the date of the marriage, and in their view when it was contracted. The authorities quoted by his lordship—viz. Westlake, p. 71; 1 Burge, 626; Savigny, § 396; Wharton, § 198; Story, § 187; Bishop on the Law of Married Women, vol. ii. § 565, and the American cases cited there—would probably be sufficient to determine the decision of any case that may occur in Scotland. In questions as to the rights of spouses and children on the death of one of the spouses, the law of the domicile at the time when the succession opens will settle English and Scottish cases (*Hog v. Lashley*, 1804, 1 Robertson Sc. App. c. 4; Westlake, pp. 73, 74; Fraser, p. 1325). The Court of Aix (Jour. ix. p. 541) decided that a wife who has, by marrying a man of a particular nationality, once acquired certain rights *in spe* as his widow cannot afterwards lose them by a change of nationality on the part of her husband.]

LIMITATIONS ON THE FREEDOM OF CONTRACT OF THE SPOUSES: DONATIONS BETWEEN THE SPOUSES.

§ 187. The positive law of the spouses in not a few instances restrains the power of the spouses to contract with each other. These are cases of limitation of capacity, and accordingly the personal law of the spouses must be exclusively applied, and the personal law which the spouses enjoyed at the date of the act in question.⁵⁶ The first of these

⁵⁶ On this subject many illustrations may no doubt be given which create doubt, *e.g.* according to a marriage contract concluded in France, the husband had a right to the wife's wages. If, then, the spouses afterwards settle in England, can the wife appeal against her

limitations is the prohibition of donations between the spouses,⁵⁷ which existed in the Roman law. If such a prohibition exists according to the *lex rei sitæ*, it is not to be applied to married persons domiciled in another country, for this reason, that this prohibition exists for the purpose of maintaining the moral integrity of the married state, and that can certainly not be matter of concern to any Government other than that to which the persons of the spouses belong.⁵⁸ If, then, to take an instance, a married couple domiciled in Vienna, where donation is not prohibited, make one to the other a donation of an immoveable estate,⁵⁹ which lies in some country where Roman law is observed, this donation is good, and conversely it is null if the immoveable estate lies in Vienna, while the domicile of the marriage is in Hannover, where Roman law prevails.

The explanation of the difference in the theory of many of the older authorities, to which, too, some of the more modern writers have attached themselves, is that, as Argentraeus correctly says,⁶⁰ they confuse this prohibition of donations between spouses—a provision of the Roman law—with the rights of the next heirs, which are founded on principles of Germanic law; the protection given to these rights is often described in particular systems of law as a prohibition of donations. But the touchstone of the distinction is this, that the donation of the Roman law, if it is not recalled, is confirmed by the death of the giver,⁶¹ and is quite admissible before marriage, while the prohibition of the German law makes any donation, even *mortis causa*, invalid, and invalid even if made before celebration of the marriage, *e.g.* between persons betrothed. The views of these older writers are, therefore, in relation to the statutes which were before them, quite correct in their results,⁶² while the theory by which all

husband to the Married Women's Property Act, by which all a wife's earnings belong to herself? In the paper in J. viii. p. 47, *præs.* pp. 54, 55, the question is answered in the affirmative, because the provision of the English law is *essentiellement d'ordre public*," v. Martens answers it in the negative on the ground that the law of married persons' property is unalterable, § 73 *ad fin.*

⁵⁷ Savigny, § 379; Guthrie, p. 297; Schmid, p. 83; Bouhier, cap. 12, § 95; Demangeat on Fœlix, i. p. 247; Laurent, v. § 222; Stobbe, § 24, note 27; Saxon Statute Book, § 14 *ad fin.* Folleville, pp. 515, 516, goes too far in proposing to extend to gifts already completed prohibitions which exist by the law of some subsequently acquired nationality.

⁵⁸ Burgundus, i. 38; Barthol. in L. 1, C. 6, S. Trin. No. 32; Bouhier, chap. 29, No. 37; Wächter, ii. p. 199; Holzschuher, i. p. 85; Unger, i. p. 93; Walter, § 42; Demangeat in his note to Fœlix, i. p. 123, and the judgment of the Cour Impériale de Paris, 6th Feb. 1856, cited there.

⁵⁹ By the 1246th article of the Austrian Code, donations between spouses are permitted.

⁶⁰ Nos. 8, 14, 15; Burgundus, as cited; Boullenois, i. pp. 105, 106; Abraham a Wesel, *ad nov. Ultraj.* No. 14 *et seq.*

⁶¹ L. 32, §§ 3, 4; L. 27, D. 24, 1.

⁶² There are in favour of the *lex rei sitæ*: P. Voet, iv. 2, § 2; J. Voet in Dig. 24, 1, § 19 (J. Voet for this reason, that the prohibition simply affects things without touching upon the personal qualities of the spouses); Cocceji, *De fund.* vii. 19; Christianæus, *Comm. ad leg. municip. Mechlin.* tit. xvii. act. 3, No. 12; Ricci, *Entro.* pp. 547, 548; Burge, i. p. 639, ii. 846; Fœlix, i. § 60, p. 123; Rocco, pp. 14-27 (according to the citation in Fœlix, *ad fin.*). For the practice of the French Parliament, which had in view that prohibition of German law, and pronounced it to be real, see Bouhier, chap. xxvii. No. 32, 45-47; Boullenois, i. pp. 489-491, ii. pp. 97 *et seq.* 104, 105, 127, 154, 155; the provision of the Code Civil, art. 1091, proceeds upon the view of the Roman law.

possible benefactions⁶³ from the one spouse to the other are subjected to the *lex domicilii*, leaves out of account the prohibitions of Germanic law, which are entirely different.

The question, too, as to whether spouses can alter existing contracts of marriage after they are married, or can substitute contract for common law provisions to regulate their property,⁶⁴ is to be settled by the law of the domicile which the spouses had,⁶⁵ at the time of the alteration in question.⁶⁶ Foreign spouses are not fettered in this matter by the fact of having property in this country.

The prohibition against alienation of the *fundus dotalis*,⁶⁷ which existed in Roman law, is in the same way a special case of true incapacity to act. In this case the spouses are in truth, unless in exceptional circumstances, incapacitated from disposing of one asset of their property *inter vivos*. The consequence is that such a prohibition, found to exist according to the *lex rei sitæ*, will not extend to foreign spouses, by the laws of whose own country alienation of this asset is allowed. The special protection, which the law desires to give the spouses in this matter, cannot be extended to foreigners, whose own law looks upon such protection as superfluous or mischievous. Conversely, alienation will be regarded as null, not upon any logical ground, it is true, but according to the law of custom which has been adopted on the continent of Europe,⁶⁸ in cases in which only the personal law of the spouses pronounces it to be so.⁶⁹

We find an analogy in the case of a person who, in accordance with the common law of Rome, is declared by a rescript of the sovereign to be of full age. Such a person may dispose of all his other property without restraint, but may not alienate landed estate.⁷⁰

⁶³ So, too, the modern German authorities. See Savigny, as cited.

⁶⁴ Demangeat, as cited; J. Voet, 23, 2, § 87; Bouhier, chap. xxii. No. 95. Cf. Code Civil, art. 1394: "*Toutes conventions matrimoniales seront rédigées avant le mariage par acte devant notaires.*" 1395: "*Elles ne peuvent recevoir aucun changement après la célébration du mariage.*" Fœlix is of a different opinion; see, too, report of a judgment of the Cour d'Appel de Limoges, 8th Aug. 1809; Sirey, ix. 2, p. 386.

⁶⁵ The Court of Cassation at Turin, on 17th Jan. 1877, decided soundly in our view that the *dos* of a foreign wife, who had married a Sardinian subject, had, in accordance with the law of Sardinia, become inalienable (J. vi. p. 75).

⁶⁶ Bouhier, cap. 20, No. 150; Beauchet, J. xi. p. 39; Folleville, p. 113. On the other hand, Raoul Jay (J. xii. p. 52) improperly treats the question as a part of the *régime matrimonial*, to be determined therefore by the law of the first matrimonial domicile.

⁶⁷ Cf. Code Civil, § 1554.

⁶⁸ English jurists will be compelled to recognise that their general principle, according to which the *lex loci actus* gives the rule, must suffer an exception here.

⁶⁹ Bouhier, c. 27, § 14; Demangeat on Fœlix, i. p. 195; Fiore, § 332; Esperson, J. viii. p. 215; Laurent, v. § 226; Aubry et Rau, § 31, note 30; and Weiss, p. 693, answer this question as it is answered in the text. French practice has, according to old tradition, allowed the *lex rei sitæ* generally to rule: see Weiss, *ut cit.* Burge, ii. p. 270; Duplessis, Consult. Œuvres, ii. p. 259; Gand, No. 652; and Fœlix, § 60, p. 123, declare for the *lex rei sitæ*.

⁷⁰ If judicial sanction is required to alienate the *fundus dotalis*, the judge who is pronounced by the personal law to be the proper judge is competent. Cf. Hannoverian law of 30th July 1840 (G. S. L. i. p. 135, § 1). Giansana's view on this subject is peculiar (ii. § 318). Perhaps

On the other hand, the question whether property in a *fundus dotalis* can be acquired by prescription, depends, not upon the *lex domicilii*, but upon the *lex rei sitæ*.⁷¹

REGULATION OF THE PROPERTY OF SPOUSES BY CONTRACT.

§ 188. It is the prevailing opinion that the import of the marriage contract (*pactum nuptiale*), which determines the rights of property between the spouses, should be settled by the law of the domicile of the husband at the celebration of the marriage,⁷² and on this point many, who take nationality as their rule in other matters, are of opinion that the guiding principle should be domicile. As a matter of principle, however, we must on this point also hold that nationality is the proper guide. We must, however, admit that circumstances may very easily occur to justify us in supposing that, in so far as the spouses were at all at liberty to make a contract for themselves, they desired that their contract should be supplemented on points that were not fully expressed, or should be interpreted by some other positive law; and then, in a matter like a marriage contract, the practical result will very often be (in so far as the law of the husband's nationality gives him freedom of contract) that the *lex domicilii* will carry the day, as so often happens in other contracts. Protracted domicile at the place, it may be, to which the bride by nationality belongs, or in which she is domiciled; ignorance on the part of the bride, or of her guardian, of the law of the husband's nationality; and the employment of expressions which are peculiar to the legal language of the domicile, possibly an engagement by the husband to continue to remain permanently at the bride's domicile,⁷³

he is misled by the principle of the so-called "*ordre public*." His view is that the *judex domicilii* (i.e. the judge who by the personal law is the proper judge) cannot interfere with property of the spouses which is situated in another country.

⁷¹ See below the law of things, and Aubry et Rau, § 31, note 20. We must take care not to confound the Roman prohibition against alienation of the *fundus dotalis* with the prohibitions which we find in German law against the alienation of particular estates, which prohibition arose from the rights of the next heirs. The judgment of the French Court of Cassation of 17th Feb. 1817, reported in Sirey, xvii. i. p. 421, pronounced the statute, which was once recognised in Normandy, by which a wife *séparée de biens* could only alienate her *fundus dotalis* with judicial permission, and after consulting her nearest relations, to be a real statute, and therefore held (before the publication of the Code) that a sale of such an estate by a married woman domiciled in Paris was null. Cf. Boullenois, i. pp. 739, 750, 798, 799.

⁷² Bartholmæus de Salic, in leg. 1, C. de S. Trin. No. 4. Jason Maynus in leg. 1, C. de S. Trin. No. 24; Molinæus in leg. 1, C. de S. Trin.; Duplessis, Consult. 17; Œuvres, ii. p. 93 *et seq.*; P. Voet, 9, 2, No. 5; Huber, § 10; Hert, iv. 39; Argentræus, No. 31, 45; Rodenburg, ii. p. 2, c. 4, § 1; J. Voet, 23, 4, § 29; Cocceji, *De fund.* vii. 12; Abraham a Wesel, de Comm. bon. Soc. i. No. 100; Massé, No. 161, p. 224; Boullenois, i. p. 637 *et seq.*; Wächter, ii. p. 47. Cf. L. 65, D. de *judiciis*. [This is assumed to be the rule of the law of Scotland in the leading case of *Earl of Stair v. Head*, 1844, Ct. of Sess. Reps. 2nd ser. vi. 905. But it is decided in that case that spouses domiciled in one country may select the law of another as the law that shall construe their contract. Even although spouses may not have expressly made such a selection, it would appear that an inference to that effect may be drawn from the language of the contract, if it shall disclose an intention to live in a particular country, and to be ruled by its law.]

⁷³ See, for instance, the English decision reported in J. ii. p. 445. [*Colliss v. Hector*, 1875, L. R. 19, Eq. 334.]

will all incline the scale towards the decision of the matter according to the *lex domicilii*. The case we have now under consideration is quite different from the case in which no special contract has been made. When parties make no contract, they allow the general rules of international law to decide, and these pronounce in our view for the law of the nationality. When parties make a contract, they introduce their own individual wills to a certain extent as factors in the case, and may quite properly demand that this individual declaration of intention should be considered in the light of the circumstances of the individual case. There will be much less reference made to the place where the contract was concluded to discover its meaning,⁷⁴ since, in the case of a contract of marriage, *bona fides* does not require the parties to subject themselves to the *lex loci actus*. (Cf. *infra* on obligatory contracts.) The same may be said of the obligation of the husband to repay the *dos* which he receives.

The independent obligations of third persons,⁷⁵ however, and the obligations undertaken by the future wife before her marriage, can only be determined by the law of their respective domiciles; in the case of the wife, because it is only after celebration of the marriage that the wife follows her husband; before this, the position of husband and wife as contracting parties is equal.⁷⁶

Marriage contracts are, upon the whole, to be dealt with like other obligatory contracts.⁷⁷ From this it follows that the interpretation of doubtful expressions must, as a general rule, be taken in the sense which the law of the place of the execution of the contract attaches to them.⁷⁸ If the *lex rei sitæ* requires a special form⁷⁹ to constitute a real right which it has been undertaken in a marriage contract to grant—*e.g.* the registration in a public register—the right in question can only be acquired by observing this form, although a personal action for the right so promised may be brought upon the contract directly.⁸⁰

⁷⁴ For the *lex loci actus*, Hommel, Rhaps. ii. obs. 409, No. 13; Gand, No. 648.

⁷⁵ Cf. Alderan Mascardus, Concl. 7, No. 57, 65, 66. *E.g.* according to the 1547th article of the Code Civil, any one who gives a *dos* is by common Roman law bound only to make it good in case of eviction under certain circumstances (L. I. C. *de jure dot.*, 5, 12; Arndt's *Pandects*, § 403). A native of the town of Hanover, who promises a *dos* to a Frenchman or an inhabitant of the Prussian Rhine Province, is only bound to warrant against eviction under the conditions of the Roman law.

⁷⁶ Gand, No. 671. [So decided by the House of Lords in Cooper, see *supra*, p. 310.]

⁷⁷ In exceptional cases, then, the *lex rei sitæ* may also be applied, but only if the contract makes special provisions for particular parcels of real property.

⁷⁸ For instance, the expressions "heirs of the body," "issue," used in an English contract running in the English language. Cf. Story, §§ 276, 113. The *exceptio non numerata dotis* must, as a rule, be governed by the law of the place where the discharge is granted. See above, § 77.

⁷⁹ The rule "*locus regit actum*" has application in this connection, but of course only as a permissive rule. From the fact that it is merely permissive it follows that a contract, which satisfies the forms required by the national law of both parties, is valid. Cf. art. 13 of regulations adopted by the Institute of International Law at Lausanne in 1888.

⁸⁰ Argentæus, Nos. 38, 39; Burge, i. p. 368; Story, § 184. There is no doubt that a community of goods depending on contract will include foreign real property (see Story, § 184; Rodenburg, iii. p. 1, c. 4, § 5; Boullenois, i. pp. 794, 795), except in cases where the real

§ 189. Some doubt is created by supposing a case where the husband immediately after the celebration of the marriage changes his domicile,⁸¹ and settles, we shall suppose, at what was the domicile of his wife. The law of the new domicile must rule, although in the general case it is the actual domicile, and not one which is yet to be acquired, which must decide; we justify the exception by the consideration that the contract has for its subject a permanent relation which will continue to subsist in every sense in the new domicile, and that the law of any country as to marriage contracts cannot be applied to marriages which are not to be carried out there at all; this holds in cases where the intention of taking up the new domicile was announced at the time of the execution of the marriage contract,⁸² and where there can be, in the circumstances, no inference of any intention to come under the provisions of the law of the former domicile.⁸³

Marriage contracts may very well contain provisions, which may be characterised as true contracts of succession: in that case, these provisions can only be defended against the unconditional rights of heirs *ab intestato*, or against the rights of heirs who take by some provision of law [as in the case of legitims], according to the rules of that legal system which is to be taken as determining the law of succession, be that the law of the last domicile, or of the last nationality.⁸⁴

We can also deduce, from the fact that the rule "*locus regit actum*" is merely permissive, the following rule, viz.: In so far as the husband undertakes unilateral obligations, if there is a plain intention on his part to impose on himself a binding obligation, we must always affirm the validity of the obligation, so far as form goes, if it is in accordance with the rules of his own law. Any other view would give him the widest opportunity of deceiving his wife.⁸⁵

DISSOLUTION OF THE MARRIAGE. SECOND MARRIAGE.

§ 190. Except in so far as the *lex rei sitæ* prevails,⁸⁶ the rules of the first personal law which the spouses had in common will settle what rights

right sought to be conferred is declared by the *lex rei sitæ* to be inadmissible (e.g. *Dominium pro diviso* in an estate which the law says shall not be divided), or the disposition itself in the contract contradicts this, and proposes to treat the subject in question as a separate estate. (The usual expression, "prohibitive statute," is not apt; see *supra*, § 33.)

⁸¹ Cf. Pothier, *de la communauté*, Nos. 15, 16.

⁸² To appeal to the law of the new domicile without previously announcing the purpose of acquiring it, is inconsistent with *bona fides*. The view that the new domicile must always decide puts the rights of the wife entirely at the mercy of the husband's caprice. See Duplessis as cited, p. 96.

⁸³ E.g. where the spouses propose to emigrate to a country foreign to both of them, with whose law they are unacquainted. It is different if the husband goes to the place where the wife is already domiciled.

⁸⁴ Supreme Court of App. Lubeck, 17th November 1874. Seuffert, 32, § 105.

⁸⁵ This consideration is overlooked in the grounds of decision in the interesting judgment of the Court of Cassation at Turin, 27th November 1885 (J. xiii. p. 617)—at least in so far as the grounds of judgment are given there—and in Chrétien's note, p. 619.

⁸⁶ See, for instance, Stephen, ii. p. 403, on the Courtesy of England. Lehr, *Dr. Ang.* § 182.

the surviving spouse has in the property of the deceased, or in the goods falling under the *communio* after the death of the predeceasing; provided that is to say, that they are the immediate results of the law applicable to the property of the spouses during the subsistence of the marriage;⁸⁷ as, for instance, where there has been a *communio*⁸⁸ *bonorum*, and at the dissolution of the marriage, the property hitherto held in common falls in whole or in part to the surviving husband, or the wife retains the management and life interest enjoyment of all the property of the spouses after her husband's death.⁸⁹ Both of these are results of the disappearance of one partner in the society that existed, in the latter case of the partner who had the whole right of management.⁹⁰ Ordinary cases of succession are determined, when the *lex rei sitæ* does not assert itself, by the rules of the last personal law which the deceased had.⁹¹

Since divorce and its consequences can only be decreed by the court of the country whose law actually regulates the personal status of the parties, the consequences of a dissolution of marriage, in so far as they are penal, can only be determined by that law. That is, for instance, true of the purely arbitrary punishments of the Roman law, which have no necessary connection with the Roman law of dowry.⁹² For other purposes the law which regulates the relations of the spouses in other matters of property is decisive here also.⁹³

⁸⁷ Chopin, *ad. leg. Andegav.* iii. 2, No. 16; Rodenburg, iv. p. 2, c. 2, § 8; Burgundus, ii. 13, 14; Savigny, § 379; Guthrie, p. 298; Beseler, ii. p. 385; cf. Puchta Lectures, § 113.

⁸⁸ Ordinance of Lippe, 1786, § 15, cf. §§ 8, 9, 6, 7; Kraut, § 200, No. 3, 201, No. 1, 202, No. 6; *Hamburger Stadtrecht*, iii. 3, 8, cf. ii. § 1; Kraut, § 202, No. 15, 201, No. 1, 3.

⁸⁹ Nürnberg Reform, Tit. 33, Geo. 5 (Kraut, § 212, No. 14); Frankfurter Ref. v. 4, § 3 (Kraut, § 205, No. 1).

⁹⁰ Many systems of law provide that the wife cannot renounce the community of goods, and relieve herself of the debts that have attached thereto during the subsistence of the marriage, except by fulfilling certain conditions. These conditions, unless they are a mere form for declaring intention, in which case the rule "*locus regit actum*" is applicable, must be fulfilled in conformity with the law which decides generally as to the *communio bonorum*. (*E.g.* the wife must give up an inventory according to the law of the first domicile.) Cf. Bouhier, chap. 28, Nos. 67, 76.

⁹¹ Cf., for instance, a statute of Hannover in 1303 (Leonhard, Statutes and Customs of the City of Hannover, p. 38; Kraut, § 250, No. 15), or the "quart" of the needy widow provided by Roman law.

⁹² The reverse is laid down in a judgment of the Supreme Court at Berlin, 31st May 1841 (*Entsch.* x. p. 181). See the judgment of the same court given below in note 96. Judgment of the Imperial Court (iv.) of 17th Oct. 1887 (*Entsch.* xviii. No. 58, p. 309). "In the first place, it is beyond all doubt that the patrimonial results of divorce are to be determined by the law of the place in which the spouses had their domicile up to the date of the dissolution of their marriage."

⁹³ If the parties, while a process of divorce is in dependence, shall change their personal law, then the results of the divorce which could not be determined by the sentence of divorce, or which it has not, by reason of the tenor of parties' pleadings, determined, must be determined by the subsequent personal law, *i.e.* by the personal law which the divorced spouses had at the time when the sentence of divorce first began to take effect. Cf. judgment of the German Imperial Court (iv.) of 27th May 1881 (*Entsch.* v. No. 54, p. 193). By omitting to plead, it may possibly be that a party has intended to renounce his or her rights.

The effect of a second marriage in the same way, in so far as the *lex rei sitæ* does not interfere and assert its claim, or the question does not become one as to property inherited from the predeceasing spouse, is to be ruled by the law of the first personal law of that marriage; but in so far as the law gives the children of the first marriage the right to require payment or security for payment of what the surviving spouse inherited from the predecessor, all questions must be settled by the law under which the children acquired these rights; in this way, the question as to whether a *dos* or *donatio propter nuptias* of the Roman law falls to the children, will be settled by the law of the original personal statute of the first marriage; and, on the other hand, the question as to whether the property passing by inheritance from the deceased spouse to the *parens binubus* is to be refunded on his or her re-marriage, must be settled by the law of the last domicile of the *parens prædefunctus*.⁹⁴ For although it is true that the children of the first marriage do not claim the goods that have fallen to the *parens binubus* on the footing of intestacy,⁹⁵ it is also true that this *parens binubus* has only been allowed to acquire these on the understanding that he shall not marry again; and, again, the obvious end of all such provisions—viz. to protect the children of the first marriage against the new spouse and the children, if there shall be any, of the second marriage⁹⁶—demands that the law of the domicile afterwards acquired by the *parens binubus* shall be excluded, to the end that the rights of the children shall not be left to depend entirely upon the pleasure of that parent. Whether the second spouse can take anything by succession is, on the other hand, dependent upon the law which governs the succession to the estate of the *parens binubus*, and therefore in certain circumstances upon the *lex rei sitæ*.⁹⁷

Lastly, the rules of the personal law of the new spouse must decide

⁹⁴ Or by the *lex rei sitæ*, if this is the law that rules the intestate succession of the predeceasing spouse.

⁹⁵ A judgment of the Supreme Court at Berlin, 3rd May 1853 (Decisions, 25, p. 373), makes the law of the place where the second marriage took place decisive; for the penalties upon a second marriage do not depend upon general principles of law, but upon considerations of morality, expediency, or convenience. No doubt there is much to be said for the view which regards it as a case of intestacy resting upon a tacit assumption as to what the predecessor would have wished, and consequently a resolutive condition by virtue of which the advantages which the survivor has enjoyed are lost by entering into a second marriage. At variance with this, however, is L. 5, § 1, C. de sec. nupt. 5, 9, which provides that children shall have a claim upon the *lucra nuptialia*, if they have not succeeded to the estate of the *parens prædefunctus*, and shall lose the right if they are ungrateful to the *parens binubus*; see also No. 22, c. 1, and c. 46, whereby Justinian's law is not to apply to persons married before the date of the law. This judgment was pronounced upon a claim by children of a first marriage to property which the *mater binuba* had inherited from her first husband. Justinian's provisions are so arbitrary that no argument can be drawn from the transitory provisions in No. 22, c. 1, and c. 46.

⁹⁶ Cf. Seuffert, Comment. i. p. 243.

⁹⁷ Abraham a Wesel, *ad. No. Const. Ultraj.* art. 10, § 138; J. Voet, in Dig. 23, 2, § 136; Boullenois, i. pp. 806-809; and Boubier, chap. 34, No. 41, declare in favour of the *lex rei sitæ*.

[The French courts have held that an English marriage-contract must be read according to the rules of French law, *quoad* its testamentary provisions, if the succession opens in France

exclusively as to the rights which children have in his or her property.⁹⁸ The limitations imposed in cases of intestacy, and upon the dispositive power of a testator—whereby, for instance, one spouse cannot, where there are children, give by his last will more than a certain proportion to the other, are, as a rule, to be determined by the law which governs the succession in question.⁹⁹ In this way we can account for the fact that the older writers who touch this question, and who have, as a rule, the purely German institution of the rights of the next heirs in view, apply the *lex rei sitæ*.¹⁰⁰

SUPPLEMENTARY PARAGRAPH.

190a. The “*règlement international des conflits des lois en matière de mariage et de divorce*,” adopted by the Institute of International Law at Lausanne, runs thus, viz.:—

“*I. De la loi qui régit la forme de la célébration du mariage.*”

“*Article premier. La loi qui régit la forme de la célébration du mariage est celle du pays où le mariage est célébré.*”

In form at least this attributes a coercitive and not a permissive force to the rule “*locus regit actum*.” This mistake rendered it necessary, in the interest of freedom of conscience, to add several subsidiary articles; but even they will not satisfy the requirements of the case. If it had simply been provided that, “in so far as matters of form are concerned, the validity of a marriage ceremony is sufficiently secured if the forms of the place where it is celebrated are observed,” then article 2 and the first half of article 3 might have been dispensed with.

“*Art. 2. Seront toute fois reconnus partout comme valables quant à la forme:—*”

“*1st. Les mariages célébrés en pays non-chrétiens conformément aux capitulations en vigueur.*”

“*2nd. Les mariages diplomatiques ou consulaires célébrés dans les formes prescrites par la loi du pays de qui relève la légation ou le consulat, si les deux parties contractantes appartiennent à ce pays.*”

“*Art. 3. Si dans un pays la forme de la célébration est purement religieuse, les étrangers doivent être autorisés à célébrer leur mariage selon les formes*

(Noireterre, 1881, J. viii. p. 529); and that, in order to ascertain whether a husband has, in settling provisions on his wife, exceeded the one-fourth part of his estate, which is the limit of this provision by French law, no account can be taken of real estate abroad (Leroy de Chaumont, 1879, J. vi. p. 549).]

⁹⁸ For instance, by the law of Hamburg, children of the first marriage have in their step-parent a guardian who is charged by law with their aliment and upbringing. Baumeister, *Hamburg. Privatr.* ii. p. 144. This is not the case according to the common law of Rome.

⁹⁹ Boullenois, i. pp. 564-569; Savigny, § 379; Guthrie, p. 298.

¹⁰⁰ Argentæus, No. 8 (this writer correctly notes that foreign real estate is not computed in reckoning the *tertia pars* which the *Coutumes* of Bretagne allow one spouse to give to the other); Rodenburg, ii. c. 5, § 1; Hert, iv. 43; Ziegler, *Dicast*, Concl. 15, No. 21; J. Voet, in Dig. 23, 2, § 85; Molinæus, *ad Leg.* i. C. de S. Trin; Stockmanns, Dec. 25, No. 10; Cochin, *Œuvres*, v. p. 80; Petr. Peckins, *de Testament Conjug.* ii. c. 28, No. 5; Hofæker, *de eff.* § 28; Jason Maynus, in L. i. C. de S. Trin. No. 10, have the Roman law of succession in view, and pronounce generally in favour of the *lex domicilii*.

légal de leur pays d'origine ou devant les autorités diplomatiques ou consulaires du mari, même si dans les pays où ils sont accrédités leur qualité d'officier d'état civil n'est pas reconnue.

"Art. 4. Chaque mariage contracté à l'étranger doit être constaté par un document officiel et communiqué aux autorités du pays d'origine du mari.

"II. De la loi qui régit les conditions nécessaires pour que le mariage puisse être célébré.

"Art. 5. Pour que le mariage puisse être célébré dans un pays autre que celui des époux ou de l'un d'eux, il faut que le futur et la future se trouvent dans les conditions prévues par leur loi nationale respective en ce qui concerne :—

"1st. L'âge.

"2nd. Les degrés prohibés de parenté.

"3rd. Le consentement des parents ou tuteurs.

"4th. La publication des bans.

"Il faut, en outre, que le futur et la future se trouvent dans les conditions prévues par la loi du lieu de la célébration en ce qui concerne :—

"1st. Les degrés prohibés de parenté.

"2nd. La publication des bans.

"Art. 6. Les autorités du pays où le mariage est célébré pourront accorder dispense des empêchements résultant de la parenté ou de l'alliance entre les futurs époux, ou du défaut de consentement de leurs parents ou tuteurs, dans les cas et dans la mesure où cette faculté appartiendrait, en vertu de la loi nationale des futurs, aux autorités de leurs patries respectives.

"Art. 7. Les autorités diplomatiques ou consulaires seront admises à délivrer des certificats constatant que leurs nationaux qui se proposent de contracter mariage se trouvent dans les conditions voulues par leur loi nationale.

"III. De la loi qui régit les conditions de validité à défaut desquelles le mariage célébré pourra être annulé.

"Art. 8. Pourra être annulé le mariage contracté en dehors des conditions exigées par la loi nationale de l'un des époux, en ce qui concerne :—

"1st. L'âge.

"2nd. Les degrés prohibés de parenté ou d'alliance.

"3rd. La publication des bans.

"Art. 9. Pourra également être annulé le mariage contracté en dehors des conditions prescrites par la loi nationale du futur, en ce qui concerne le consentement des parents ou tuteurs.

The distinction as regards the different kinds of impediments in the way of marriage, which lies at the foundation of these proposals, is not, strictly speaking, sound. In the case of a marriage which two foreigners propose to celebrate, we can only justify the observance of the law of the place of the ceremony as to forbidden degrees of affinity or consanguinity in so far as the consummation of such an union is by that law a criminal offence. It is no matter of concern to our State whether two foreign spouses, who are only temporarily present in this country, are or are not nearly related to each other. On the other hand, the power of dispensation,

which by article 6th is given to the officials of the State in which the marriage ceremony takes place, goes too far, if it is expected that the State to which the spouses belong will respect that dispensation, if it should be given. If, however, all that is meant is that the officials of the State, in which the marriage is celebrated, may be authorised to proceed with the marriage, then there is no reason for restricting the powers of dispensation to the cases which are mentioned, if it should happen that the *lex loci actus* recognises dispensations in other cases. Lastly, the distinction which is taken in article 9th between different kinds of impediments to marriage, with reference to the process of annulling a marriage, cannot be approved. If there is any distinction to be made at all, if it is not simply to be said that any offence against the personal law of the wife in the same way as any offence against that of the husband shall constitute a ground for annulling the marriage, then we should refuse to give effect to the plea of near kinship as a ground of nullity, supposing that that plea were founded on the law of the wife alone, and were not to be found in the law of the husband; on the other hand, again, we should in such a case recognise that a failure to obtain the consent of parents and guardians must have an international effect. The question in this latter case is truly one which involves the protection of a woman who is minor, or is in a dependent position in a family. To say that this protection is *ipso facto* to be lost, from the fact that the wife has actually followed the husband into his country, or has by force or by craft been carried there by the husband, may fit in with the prehistoric idea of marriage by seizure, but will hardly fit in with the spirit of modern international law. The error of such a distinction becomes all the more prominent if we observe that, by some defective process of reasoning, the opposite result is reached in the case of the impediments to marriage arising from a defect of age, or from a failure to publish the banns, both of which stand in close connection with the requirement of parents' or guardians' consent, or at least may do so according to the positive provisions of some systems of law. The resolution on this point taken by the Institute runs directly in the teeth of the principles of the modern Franco-Italian school. There is room for debate whether the rules of private law have in themselves extra-territorial effect, with no other limit than the territorial *jus publicum* of some other State; but the directly contrary proposition here affirmed by the Institute is undoubtedly wrong:—

“IV. *De la loi qui régit les effets du mariage et les contrats matrimoniaux.*

“Art. 10. *Les effets du mariage sur l'état de la femme, et sur l'état des enfants nés avant le mariage, se règlent d'après la loi de la nationalité à laquelle appartenait le mari lorsque le mariage a été contracté.*

“Art. 11. *Les droits et devoirs du mari envers la femme et de la femme envers le mari sont reconnus et protégés selon la loi nationale du mari, sauf les restrictions du droit public du lieu de la résidence des époux.*

“Art. 12. *Le régime des biens des époux embrasse tous les biens des époux,*

tant mobiliers qu'immobiliers, sauf les immeubles qui sont régis par une loi spéciale.

"Art. 13. Les contrats matrimoniaux relatifs aux biens des époux sont régis, quant à la forme, par la loi du lieu où ces contrats ont été conclus. Doivent toutefois être également considérés comme valables partout, les contrats matrimoniaux faits dans les formes exigées par la loi nationale des deux parties.

"Art. 14. A défaut d'un contrat de mariage, la loi du domicile matrimonial—c'est à dire du premier établissement des époux—régit les droits patrimoniaux des époux, s'il n'appert pas des circonstances ou des faits l'intention contraire des parties.

"Art. 15. Un changement du domicile ou de la nationalité des époux ou du mari n'a aucune influence sur le régime une fois établi entre les époux, sauf les droits des tiers.

"V. De la loi qui régit les effets de la nullité de mariage prononcée dans le pays de l'un des époux.

"Art. 16. Lorsqu'un mariage valable d'après la loi du pays de l'un des contractants aura été déclaré nul dans le pays de l'autre, le mariage devra être considéré comme nul partout, sauf les effets d'un mariage putatif.

"VI. De la loi qui régit le divorce.

"Art. 17. La question de savoir si un divorce est admissible ou non dépend de la législation nationale des époux.

"Art. 18. Si le divorce est admis en principe par la loi nationale, les causes qui le motivent doivent être celles de la loi du lieu où l'action est intentée. Le divorce ainsi prononcé par le tribunal compétent sera reconnu valable partout."

Of these articles, article 10, in the first place, is incorrect. Apart from the consideration that the rights of children cannot be disposed of as part of this subject, we cannot see why any person, who may, according to the personal law which he enjoys at any particular moment, legitimate a child, should be prevented from doing so by the operation of a personal law, which was no doubt regulative of the relations of the spouses at the time at which they were married, but has now no further operation upon their personal relations. See *infra*, § 192.

Another error has been committed in taking as the basis for the regulation of the matrimonial property the law of the matrimonial domicile, instead of the national law of the husband. This is wrong, both with reference to the resolutions passed at Oxford as to the effects of nationality on matters of private law, and also with reference to the concluding words of art. 13. If art. 14 is to stand, we must substitute "*par la loi du domicile matrimoniale*" for "*par la loi nationale*" in art. 13.

Art. 18, which I hold to be untenable, was presented in the same form in the Heidelberg resolutions of 1887. See *supra*, § 178.

II. RELATIONS OF PARENTS AND CHILDREN.

A. PERSONAL RELATIONS IN GENERAL.

§ 191. The purely personal relations of parents and children are, like the personal relations of the spouses, to be determined by their personal law, or the law of their nationality. Rights, however, which must be held by the law of any particular State to be immoral or contrary to the principles of the freedom of individuals, cannot be put in force within that State. The result is that a father or mother has no more right of correction than is warranted by the law of their own home, and no more than the law of the place, in which it is proposed to exercise that right, permits.¹ A French father has the right given to him by the Code Civil (art. 376, 377) to have, in certain circumstances, his minor son, who is not forisfamiliated, detained in a house of correction, but he does not enjoy any such right in a country which does not ascribe any such extensive scope for the father's powers. But a foreign father has just as little claim to exercise this right in France, if his own domestic law does not invest him with it. If this foreign law does not assign to the family relation, in order to insure due respect being paid to the father, so extensive a power as this, the law of France has no reason for doing so. Public order is sufficiently protected by means of the public criminal law, which also lays obligations upon children.² The mother, too, upon the father's death, assumes rights of a similar kind, in so far only as the domestic law of the marriage allows her to do so. It is plain that, by the acquisition of another nationality, the rights of the parents may be altered.³ The same rules apply to the right of the father, or the mother, as the case may be, to settle the religious training of the children.⁴ But if by the operation of some particular legal

¹ Wächter, ii. p. 188 ; Stobbe, § 34, note 31 ; Unger, p. 195.

² To the same effect Fiore, §§ 161, 162 ; Brocher, § 105 ; Asser-Rivier, § 56 *ad fin.* ; and particularly Weiss, p. 746. It is, however, being more and more recognised in France, that the *patria potestas* is not a *droit civil* to the effect that foreigners are debarred from it in France. Cf. C. de Paris, 2nd August 1874 (J. i. p. 32), and Weiss, p. 749, note 1.

³ Asser-Rivier, *ut cit.*

⁴ Where, however, there is doubt, any permanent arrangement, which has been arrived at in accordance with the law of the earlier domicile, must continue to be respected in the new domicile, even although the law of the new domicile should pronounce contracts, as to the religion in which children are to be educated, to be null. Again, in case of doubt, we must hold that the provisions of the law of the place of residence, as to the religious upbringing of children, have no application to the children of foreigners, and in competition with the national law of foreigners, have no compulsory force. To this effect is the interesting decision of the Austrian Minister of Education, of 31st March 1881, reported in J. viii. p. 236. The question was whether a Prussian subject domiciled in Austria could exercise the right, which by Prussian law he had, of settling the form of his children's religious education. The Austrian minister rightly decided that the Austrian law could do nothing more than determine the proper form for the declaration of the father.

fact, such as a decree of divorce, the mother has acquired special rights in reference to the upbringing of the children, these will not be touched by a subsequent change of nationality on the part of the father: it may be that they will require to be made good in the new *forum* which the father has acquired. (To this effect a judgment of the Supreme Court of Vienna, of 2nd June 1881; Seuffert, xxxviii. § 1, a judgment which in this way recognised the consequences of divorce according to the law of Bavaria; so, too, judgments of the Supreme Court of Bavaria, of 16th December 1876, and of the Supreme Court at Celle, of 5th October 1877; Seuffert, xxxii. § 203, xxxiii. § 97.)

If the child has a different nationality from that of his father, the latter has no more extensive rights than are allowed him by the law of the child's nationality; *e.g.* if the consent of the father is not needed for the betrothal or marriage of the child, it is of no consequence that the father may by his own personal law refuse to give such consent, and by doing so stop the betrothal or marriage.⁵

NOTE M ON § 191. PERSONAL RELATIONS OF PARENT AND CHILD.

[In England the extent of the authority of a foreign parent over his child is the same as that of an English parent (Westlake, p. 48). Boyle, L. J. C., in *Edmonstone v. Edmonstone*, 1st June 1816, Fac. Coll. gives an opinion which, read literally, implies that Scots law is the same. His lordship refuses to admit that persons coming into the territory of a foreign State can insist on having effect given to the peculiarities of their own law. But the fair interpretation of the passage seems to be that placed on it by Lord Fraser (Parent and Child, p. 590), which assimilates the law of Scotland very much to that of the text, recognising the foreign law, except in so far as it offends our sense of propriety, order, or decency.

On the other hand, it has been held by the French courts that they will, in the interests of morality, accord to a foreigner, who is merely resident in France, the powers conferred by the *patria potestas* upon Frenchmen; and although without the authorisation of Government he does not enjoy civil rights, he will yet be entitled to appeal to the courts to ordain a child of nineteen years to return to him (Trib. Civ. de la Seine, 3rd February 1872). This decision seems to be rather in the direction of the English principle, than in that laid down in the text, and adopted by Lord Fraser, for it does not appear that in this case the father would, by the law of his own country, have had any such rights. The distinction

⁵ So decided by the Appeal Court of Celle, 15th January 1870, Seuff. xxiv. § 2, in the case of different domiciles. To the same effect Stobbe, § 34, note 31. *Vesque v. Püttlingen* is of opinion that by the law of Austria, as the *patria potestas* is rather a means for protecting the child than a prerogative of the father, where they have different nationalities, the rights of a foreign father over an Austrian child will be determined exclusively by the law of Austria.

between the notion of domicile with us, and of nationality in French law, as conferring a right of access to legal remedies, must, however, be kept in view. The father's residence may have had all the permanency of what we call domicile.]

B. PATERNAL AUTHORITY.

1. CONSTITUTION OF THIS AUTHORITY BY BIRTH OR LEGITIMATION.

§ 192. The personal law which attached to the father of a child at the time of the child's birth must decide all questions as to whether the child was born in wedlock, and therefore became subject to his father's authority.¹ The place of the marriage in particular may be set out of account.²

The same law will determine the effect of the special presumptions with regard to paternity (the French *action en desaveu*, cf. Code Civ. 312 *et seq.*): these are not rules for convincing the judge, which would be subject to the *lex fori*,³ but substantial rights of the child;⁴ as a French author has said, we have here to consider the step by which they enter the families that make up the nation. We shall give our reasons for this view in discussing the law of process; at present we need only point out how dangerous it would be if the child were prevented from founding on the presumptions that established his legitimacy at the time of his birth, or if different judgments as to his legitimacy could be given in different countries.

If a particular form is necessary for the recognition of a bastard child, we must apply the maxim "*locus regit actum*," if we are satisfied of the existence of an intention to recognise the child, an intention which in certain circumstances—the act of recognition being essentially an act which falls under the personal law of him who makes it—may be open to doubt.⁵

¹ Bouhier, chap. 24, No. 122; Gunther, p. 732; Walter, § 46; Gand, No. 430; Savigny, § 380; Guthrie, p. 301; Unger, p. 195; Burge, i. p. 89; Fœlix, i. § 83, p. 82.

² Cf. Trib. Lesparre, and C. de Bourdeaux, 27th August 1877 (J. v. p. 39), and Clunet (J. v. p. 40). Thus the children of a Frenchman may be legitimated by his marriage, which has taken place in England.

³ Burge, i. p. 88, is of another mind.

⁴ See *infra* the law of process as to the presumptions which come in for particular legal relations. Bouhier and Fœlix; Asser-Rivier, § 56, note 1; Duguit, J. xii. p. 353; Savigny, § 380; Guthrie, p. 301; Unger, p. 195; Stobbe, § 34, note 30; Fiore, § 136; Brocher, Rev. v. p. 57; Laurent, v. § 242, take the same view as that stated in the text. Even Burge recognises that the so-called *presumptiones juris et de jure*, such as the 314th article of the Code Civil establishes in favour of legitimacy, against which no counter-proof, however strong it may be, is admissible, are not mere regulations for the persuasion of the judge. The rules as to *possession d'état* are part of the same subject. If the disposal of an inheritance depends on the birth of a child in wedlock, and if the legitimacy must be questioned within a certain period, it is the personal law of the father which must regulate all such questions. See Fiore *ut cit.*; Savigny (§ 377. Guthrie, p. 284) is wrong.

⁵ A child begotten and born in France of foreign parents can use his French *acte de naissance* to prove his legitimacy, but may also have recourse to the means of proof recognised in his own country. Fœlix as cited, and § 73, Demangeat; Laurent, v. § 252; Duguit, *Forme*, p. 97, and Rivier, § 58, note 1 (see, too, C. de Paris, 2nd Aug. 1876, J. iv. p. 230), propose that the rule "*locus regit actum*" should not be applied, if the personal law requires an *Acte authentique*. That is an arbitrary rule. The personal law may, no doubt, restrict the recognition of the rule;

Legitimation of bastards, either by subsequent marriage or by an Act of the Government (*Rescriptum principis*), is nothing but a legal equalisation of certain children, illegitimately begotten, with legitimate children. The law which rules the rights of legitimate children must therefore regulate the legitimation of bastards; and as the former are subject to the actual personal law of the father, the latter must be determined⁶ also by the personal law of the father at the date when the fact said to infer legitimation took place. If, then, there is a question of legitimation *per subsequens matrimonium*, the child is legitimate, if that is the result of the personal law which the father enjoyed at the time of the marriage. This is now the prevailing view.⁷

The result, to take an illustration, is that, if the father at the time of the marriage is a Frenchman, and the child up to that time has not been recognised, the 331st article of the Code Civil prevents him from subsequently legitimating the child unless, be it remarked, he subsequently again changes his nationality, and the personal law so subsequently acquired by him gives effect to a subsequent act of recognition.

DECISIVE DATE.

§ 193. Some authorities have laid down that the time of the birth shall alone rule such questions, because by its birth the child acquires⁸ the character which is to determine whether it can be legitimated, and if so, in what way; or, as has been well said, because by the birth of the child there

but no such restriction is to be presumed from the fact that the personal law requires public intimation of any recognition which is to take place in its own country. See Fiore, § 139, to the opposite effect, who, however, properly points out that "non-authentic" documents or *actes* are of course much exposed to dispute, and do not, by virtue of the rule "*locus regit actum*," take rank in all respects with "authentic" documents or *actes*. Cf. Clunet, J. iv. p. 234, and C. de Besancon, 29th July 1876, J. iv. p. 228.

⁶ It is of no moment in what place the subsequent marriage of the parents took place. See Wheaton, § 93, p. 123, and the authorities cited *infra*. Stobbe *ut cit.*

⁷ Fiore, § 147; Asser-Rivier, § 57, *ad fin.*; Westlake Holtzendorff, § 50; Westlake, Rev. xiii. p. 440; Wharton, § 241, according to the decisions cited by him, notes that in English practice legitimation is only recognised if it is in accordance both with the personal law which the father had at the time of the birth of the child, and with that which he had at the date of the subsequent marriage. Wharton says the American practice is not yet established. Personally he pronounces decidedly in favour of the view expressed in the text, to which modern authority in England also is inclined. [As to the rule in Scotland, see *infra*, p. 440.]

⁸ Merlin, *Questions de droit*, art Legitimation, § 1; Story, § 93; cf. Burge, i. pp. 102, 106, 107. It seems, however, that the judgments of the English courts there cited do not at bottom rest on this consideration, but upon the circumstance to be illustrated, *infra*, § 197. The decision of the Cour de Caen, 18th Nov. 1852, reported by Demangeat on Fœlix, i. p. 82, note *d*, that a child begotten by an Englishman in England upon a French woman cannot be legitimated by the subsequent marriage of its parents, does not contradict our view; it would not be at variance with our theory unless the Englishman had been subsequently naturalised in France. Durand says that the national law of the child gives the rule: legitimation is not a right of the parents. The question, however, is, does the child belong to the family founded by the father, or does it not? Durand deduces from his principle this rule, that the form of recognition, if not determined by the rule "*locus regit actum*," is settled by the national law of the child.

is established a legal relation between it and its father, which must be governed alone by the law under which it originated.⁹ But although the birth of a bastard may lay certain obligations upon him who has had connection with the mother before the birth, and to a certain extent therefore a legal relation is established by the birth between the child and the putative father; yet the very meaning of an illegitimate birth is that a family relation, which is all we are now concerned with, certainly does not arise between them. Nothing can be inferred from the purely arbitrary expression "capacity or incapacity of the child to be legitimated;" it might as reasonably be maintained that if the law of the place where the child was born forbade marriages between cousins, and thus pronounced a child incapable of such a marriage, this child could not, in consequence of his original incapacity, contract a marriage in that degree after he had acquired a new domicile, the law of which was ignorant of the prohibition. Nor can it be urged that according to our view the father may, before entering on his marriage with the mother, choose a personal law prejudicial to the interests of the child. For on the one hand the legitimation of a child depends upon a voluntary recognition by the father,¹⁰ and, on the other, if a recognition of the child made under a prior personal law really confers a right upon it conditional upon the subsequent marriage, then this right is not lost by a change of the personal law.¹¹ Although the new personal law does not invest the recognition which has taken place within its bounds with the force of legitimation, it will certainly not deny to a recognition made within the territory of another law the effect which that law attached to it.

WHERE THE FATHER AND THE CHILD ARE SUBJECT TO DIFFERENT PERSONAL LAWS.

§ 194. The question may, however, be raised: If the father and the child belong to different States with distinct legal systems, is it sufficient that there should be legitimation by the law under which the father lives, or must it also conform to the law of the child?¹²

⁹ Schäffner, pp. 50, 51.

¹⁰ Savigny, § 380; Guthrie, p. 302.

¹¹ It is not quite accurate to say that the domicile of the father at the time of the marriage decides (Savigny as cited; Walter, § 45; Unger, i. p. 197). The decision given by Schäffner, pp. 51, 52, may be reconciled with the view taken here, but not with the view which takes as decisive the domicile at the time of the marriage. The child may, according to our view, appeal to that personal law among many successive personal laws of the father which is most favourable to him. But the fact of the birth in itself does not establish any family relation between the bastard and the father. Savigny says in reference to the Prussian A. L. R. § 380, note 1: "The Prussian law indeed regards mere proof of intercourse within a certain time before the birth as itself proof of paternity; yet in legitimation by marriage it makes the rights of legitimacy begin from the nuptial ceremony. Hence, according to the sense of the Landrecht, legitimation has no place if the father before marriage transfers his domicile into a country where the common law prevails, and then refuses to recognise the child."

¹² [A bastard born of a foreign mother and a French father is of foreign nationality till the marriage of its parents, when its nationality becomes that of the father (Carmellini, Trib. d'Albertville, 1879, J. vi. p. 393.)]

These questions have recently been thoroughly discussed by Duguit¹³ and Weiss (p. 733).¹⁴ Duguit pronounces in favour of the exclusive competency of the personal law of the father, while Weiss takes the opposite view. Duguit's opinion is that the law which is recognised as applicable to the head of the family, in matters concerned with family law, must also furnish the rule for all the members of that family. In any other view we should be landed in this illogical position, that the legitimization would be effectual as regarded the father, but ineffectual as regarded the child. If, however, the question raised is a question as to the validity of an act of legitimization, the first point for determination is whether the child is a member of the family or not. The bond between father and child must be made fast at both ends, just as in marriage the bond between husband and wife must hold on both sides, before the personal law of the wife can be made to follow that of the husband. On principle, therefore, the opposite of Duguit's view is the sound view.¹⁵

But, in reaching a practical solution of the question, we must consider the following matters. If the personal law of the child requires more conditions to be observed before it will pronounce that a child has been legitimated, the reason of that is not any anxiety for the interest of the child so much as for that of the father and his family, *e.g.* the other children, his collateral relations. But the State to which the child has up to that moment belonged has no interest in that matter, and if that legal system which is charged with the protection of the family is willing to hold the child legitimated, there is in truth no conflict between the two systems. That system to which the child has hitherto belonged says: "If the father belonged to me, I would not hold the child to be legitimated." That involves no contradiction of the other system, which says: "Since the father belongs to me, I do hold the child to be legitimated." No doubt we must assume that the assent of the child is given in due legal form, for legitimization can only take place against the child's wish, if the personal law of the child forces that upon him or her.¹⁶ But, in by far the greater number of cases, it will be beyond all doubt that the legitimization is advantageous to the child, and the child, or its guardian, can subsequently signify its approval of it and found upon it. Thus in practice the personal law of the father is in the general case the only law which is invoked.

What, however, are we to say if the personal law of the child in the case in question absolutely forbids legitimization as *contra bonos mores*, whereas the personal law of the father permits it? If, for instance, the latter permits while the former forbids the legitimization of an *adulterinus*? Fiore, § 137, takes the view that, as we are here concerned with a principle of public order or police, the legitimization can have no operation in

¹³ J. xiii. pp. 515, 516.

¹⁴ In the same way, v. Martens, § 74.

¹⁵ See Gand, § 46, and Brocher, *Nouv. Tr.* § 44, p. 154.

¹⁶ It is different with the rights of the mother; for in that case it is possible to have a convincing proof of the relationship. Cf. Gand, § 458,

any country which does not admit it in the particular circumstances of the case. Weiss must, of course, reach the same result, as he requires in all cases a concurrence of these two legal systems. But if we examine the matter closely, we find that all the rules as to legitimation rest upon considerations of public order, upon "*boni mores*," but that the point is that different legal systems have different ideas as to what public order, "*boni mores*," is. This argument will therefore prove everything, and therefore nothing.¹⁷ It is, however, of the highest importance, that the laws which prohibit such legitimation, *e.g.* the laws of France and Italy, regard it as unseemly that a family connection between the *adulterinus* and his father should be publicly recognised. If, however, the *adulterinus* by means of this legitimation enters a family which belongs permanently to a foreign country, what possible interest can the other legal system have in hindering the formation of the family tie? Just as much interest as it would have had in refusing to recognise the legitimation if both persons had from the first belonged to the other State, *i.e.* no interest at all. The prohibition, the object of which is not so much to put the innocent child at a disadvantage as to protect the purity of families which have a permanent connection with the State, has no meaning in so far as families are concerned, which have no such permanent connection.¹⁸

PRIVILEGES OF RANK.

§ 195. Peculiar difficulties are presented by the case where the original personal law of the father refuses to recognise the subsequent marriage which he has contracted under the sway of another personal law (by being naturalised in another State), as a ground for legitimation, and questions thereafter arise as to some special privileges of rank in the former country. In a case of that kind the civil tribunal of the Seine, of 30th May 1879, recognised that the legitimation in itself must be ruled by the national law of the father at the date at which it took place, but that in

¹⁷ By such considerations it might be sought to show that, if the law of the place of the marriage necessarily associates legitimation with marriage, the children even of foreigners would have to be recognised as legitimated in the country where the marriage took place, even although the personal law of the father knew no such rule. This is a palpable error. It has, however, found some favour in French jurisprudence by virtue of the magic sound of the words, "*ordre public*," which will justify anything. See C. de Rouen, 5th January 1887, affirming the judgment of the court of first instance (J. xiv. p. 183) and on this disputed question generally, Duguit (J. xiii. p. 513).

¹⁸ Fiore, § 137, is of another opinion. On the other hand, the law of the Argentine Republic says, so far soundly (Daireaux, J. xiii. p. 297), on this point: "*La reconnaissance des enfants adultérins, incestueux ou sacrilèges (e.g. children begotten by priests) étant prohibée par disposition d'ordre public, elle ne pourra être demandée ni exécutée dans les limites du territoire, quand bien même la loi du domicile des parents au moment de la naissance ne s'y opposait pas; mais celle pratiquée hors du territoire produira tous ses effets dans la République si elle était permise dans le pays où elle a été exécutée.*"

such a case the legitimation could not confer titles of nobility belonging to the father in virtue of a personal law which he had previously enjoyed.¹⁹ This decision is wrong, if we assume that the father's noble rank was recognised when he took his new nationality; for in that case his rank passed to his child in conformity with the new personal law, and persons who belonged to the family of the father, in particular his collateral relatives, had no right to forbid the child to bear his name, title, and arms,²⁰ even in the State to which they themselves belonged, and to which the father once belonged. It is quite sound, however, to say this much, that the child cannot make good his relationship to those other members of the family; for the law of the country to which the family belongs can deny this effect to the act of legitimation.²¹

IS THE PERSONAL LAW OF THE MOTHER TO BE CONSIDERED?

§ 196. The application of the personal law of the father to the question of legitimation may, especially if the law of the domicile be held to be the personal law, lead to the mother being deceived, or put difficulties in the way of the subsequent marriage. Considerations of this kind prompted a judgment of the French Court of Cassation, of 23rd November 1857, which has been much canvassed. It recognised, on the ground of French legal principles, an act of legitimation in a case in which a foreigner, an Englishman, married a French woman: "*Attendu que la législation et la jurisprudence anglaises . . . ne pourraient au cas, où le père seul est Anglais et domicilié en France, la mère et les enfants nés en France, enlever à cette femme le droit qu'elle tenait de la loi Française, qui était la loi du domicile matrimonial à laquelle les futurs époux sont réputés avoir eu la volonté de se soumettre . . .*"²² But the law of the family cannot be made to depend in this fashion on the expectations of the parties. To do so would be to place it on a level with ordinary contract law, without being able to found upon the very consideration which is the determinant in ordinary contract law. For each party will certainly, if he or she is wise, inform him or herself in the case of a marriage contract, if ever, as to the personal law of the party with whom he or she is about to contract. Besides, the result of such conclusions, drawn as they are from the supposed interest of subjects of

¹⁹ J. vi. p. 391. The German Imperial Court has given an analogous decision (10th March 1880, Dec. ii. § 39, p. 145), to the effect that a member of a family belonging to the high German nobility, who is domiciled abroad, cannot contract a marriage with a wife of the rank of an ordinary citizen, so as to give the children right to the title, arms, and name of the father. Here it is to be noted that, in the view which the Imperial Court holds firmly up to the present moment, it is domicile which regulates the personal law.

²⁰ Cf. what was said *supra*, § 98 (p. 216), on the law of names.

²¹ So, too, Dernburg, *Pandekten*, i. § 46, note 10, as to the decision of the German Imperial Court cited in note 20. Laurent, v. § 289, seems to agree with the decision of the French Court.

²² Of course, we find in this case also an appeal to "*ordre public*" as an *ultimum refugium*.

the country, and dependent exclusively on the theories of domestic law, is to set up at once different modes of treating the relation in different countries. In the father's country, in the case just mentioned, the children would be regarded as illegitimate, whereas their mother's country treats them as legitimate.

We should, however, be just as little inclined—although Duguit is of another opinion—to make an exception in the case of naturalisation being obtained *in fraudem legis*, i.e. in the case where a man gets himself naturalised in another State, in order to bring about in that other State the legitimation which is not permissible in his own. This exception breaks down in the same way as the theory of naturalisation being invalid because effected *in fraudem legis*, which we have already tried to refute. As Duguit himself owns, the proof of the conduct of the person being *in fraudem legis* is difficult enough, while uncertainty as to the status of the family, and challenges of it, bring unhappiness and ruin upon the family, without any advantage to the State.

EFFECT OF LEGITIMATION ON SUCCESSION. THEORY OF ENGLISH LAW.

§ 197. The effect of legitimation, in accordance with the law of the domicile, must extend to questions of succession to immoveables situated abroad,²³ in so far as these depend upon the recognition of the child as legitimate.²⁴ The judgments of the English courts²⁵ differ from this, and require, in order to found a claim to succession in immoveables, that the child should be held legitimate by the law of the place where the estate lies, and that in spite of the fact that they have approved of the view whereby a child, illegitimate by the law of its domicile, is held incapable of making any claim of succession to immoveables, whatever the law of the place where these are situated may be.²⁶ These judgments may be explained in this manner: The exclusion of children begotten out of wedlock,²⁷ who have been recognised by the father, depended, in earlier

²³ Schäffner, p. 53; Bouhier, chap. 24, No. 123; Gunther, p. 732; Hommel, Rhaps. Quæst. ii. obs. 409, No. 3; Hert, iv. 14; Boullenois, i. pp. 62, 63, 130, 131.

²⁴ Story, § 87a, and Lord Brougham (Story, § 93p) pronounces in the same sense. See judgment of the Supreme Court of Appeal at Oldenburg, 5th March 1853 (Seuffert, vi. 433, 434): "The law applicable at the time of the birth or legitimation, as the case may be, decides what children are to be held legitimate, or validly legitimated. But in succession the law of the domicile of the deceased determines the rights of legitimated as well as of legitimate children."

²⁵ Burge, i. p. 109, approves of these judgments: "The personal quality or status of the person, if it constitutes his title to succeed to real property, must be that which the *lex loci vel rei sitæ* has prescribed." Wharton, §§ 242, 243; Westlake Holtzendorff, §§ 168, 168a; see too, Foote, p. 39.

²⁶ Story, 87a.

²⁷ Burge, i. p. 90; Blackstone, i. 451; Stephen, ii. 299. The bastard is counted a *filius nullius* in questions of succession to moveables also; but the Crown can grant special privileges, Stephen, ii. 300. But a child validly legitimated according to the law of his father's domicile, can in England succeed in moveables.

English law, not only upon the legal uncertainty as to their birth—which can only be removed by legitimation, as is the case in modern Roman law—but upon an incomplete incapacity attributed to bastards,²⁸ such as we often find in older German law and in many feudal systems. Now, since a foreigner has no greater or more complete capacity than an Englishman, he is not entitled to acquire landed property in England, where feudal principles regulate all questions of title to land, any more than he would be entitled in his own country, supposing the same principles of feudal law to prevail there, to claim succession to feu rights, even although he had obtained a grant of legitimacy from the Crown, which would apply to all other legal relations.²⁹ The fact that one who is pronounced incapable by his own *lex domicilii* cannot succeed *ab intestato* to land in England,³⁰ whatever the law of England might say as to his capacity, is explained by observing that in such a case the *lex domicilii* denies the relationship of the deceased to the successor, and that relationship must be determined by the *lex domicilii*, and constitutes by the law of England a necessary condition of a claim of succession in immoveables.

If, as is probable, the remnants of feudal principles shall still more pass out of memory in England, a time will come when, even in questions of succession to real estate in England, an act of legitimation, valid in accordance with the personal law, will receive full effect.

NOTE N ON §§ 192-197. LEGITIMATION.

[The law of Scotland holds that the domicile of the father at the time of the marriage is the important consideration in determining the legal effect of that marriage upon the status of the children of the persons married (Fraser, Parent and Child, p. 52, and cases quoted there). The case of a birth taking place while the domicile of the putative father was in a country whose law forbade legitimation *per subsequens matrimonium*, while his marriage with the mother took place at a time when his domicile was in a country whose law allowed such legitimation, has not yet occurred in

²⁸ The exception which the law of England makes in the case of a bastard *puis né* can only be referred to equitable principles.

²⁹ See *supra*, § 137, principles of legal capacity. The grounds assigned in England for this decision do not justify it, as Lord Brougham has shown. In particular, the words of the statute of Merton, which have to be considered, by which there is required birth "in lawful wedlock," merely require legitimacy generally; nor can we allow an appeal to the fact that we have to deal with a prohibitive statute, since, as is well known, there are prohibitive statutes which, without any dispute, are counted as personal statutes. Molinæus, ad Consult. Paris, § 8, gl. 1, Nos. 36-46, gives a decision similar to the English decision, and Bouhier, chap. 24, No. 123, also, in the case of a statute calling only children "*nés en loyal mariage*" to the succession. Westlake gives the same explanation. So long ago as 1840, Lord Brougham took a different view in the well-known case of *Birtwhistle v. Vardill* [7 Cl. and Fin. 940], decided by the House of Lords against his views. Westlake says that we have here to deal with no rule of international law, but with a rule of feudal law. The law of Scotland differs from that of England.

³⁰ Phillimore, § 539.

Scottish law; the domicile at the date of the birth has never been in conflict with that at the date of the marriage, but the judges in Monro's case, 1840, 7 Cl. and Fin. p. 842, all held the view that if such a case should occur, the law of the domicile at the date of the marriage must rule. Lord Brougham, in giving judgment in that case in the House of Lords, and enunciating principles applicable in England as well as in Scotland, says: "If the domicile were not the same for both parents at these two periods, we should hold that that of the father at the time of the marriage should give the rule."

Lord Hatherley, however, in a subsequent case (*Udny v. Udny*, 1869, L. R. 1, S. and D. A. 447) makes the law of the country in which the father is domiciled at the date of the birth give the rule: his lordship bases this opinion upon the view attacked by the author—viz. the capacity for legitimation attaching to the child at that date.

As regards succession to real estate, the law of England is correctly stated in the text; that of Scotland will allow one legitimate by the law of his domicile, unless that character be derived from a union considered incestuous by Scots law, to inherit real estate in Scotland.

The French courts have held that the place of the marriage matters not, and that an English marriage will be sufficient to legitimate the children of a French father and an English mother (*Courbin v. Verrières*, C. de Bourdeaux, 1877, J. v. p. 39). On the question as to the form of legitimation—i.e. whether there must, previously to the marriage, be a recognition in the French form of the paternity of the children, or a formal recognition of some kind—the French courts have differed; the Court of Besancon on Appeal (*Balmiger v. Dutailly*, 1876, J. iv. p. 228) determined that in the case of children born of French parents in California, where the marriage afterwards took place, no previous recognition was required, the fact of the children having lived in family with their parents being sufficient evidence of paternity, which is the object of requiring a formal recognition; the question of the status of the children was held to be a personal law, and need not, therefore, be referred to the determination of the law of the country in which they were claiming succession; such children were therefore held entitled to succeed to estate, real and personal, belonging to a succession that had opened in France, and was therefore being administered according to French law. The Court of Paris, on the other hand, held (*Chevillon v. Héritiers Méchain*, 1876, J. iv. 230) that bastards, if legitimated abroad, could only be legitimated according to French law, and that the fact of their being children of their reputed father could only be proved in the way directed by French law—viz. by a declaration previous to the marriage, no equivalents being sufficient. The peculiarity of the French rule of evidence as to the paternity of a child, which does not permit that relation to be established, save by the confession of the father, leads to these difficulties, and it is on the ground that any infraction of this rule would be *contra bonos mores* that the decision of the Court of Paris proceeds. Again, the French courts have held (*Joly v. Perkins*, 1887, J. xiv. p. 183)

that, legitimation being a matter of public order, it may result from a marriage which has taken place in France, the husband being by nationality an Englishman, and that this result will ensue all the more readily, if the wife is a Frenchwoman.]

Legitimatio per Rescriptum IN PARTICULAR.

§ 198. In what we have said, we have proceeded on the footing that legitimation, if the consent of the child be validly given, is dependent solely on the personal law of the father, and that, therefore, if this law allows legitimation by an act of the head of the State, it matters not to enquire whether some other legal system, in particular the personal law which the child has hitherto enjoyed, also recognises this legitimation; but that on the contrary legitimation *per rescriptum* is to be regarded in international law on exactly the same footing as legitimation *per subsequens matrimonium*. This opinion, which as we think is the prevailing opinion in German jurisprudence, and in which, too, Fiore, § 149; Phillimore, § 542; and Wharton, § 249, concur, has, however, often been disputed.

In the first place, it has been said that an act of that kind by a sovereign, or possibly by a sovereign corporation, must necessarily have its operation confined to the dominions of that sovereign, for he has no authority beyond these limits. But if it be true generally that the personal law of the father is to rule, that law must be allowed to say that legitimation can take place by means of an act of that kind. The legitimation is to be recognised, not because the sovereign is to exercise sovereign rights in another country, but because the personal law is to have effect there.³¹ The opposite opinion, which is held by older writers,³² is no doubt explained, and to some extent justified, by the imperfect legal capacity which, in the Middle Ages, and in many territories down to later times, clung to the bastard,³³ especially, too, as the sole result of legitimation, even in the territory of the sovereign who bestowed it, was in many cases merely to withdraw the estate of the person so legitimated, upon his death, from the

³¹ So, in particular, Foote *ut cit.* Gianzana, i. § 101, takes the opposite side in rather a peculiar way.

³² Duguit (J. xiii. p. 525) proposes to take an odd distinction, according as the legitimation is a form of which the parties have a right to avail themselves, or an act of grace which is dependent on the good pleasure of the sovereign. In the former case, the legitimation is to have extra-territorial effect, in the latter, not. This distinction cannot be maintained. The rule "*locus regit actum*" has no application to the *legitimatio per rescriptum principis*. The *princeps* cannot be approached except by a father who belongs to his State. It would be otherwise if legitimation could take place, for instance, by a notarial act, or by a declaration before a court, which had no right to hold a *causæ cognitio*.

³³ Alb. Brun. *de statut.* art. xiii. § 51. "*Et ideo differt legitimatus a legitimo tanquam imago ab eo cujus imaginem representat. Et propterea Salycetus dixit quod legitimatio non facit esse essentialiter legitimam.*" Bald Ubald in L. 1, C. de S. Trin. No. 75; Chassenæus in *Consuet. Burgund.* Rubr. ix. in tit. *des mains mortes. verb. va demeurer*, Nos. 17, 18; P. Voet, iv. 3, § 15; Argentæus, No. 20; J. Voet, *de stat.* § 7; Bartol. ad L. 1, C. de S. Trin. Alef. No. 59; Cocceji, *de fund.* v. §§ 7, 8; Boullenois, i. p. 64; cf. Bouhier, chap. 24, No. 129.

grasp of his sovereign, and to leave it to the relatives of the person legitimated, by suspending the old German rule of law, which forbade bastards either to succeed or, to a certain extent, to leave a succession.³⁴ In view of the import which attaches to legitimation, when, as in modern times,³⁵ in most territorial systems, illegitimacy no longer works any diminution of legal capacity, while legitimacy merely gives the concrete rights which depend on relationship, it cannot be represented, in discussing the effect of legitimation *per rescriptum* on the right of succession to foreign heritable property, that the sovereign is dealing with estate which lies beyond his territory: ³⁶ as we hold a foreigner to be a bastard, if he is so by the law of his domicile, we must also hold him to be legitimate if the law of his domicile declares him to be so.³⁷ On the other hand, legitimation given in a country of which the father is not a subject, does not bestow any rights of relationship as against him.³⁸

But, in the second place, the more modern French school, while they reject the view of the older writers³⁹ as to the effect of the legitimation being necessarily confined to the territory of the sovereign who bestows it, refuse to recognise this kind of legitimation, unless it is also recognised in the personal law which the child has hitherto enjoyed. In this way one who has hitherto been a French child in respect that the Code Civil has never sanctioned legitimation *per rescriptum*, can never be legitimated by the act of a foreign sovereign. But Laurent, in arguing in support of this doctrine that legitimation touches the *status* of persons, and that this *status* must be determined everywhere for Frenchmen by the law of France, proves too much. This rule would have to hold also in the case of legitimation by subsequent marriage, so that, in this case also, the personal law of the child would be the only rule. Of course, in determining the question of legitimation, we decide, but not absolutely, the question whether the child thereby changes its nationality.⁴⁰

³⁴ Chassenæus, l. c. Rubr. viii. in tit. *Des successions de bastards*, verb. *ab. intest.* Nos. 32, 41, 250; Mynsinger, *Observ. Cent.* iii. obs. 26, Nos. 7, 8, 11; Gerber, *D. Pr. R.* § 39.

³⁵ Except in feudal law. See Gerber, § 110.

³⁶ Several of the authors cited in note 34 take this ground.

³⁷ Schäffner, p. 55; Wening Ingenheim, § 22; Mühlenbruch, § 72; Gunther, p. 732; Hommel, *Rhaps. Quæst.* ii. obs. 409, No. 3, Supreme Court of Appeal at Kiel, 2nd February 1853 (Seuffert, 7, p. 399). "The legal effect of legitimation bestowed by a foreign sovereign extends to estate of a deceased person situated abroad." One who by a *rescriptum principis* is legitimated in his own domicile must, therefore, be held to be legitimate in France, although the Code Civil does not recognise emancipation *per rescriptum* (cf. Code Civil, arts. 331-333; Zacharia, *Civilrecht*, iii. § 370).

³⁸ Judgment of the Cour d'Appel of Paris, 11th February 1808 (Sirey, 8, 2, p. 86). Such a legitimation no doubt confers complete legal capacity for all legal relations pertaining to the territory of the sovereign conferring it, if the bastard has an incomplete capacity there.

³⁹ So Laurent, v. § 294. Weiss, pp. 734, 735.

⁴⁰ Foote, pp. 44, 45, discusses another limitation which is to be placed on the effect of legitimation, viz.: that the legitimation must not involve anything which is absolutely at variance with the law of the country in which it is proposed that it shall receive effect; and he founds, in support of this limitation, particularly on a judgment of Lord Brougham [in *Fenton v. Livingstone*, 1859, 3 Macq. 497]. If, for instance, the *lex domicilii* sanctions the marriage

2. ADOPTION AND ARROGATION. EMANCIPATION.

§ 199. The constitution of the paternal authority by adoption or arrogation must be subject to the same rules which apply to its constitution by legitimation. The only difference between the two modes of constituting the paternal authority is that in the case of legitimation there is a natural relation between the parties, which is the occasion of it, and which dictates the form of it, whereas in adoption and arrogation the only originating element is the will of the parties. The important matter in adoption and arrogation for international law is the object which they are intended to effect, *i.e.* the entry of the adopted or arrogated person into the family of the person who adopts.

As a matter of principle, then, both systems of law, *viz.* the personal law of the adoptive father, and that of the adopted child, must permit adoption.¹ The conditions with which the adoption is hedged, are provided for this reason only, that the family of the adoptive father may be protected against the intrusion, more or less arbitrary, of foreign elements, or that adoption or arrogation may not prevent legitimation by subsequent marriage. Such conditions, from their nature, only fall to be considered if they exist in the personal law of the person who makes the adoption. The legal system and the State to which the child belongs have no concern with the constitution of the family of the adoptive father. Its only care is the welfare of the child, and thus none of the restrictive conditions which exist in the law of the child need be considered,² except those which are intended to protect the person adopted from a hasty and disadvantageous adoption or arrogation.³ If we are asked to consider in particular those restrictive conditions, which are set up in the real or supposed interest of public morality, none of these can be regarded, except such as exist in the country of the adoptive father. As a general rule, therefore, the conditions of the personal law of the adoptive father will come more into practical effect than those of that of the child.⁴ If

into which the parents of the person legitimated have entered, while the *lex rei sitæ* holds it to be a crime, the legitimated child cannot inherit *ab intestato* under the *lex rei sitæ*. But this is an offence against the leading principle of international law stated in § 36. What is said to be a criminal relation does not work itself out within the territory where the estate is situated. The decision is simply an echo of the theory which holds that all, even the most remote conditions of a real right, can only be determined by the *lex rei sitæ*.

¹ Of course, the actual personal law, *i.e.* that which existed at the time of the adoption, must rule.

² The result is substantially the same if, with Vesque v. Püttlingen, p. 255; Fiore, § 152; Laurent, vi. § 31; Brocher, i. § 101; Nouv. Tr. § 46; Weiss, p. 739, we allow the personal law of the adoptive father to determine his capacity, and the personal law of the child to determine his.

³ *E.g.* the rule of the Code Civil, art. 346: "*L'adoption ne pourra en aucun cas, avoir lieu avant la majorité de l'adopté.*"

⁴ In my first edition I fell into error, in proceeding too exclusively upon the personal law of the adoptive father. Unger, p. 195, and Stobbe, § 31, vii. still follow this theory. Schmid has on this subject also a peculiar doctrine. According to him, the legal results of adoption

English law knows no adoption in the sense of the law of Rome or of France, or if the law of Rome and the law of Italy exclude the adoption of a natural child, a thing which is sanctioned by other systems, the adoption of a child of English nationality is, for all that, possible by a Prussian who has his domicile in the province of Hannover, or by a Frenchman: and in the same way a Saxon subject⁵ may adopt a natural child who has been French by nationality.⁶ There is, however, no doubt that in such a case the adoptive father could not make good any rights against the child, for these rights could only be acquired under the personal law of the child.⁷ On the other hand, it is in our view unsound to attribute any effect at all, in any State you like, to an adoption which is invalid by the personal law of the adoptive father, and that even although the rule of law, which forbids adoption in the country of the adoptive father, is directly in contradiction of all the legal theories on which the system of the other State which is in question rests. Thus, for instance, adoption by a monk, who is by his own personal law incapable of adopting, has no effect even in such a country as France, where the *status* of members of religious orders is ignored to all civil effects. The same rule holds, *e.g.* in a case where adoption by a person of noble rank is forbidden unless with the sanction of the sovereign, and the necessity of obtaining this has been overlooked, even although in the country to which the adoptive son belongs, all special rights of nobility have, as a matter of principle, been swept away.⁸ How can it be asserted that a child has been admitted into the family of the adoptive father, if the law which directly regulates this family rejects the person who is alleged to have so entered it?

The rule "*locus regit actum*"⁹ determines the form of the adoption. The personal law which is in itself applicable, may, however, expressly or by implication, exclude the application of any foreign forms. Again, if the law requires the approval of some court or some official to be obtained, and if it is competent for the court or official to refuse to approve, this is not a form¹⁰ in the sense of the rule "*locus regit actum*." Approval of this

must always be settled by the judge according to his own law, and thus if it does not permit adoption, all legal effect will be denied to an adoption validly carried out in a foreign country in which the adoptive father was at that time domiciled.

⁵ Bürgerl. Gesetz. für das Königr. Sachsen. § 1790.

⁶ Weiss, p. 740, is of a different opinion.

⁷ The result would be a sort of one-sided adoption.

⁸ Weiss, p. 740. The theory of *Ordre Public International* is a bad guide here.

⁹ Bouhier, cap. 24, § 86; Boullenois, ii. pp. 48, 49; Merlin, *Rép. Puissance Paternelle*, vii. §§ 5-7; Hert, iv. 47; Hofeaker, *De off.* § 21; Unger, p. 195; Weiss, p. 740.

¹⁰ Unger, *ut cit.* note 139, and Vesque v. Püttlingen, p. 256. Thus, *e.g.* in a foreign country an agreement may be made without the observance of any particular form, in place of the written or judicial form required elsewhere, but a man who happens to be in a foreign country cannot escape from the necessity of submitting the act of adoption to the proper personal judge, as his personal law requires him to do. Wächter, ii. p. 185, note 308, in proposing to exclude the application of the rule "*locus regit actum*" in such cases, has this in mind.

kind can only be given by the officials of the State to which the person belongs,¹¹ and it will often be necessary to have a double approval, one in the State of the adoptive father, and a second in the State of the child that is to be adopted.

If the child does not, in virtue of the adoption, acquire the nationality¹² of the adoptive father, then the rights of the child as against the father adopting him must be ruled by the personal law of the father, the rights of the father as against the child by the child's personal law. A different view proposes that the law of the adoptive father shall be the exclusive rule, while yet another theory takes that of the child as the exclusive rule. But, although it is true that in a question of adoption it is the rights of the child as against the adoptive father that come far most frequently into view, and that the law, even in France, refers the parties, in so far as the execution of the act of adoption is concerned, to the judge of the adoptive father's domicile,¹³ it does not follow from this being the general course of matters that the personal law of the adoptive father is the only law applicable. In opposition to the argument that adoption operates a change in the *status* of the child,¹⁴ we may refer to the fact that the child enters the family of his adoptive father.

But both theories come into conflict with the leading principles of the law of succession. Now, adoption is a matter of special importance in the law of succession, and the course of succession to the adoptive father must be in accordance with his personal law, while succession to the child must be regulated by his personal law. With these rules the theory which we have adopted is in complete accord. What rights the child has against his original family, and what rights they continue to have against him after the adoption, are questions that must be determined by the personal law of the child.¹⁵

IS IT ONLY NATIVES OF THE SAME COUNTRY THAT CAN ADOPT?

§ 200. The adoption of a native of this country by a foreigner must be recognised as competent and effectual, in so far as it is not expressly forbidden

¹¹ So, too, Duguit, *Forme*, p. 99, with reference to Code Civ. 331. The rule would hold good, even if the judicial organisation and the powers of the officials in the different countries concerned were identical.

¹² It is obvious that, if both persons belong to the same nationality, the effects of adoption are dependent on the common personal law. By the English common law the *lex rei sitæ* gives the exclusive rule for succession in real estate in this connection. Wharton, § 251 (p. 360).

¹³ Laurent, vi. § 39; Fiore, § 153. German authorities do not, as a rule, express any opinion on this matter.

¹⁴ So Weiss, p. 740.

¹⁵ Thus, too, Fiore, § 153. But does this proposition not contradict the principle adopted by Fiore, of fixing the relations of the adoptive children to the parents exclusively by the personal law of the latter? The quality of the tie which continues to subsist between the child and his original family may, to a certain extent, depend upon the quality of the tie which is created between the child and his adoptive parent.

by law. The adoptive father does not acquire any public office or trust, but at the most a family authority which belongs to the sphere of private law, and in matters of private law the principle of the legal equality of natives and foreigners prevails. The practice in France¹⁶ is at present to the contrary, on the ground of the absurd theory of *droits civils*. It is required that both parties should be admitted to French nationality, or at least to the enjoyment of civil rights.¹⁷

EMANCIPATION.

§ 201. The termination of the power of the father, be it by the child attaining majority or by its marriage, or by some legal process specially directed to this object, *i.e.* emancipation in the strictest sense, is—with due regard always to the rule "*locus regit actum*"—to be determined by the personal law of the father. If the holder of paternal power and the child are of different nationalities, subject to different personal laws, the power of the father must come to an end, although according to the father's personal law it would continue, if by the personal law of the child it is to come to an end.¹⁸ A daughter is always emancipated by marriage, if the law of the new domicile makes the paternal power cease upon that event, since the wife follows her husband's domicile. The same rules as to the form of emancipation will prevail, as in the case of the form of the act of adoption.

3. RIGHTS OF THE FATHER IN THE PROPERTY OF HIS CHILDREN.

§ 202. The rights of the father in the property of his children are to be determined by the same principles¹ which decide whether and to what extent the personal law or the *lex rei sitæ* is to regulate questions of patrimonial rights between the spouses.² According to older German law, which was retained in various of the customary laws of France up to the time of the publication of the Code and according to the law of England, the *lex rei sitæ* is applied in the case of immoveables, while, according to

¹⁶ Cf. Félix, i. p. 87; Gand, § 465, and the recent judgments reported in J. ix. p. 187, and xi. p. 179. On the other hand, Mailher de Chassat, § 225; Demangeat on Félix; and what was said *supra*, § 96, as to legal capacity. Bard, § 153 *ad fin.*

¹⁷ As a rule, adoption has not the effect of founding a new nationality. See *supra*, § 53 *ad fin.*

¹⁸ So Wächter, ii. p. 187.

¹ Differences—By the law of England, the father has the administration, but not the usufruct of his son's property (Blackstone, i. p. 453; Stephen, ii. p. 294); while by common Roman law the father as a rule enjoys both.

² The personal law alone decides whether a son is under paternal authority or not. The usufruct of the father of an Englishman in an estate situated in the territory of the common law of Rome, terminates with his 21st year, since by the law of England the authority of a father terminates then. Merlin, *Rép. Puissance Paternelle*, vii. § 1.

the common law of Rome and modern French law, the personal law is the rule.³

The following exceptions are admitted:—

1st. The law, by which the rights of the father in the estate of the children are fixed, does not propose to settle these for all time, in the same way as the law with regard to the property of the spouses. The authority of the father, at least in modern law, is a legal relation which is terminated by his death. Besides, the father's right of property is not, like the rights of the spouses, subject to an unlimited power of contract in the parties interested, but rests upon the relation which *jus publicum* confers. This is determined by the actual personal law. Lastly, however, it cannot be the intention of a new personal law to disturb rights of property which have already arisen.⁴ On these reasons depends the correctness of the prevailing theory, which holds the personal law of property at the time of the alleged acquisition to be the rule, and not the personal law which existed at the date of the child's birth.⁵ But, of course, in such matters the rules "*Res succedit in locum pretii*," and "*pretium succedit in locum rei*," must be recognised, otherwise we should either find that an unnatural limitation would be placed on the administration of the property which belonged to the child, or a complete breach would be made in our principle.

³ Capacity to act is to be determined exclusively by the personal law. The *lex rei sitæ* should rule, according to Merlin, *Rép. Puissance Paternelle*, vii. § 1; Duplessis, Consult. xv.; Œuvres, ii. p. 77; D'Aguesseau, Œuvres, iv. p. 660; Boullenois, i. p. 68; Fœlix, i. p. 121; Gand, No. 473 (who even in moveables would have the *lex rei sitæ* prevail), and also according to the practice of the English common law.

The grounds adduced by these authors do not, however, justify their theory, which is, in its result, according to the older German and English law, correct. Merlin as cited: "*La loi qui donne à un père l'usufruit des biens de son fils doit être réelle, parceque son objet est réel.*" The theory that in the case of real property the *lex rei sitæ* rules, and that we have then to do with what is called a *statut réel*, has more modern adherents in French jurisprudence, such as Troplong (J. v. p. 168). For the general validity of the *lex domicilii*, see Seuffert, Comm. i. p. 244; Walter, § 46; Bouhier, chap. xxiv. No. 47; Mittermaier, § 30, p. 116; Wächter, ii. pp. 187, 188; Unger, i. p. 195. Stobbe, § 34, after note 31; Fiore, § 164; Laurent, vi. § 1.

⁴ To apply the law of a new domicile to property already acquired would place the rights of the children entirely at the mercy of the father. Cf. Seuffert as cited, and the authors quoted in the following note.

⁵ Bouhier, chap. xxii. No. 17; Merlin as cited, § 2. With this the more recent decision of an English court, reported by Story, § 463a, coincides [Gambier v. Gambier, 1835, 7, Sim 263], Wharton, § 257. Stobbe, § 34, note 32, is the most recent authority (in his second edition) for consistently applying the law of the new domicile. He thinks that the view I have adopted would lead to odd legal predicaments. I cannot concede that, and all the less so as my view is the view of the older authorities, who drew directly from practice. The judgment of the Imperial Court of 1st October 1884, as it is reported by Bolze (Praxis, i. No. 45, p. 10), seems to pronounce universally in favour of the law of the new domicile. But the question discussed in this case was the right of the children to a preference in the father's bankruptcy. They were, besides, allowed this preference in accordance with the law of the new domicile as regarded that part of the children's estate which the father had in his hands at the time the new domicile was acquired. We can concur in this result on other grounds. The law of the new domicile will guarantee this preference to the children over all property under the father's administration, either on the ground of the law of the new domicile or on that of the previous one.

2nd. It is certain that, if the personal law allows it, the father can renounce a right of usufruct which the *lex rei sitæ* bestows upon him, and under similar conditions the son may acquire a foreign estate in such manner as to exclude the usufruct of the father. This must be the case if the son acquires an estate abroad out of his own funds, over which the father has no usufruct.⁶ In like manner it must be assumed that there is a reservation of the usufruct in favour of the father, if he acquires a property with funds of the son over which he has a usufruct, and the *lex rei sitæ* can, as a rule, therefore be applied only to estate which the son has inherited.

3rd. It is conceivable that the child should be subject to a personal law other than that of the father. This will, for instance, very likely be the case if, as in the law of France, the naturalisation of a father is not extended to his minor children who are still under his *potestas*.

In this case, is it the personal law of the father or that of the child which is to rule?

Laurent (vi. § 21) pronounces in favour of the former,⁷ principally because the legal usufruct of the father exists in his own interest. But it is not clear how a foreign law should possibly be the foundation, as a personal law, of rights over the property of a person who is in no sense subject to it. It is sounder to hold that family rights can extend no further than the law of the dependent member of the family permits them to do. Thus, in my opinion, the father can never claim higher rights than are conferred upon him by the personal law of the child. The only possible doubt is whether the father can enjoy higher rights than those which are conferred on him by his own law. As, however, the right of usufruct is closely connected with the law of administration, and as this latter right, in respect it is part of the law of curatory, must be settled by the personal law of the ward, the father's right of usufruct must also be exclusively

⁶ The intention of the donor or decessing person will decide in cases of donation or bequests *mortis causa*, and this intention may no doubt be determined by the law of an earlier domicile. Older authorities propose to apply the law of the earlier domicile in such cases on account of the possibility of *dolus* on the part of the father. See Merlin as cited, No. 2.

⁷ To the same effect is the judgment of the French Court of Cassation, of 14th March 1877 (J. v. p. 167), cited by Laurent. In this case the children were children of an Algerian Jew and his wife; the father died, and the mother became naturalised as a Frenchwoman; she then claimed under the French law the enjoyment of her children's property, and this was allowed to her as from the date of her naturalisation, *ratione potestatis paternæ*, although her children remained of their father's nationality, and were never naturalised. [The rule in England would seem to be different; see Sir L. Shadwell in *Gambier v. Gambier*, 1835, 7 Sim, 263, where a father claimed the *liferent* of his children's property. The judgment in this case is not directly an authority to the contrary, for neither parent nor children were there domiciled in a country where the law would allow the claim; the judge, however, deals with the case as being a claim upon property adjudged to belong to domiciled British subjects—viz. the children; "and so long as they are domiciled in this country, their personal property must be administered according to the law of this country." The principles of English and Scots law would forbid the recognition of any such rights over real estate unless the claim was in accordance with the *lex rei sitæ*.]

regulated by the personal law of the child.⁸ German authors have not given any definite utterance on these questions, because to them the law of the domicile is the personal statute, and the child's domicile follows that of the father. It is obvious that similar principles must govern our decision in any questions that may be raised as to the mother's rights in the property of her children.

4. OBLIGATION TO MAINTAIN AND DOWER.

§ 203. The obligation to maintain and dower which arises from kinship is to be determined by the personal law of the person against whom the claim is made. Effects of the family tie which are repudiated by the personal law of the person who is said to be liable to the obligation can, at the most, only arise through some act of his which may be interpreted as a subjection of himself to another territorial law, *e.g.* residence or marriage in a foreign country. Can it be that a foreign law should provide that A, who belongs to State X, and who has never set foot in the country of Y, should still be bound by Y's law to aliment a relation who lives there, although the law of X releases him from any duty of the kind?

It looks as if there could hardly be any hesitation in answering this question in the negative.¹ But yet the law of France² has more than once applied the personal law of the claimant, or at least the rules of French jurisprudence, against one who belonged to a foreign country, because the obligation of aliment is a part of *ordre public*. With this last argument we can, as we well know, prove a great deal. But in a case of this kind, the courts of the United States refused, and in our opinion rightly refused, to apply a French judgment. So long only as the person against whom the claim is made resides in the country, can the duty of aliment as part of the *ordre public* affect him. No exception, again, to the principle we have adopted can be allowed even in the case in which both parties once had the same personal law, the law, that is, of the person who now makes the claim; while the other party, by naturalisation in another country, has placed himself under a system of law which denies the obliga-

⁸ So, too, *Vesque v. Püttlingen*, § 69 *ad fin.* and § 68; and *Weiss*, p. 750, in favour of the personal law of the child.

¹ To this effect the German Imperial Court, 4th Jan. 1887 and 25th April 1887 (*Bolze, Praxis*, iv. § 15, p. 5). A brother who is in need of assistance cannot raise against his sister who lives in Dresden a claim for aliment, which is well founded according to the Prussian statute, but not according to the Code of Saxony. In the same way a Prussian Charity Union (*Armenverband*) cannot raise an action against a brother of a person they have supported, the brother being resident in the territory of the common law of Rome.

² Cf. the judgments reported in J. i. p. 45 [where a son-in-law claimed aliment from his dead wife's parents, he being French, they American] and J. iv. p. 428. *Laurent, v.* § 87, proposes to apply strictly to claims for aliment the law of the judge, if it recognises the obligation; for, says he, you have here a law of nature to deal with. He recommends, besides, that international treaties should be entered into. That is altogether capricious.

tion.³ For the right we are dealing with here is not an independent vested right acquired by any special act of the will, but with an obligation which flows directly from some other legal relation by virtue of a general rule of law. Again, in a case of a change from the sphere of one law to another within the same empire, the new law must certainly be applied.

NOTE O ON § 203. CLAIM OF CHILDREN FOR ALIMENT.

[Claims for aliment will be viewed favourably by all courts, and will be enforced against parties not otherwise subject to their jurisdiction. This is a consequence of the claim being due *ex debito naturali*, and presumably the same in every civilised country. The French courts will allow one foreigner to sue another for aliment, although as a general rule they are closed to suits between foreigners (Bouchard, 1876, Trib. Civ. de la Seine, J. iii. p. 184). In another case, where the same rule was applied against a defender resident but not permanently domiciled in France, it was remarked: "The action is founded on a natural obligation, as well as consecrated by public law, and it touches public decency that it should be implemented" (Frings v. Mathyssens, 1879, Trib. Civ. de la Seine, J. vi. p. 489). French children have been held liable by the French courts to aliment their father, who had become naturalised in America, where no such obligation exists, on the ground that the paternal relation, on which the obligation was founded, took its origin before his American naturalisation (Trib. Civ. de la Seine, 1877, J. iv. p. 428). This would seem to be the general rule, although it was laid down by an Algerine court that the question of the obligation to aliment children, and the extent of that obligation, are to be determined by the law of the marriage (Broni Yso, 1882, J. ix. p. 626). In Scotland it has been laid down that personal presence in the territory for however short a time will found jurisdiction to entertain an action of aliment by a child against a father, the father having the child with him within the jurisdiction of the Scottish courts (per Lord Mackenzie in Ringer v. Churchill, 1840, Ct. of Sess. Reps. 2nd ser. p. 316).

The same favourable view is taken of claims for aliment by a wife against her husband. The court of any country where the husband resides will, according to French decisions, entertain a suit for aliment, and if the marriage is denied, process will be sisted until this question can be determined by the judge of the proper domicile (Ullmann, 1880, Cour

³ To a different effect the Trib. Civ. Seine, 22nd May 1877, J. iv. p. 428. [But in this case the father, who claimed aliment, had settled in the United States, where no such claim lies. It was the children who remained in France.] See, too, Folleville, Natur. pp. 505, 506. Clunet does not approve the reasoning of the decision of the Trib. Civ. Seine, but proceeds rather on the notion of *ordre public*.

de Paris, J. vii. p. 300). The general principle upon which this assertion of jurisdiction is advanced, is forcibly stated in a judgment of the Civil Tribunal of the Seine, and is put upon considerations which will hold good for all systems of jurisprudence: "Marriage is a contract belonging at the same time to natural law and to the law of nations; it creates for the spouses rights and duties which follow them everywhere, and which they are bound mutually to observe in a foreign country as fully as in their own; in particular, one of its results is the obligation on the husband to receive his wife in his house, and to supply her wants." Following out this general statement of the law, the court ordained a foreigner trading in France and resident there, to entertain his wife in his house, or otherwise to pay her a certain allowance (*Stoops v. Stoops*, 1878, J. v. p. 495). As to interim awards of aliment, while actions for divorce are pending, the courts of all countries will give temporary remedies to injured spouses, even where they have no jurisdiction to affect their conjugal relation permanently; residence of the husband in England will found jurisdiction for a judicial separation; indeed, the English courts will exercise even a jurisdiction for divorce upon the ground of residence; in Scotland, residence of the spouses, far short of that required to constitute a matrimonial domicile, will give the court jurisdiction in an action of separation and aliment (*Fraser*, 1294), and will enable it also to regulate the custody of the children. The Italian courts will authorise a wife to quit her husband's house in cases where they are not competent to pronounce any decree that will affect the relations of the spouses permanently (*Nellinger v. Struve*, App. Court of Milan, 1876, J. iii. 220). The French courts will award aliment to an injured wife, give her the custody of children, and allow her the expenses of a journey to the territory where her divorce must be sought (*Subercasseaux*, Trib. Civ. de la Seine, 1877, J. v. p. 45); and even if the expense be the expense of a voyage to America, it will be allowed against the husband, and extra expense admitted on account of the delicacy of one of the children of the marriage, who is to accompany the wife (*ibidem*). There will be inquiry to see if there be a *probabilis causa*, but the application for aliment and for expenses *ad litem* may be made in the French courts although no judicial steps have been taken there (*Stern v. Stern*, Trib. Civ. de la Seine, 1881, J. viii. 526). A French court may also put property under judicial management pending a divorce suit in a foreign court to which the French court is incompetent (*Grabisheid*, Cour de Cass. 19th April 1878, J. v. p. 506; *Reber v. Reber*, 1885, J. xii. 185), but the aliment or protection will only be given for such limited time as is sufficient to institute the action in a foreign court, or, in the case of protection of property, to carry through that action (*Van Overbecke*, 1881, Trib. Civ. de la Seine, J. vii. p. 303; *Favre*, 1881, J. ix. p. 627); interim aliment for children who have been awarded to the custody of the wife has also been allowed (*Glover v. Glover*, Trib. Civ. de la Seine, 21st January 1880).

OBLIGATION OF A FATHER TO ALIMENT BASTARDS.

§ 204. It is plain that the legal relations between the mother and her bastard children must be determined by the personal law of the mother. But both in practice and in the literature of the subject we are confronted with the most various views on the question as to what territorial law is to adjudicate upon the claims of the bastard against the true or possible father, and in particular upon his action for aliment, or *reconnaissance forcée*, as the jurisprudence of France calls it. The personal law of the mother at the date of conception, and at the date of birth, the law of the place of the *copula*, the personal law of the father, the *lex fori*, all have their advocates: while many think that the claim cannot be recognised except several of these systems concur in approving of it.

One theory, which formerly was widely entertained in Germany, holds the claim to be one arising from a delict, viz. that of illicit intercourse. Now, it is no doubt quite correct to regard as a claim on delict⁴ the claim which the law sometimes, and in particular where the modern common law of Rome prevails, allows of damages by the mother for defloration, provided always that there has been seduction. But it is impossible to recognise that the act which has given birth to the child is any violation of its rights, so as to give it an action founded on delict.⁵

The decisive point of time is rather to be determined as follows: The law, which finds the paramour liable in aliment, has the intention of exercising a permanent care for the welfare of the bastard and the mother. It will, therefore, so far as may be, apply to all bastards belonging to its own country, and conversely it will not apply to children accidentally born there of foreign mothers, if their own domestic law recognises no such protective care, or even, as may be the case, holds it to be a mischief. For the permanent protective care for persons is a matter for the State to

⁴ Opinions are divided even on this view, for some think that in the case of claims on delict the law of the place where the act took place, others the law of the *forum*, ought to rule. For the law of the place of the *copula*, see Reyscher, § 22; Phillips, p. 192; Bluntschli, Sup. Ct. of App. at Jena (1835, 1839, and 10th Dec. 1869); Seuffert, ii. § 118; xxiv. § 103; Sup. Ct. of App. at Munich, 1st Dec. 1829 (Seuffert, i. § 153); Supreme Court of Wolfenbüttel, Jan. 1866 (Seuffert, § 212).

For the *lex fori*—Mittermaier, § 30 *ad fin.*; Savigny, § 374; Guthrie, p. 254; Schmid, p. 89; Vesque v. Püttlingen, p. 255 (because the question is one as to laws which rest on considerations of morality); Emminghaus, *Pand. des Sächs. Rechts*, p. 52; Code of Saxony, § 12, and the practice of the Sup. Ct. of Dresden of earlier date (Seuffert, xiv. § 196). A more recent judgment of the Supreme Court of Austria, of 26th September 1882 (J. xiii. p. 464), seems to hold that an action will lie, if it is sanctioned either by the *lex fori* or by the personal law of the defender. [The same court on 31st Oct. 1871 held that it was competent to give decree for aliment against the father of a bastard, in a case where both he and the mother were foreigners, and that the condition and measure of the claim was the law of the mother's domicile.]

⁵ It is possible that the act, which may be considered a delict, should give rise to a claim by the State or the Commune for the support of the child.

which these persons belong. Accordingly, a child can only claim aliment under the conditions and to the amount which the personal law of the mother sanctions.⁶ But it is quite possible that the mother should in the interval between the *copula* and the birth of the child acquire a new personal law by being naturalised in another State, or acquire another domicile within the same State, in which a different law is recognised. Shall her personal law at the time of the birth or her personal law at the time of the *copula* rule? We must pronounce in favour of the latter. The claim of the child arises from the fact of procreation, although it is first brought into operation when the child comes into the world alive.⁷ Besides, on any other theory it would be possible for the mother to alter very materially at her good pleasure the obligation incumbent on her paramour, by changing her personal law in this interval.⁸ Lastly, no reason at all can be given for subjecting the father or paramour who is personally subject to another law, and has never stayed at the place of birth during the critical period, to the law of the place of the birth.⁹

It can, clearly enough, never be sufficient that the personal law of the mother gives the bastard the claim in question, since the paramour cannot be brought within the operation of this law without something further to establish his liability. It is necessary, too, that the claim should be recognised by the law of the place of *concubitus*, since we are dealing with an obligation which arises directly out of this act, even although there is

⁶ The recognition of the mother's *lex domicilii* was recognised by the undeviating practice of the old Supreme Court of Russia, but it was put upon what, in our opinion, was an unsound basis, viz. that the matter was one of *status* of the personal qualities and powers of the child. Cf. *Plenarbeschluss*, 21st Nov. 1849 (Entsch. xxiii. p. 39; Seuff. iii. § 254). Judgments of 1st Nov. 1850, 11th April 1856; 4th Oct. 1858 (Entsch. xx. p. 300; xxxii. p. 404; Striethorst, *Arch. Jahrg.* ii. vol. i. p. 355).

So, too, Holzschuher, i. pp. 79, 488; Stobbe, § 34, note 33; Dernburg, *Preuss. Privatr. i.* § 28, note 5; iii. § 68, note 10. The more modern French authorities proceed on the view that the question is one of a *statut personnel*. See Laurent, v. § 252; Folleville, pp. 505, 506; Brocher, i. p. 316; Weiss, p. 728.

⁷ So the more recent practice of the Supreme Court of Prussia. See judgments of 1st Feb. 1858 and 24th Feb. 1864 (Seuffert, xii. § 333; xxxii. § 3).

⁸ Stobbe, *ut cit.* declares for the time of the birth, because it is at least an exceptional thing to associate rights with the conception instead of with the birth. But this exceptional treatment is here inevitable, for it is impracticable to bring the paramour under the law of the place where the child is born, a place in which he need never have stayed. The further reason, that although the father was not liable in aliment according to the law of the place of the *copula*, "he had, however, no vested right to be free from claims of aliment," is rather too subtle and scholastic an argument.

⁹ If there has been *concubitus* at several places with different systems of law, it is sufficient that the claims exist according to one of these systems. The child may choose that one which is most favourable to him on which to base his claim. It is enough that he may have been begotten at that place, and that the alleged father is subjected to its law by having lived there. Stobbe (note 36) pronounces this to be a sound inference, if we are to take the law of the place of the *copula* as the determinant. But see a contrary judgment of the Prussian Supreme Court of 19th June 1866 (Seuffert, xxii. § 1). The practice of Hesse (Roth, *Kurhess Privatr.* p. 603) takes this peculiar course, that if the law of the place of conception gives no claim, the *lex fori* may step in to regulate the matter. See, against this, Stobbe, *ut cit.*

no intention that it should arise.¹⁰ Whoever visits a particular country subjects himself to the laws that are there recognised as regulating this matter,¹¹ and these are the only laws that can apply to all who are domiciled there. A child, then, can only make these claims in so far as the personal law of the mother at the time of the conception, and the law of the country in which it is possible that the conception took place, allow them.

We have yet another qualification to add. The law of the place of action must not reject the action as one that is *contra bonos mores*; in support of this doctrine, it is pleaded that we must have recourse to the prohibitive character of the laws which rest directly on some conception of what is proper or decent, however mistaken that conception may be. For in such a case the court is being invoked to give immediate effect to a claim of which its own law, the *lex fori*, disapproves (see *supra*, § 36). This qualification is generally admitted.¹² Thus no one can institute any such action, where the rule of the French statute book, art. 340, or the *Codice Ital.* § 189, or the Code for the Netherlands, § 340, is in force, unless one of the exceptional cases therein provided for should occur.

§ 205. We have, however, this much to say. A rule of law of this kind, which sets bounds to the rights of bastard children, rests on a twofold foundation. In the first place, the law holds that the process of proving the claim, which is at the bottom of such actions, is injurious to public morality,¹³ and, in the second place, it desires to protect the peace of families against such claims.¹⁴ But neither of these reasons applies to the

¹⁰ See *infra* the law of obligations. [See also Ross, Ct. of Sess. Reps. 4th ser. xix. p. 31.]

¹¹ See the judgment of the Supreme Court of Berlin cited in note 9 (1864).

¹² Cf. *e.g.* Unger, p. 197. He proposes that the *lex fori* shall regulate the competency of the suit, while the *lex domicilii* of the fornicator shall regulate the extent and the amount of his obligation: see Stobbe, note 34; Code of Zürich, § 292; also the judgments of the Supreme Court at Berlin, of 1858 and 1864, cited in note 7; Fiore, § 141; Weiss, p. 729. Of course, all those who adopt the *lex fori* as a general rule are of this opinion. Laurent, v. §§ 252-262, proposes that suits of this kind between foreigners should be entertained in France, because the provision of the Code Civil in truth is repugnant to morality, and so does not constitute a *statut réel*, in Laurent's sense, *i.e.* is not a statute which must receive effect absolutely and unconditionally in France. It is obvious that Laurent thus sets his own authority above that of the legislature.

¹³ Against this *ratio* the fact that the law does allow proof in special cases, *e.g.* where a rape or a seduction has taken place, proves nothing, Code Civ. § 340; Cod. Ital. § 189. It is, however, distinctly a mistake to see in this restriction a mere exclusion of certain modes of proof, and to regard it as a rule of process merely, which can, therefore, never be recognised to any effect by a foreign court. Thus the Supreme Court at Stuttgart, 13th June 1833 (Seuffert, xiii. § 182). On the other hand, Durand, § 166.

¹⁴ In so far as the child makes a claim not merely for definite money payments or aliment, but for real family rights, the personal law of the alleged father must also be taken into account (see Brocher, *Nouv. Tr.* § 45). For one can only enter a particular family—even although the rights claimed are not those of a full member of it—in accordance with the personal law of its head. We must, therefore, always enquire carefully how far the claim goes; it may be well founded for one purpose, and ill founded for another.

case of a foreign child pleading the judgment of a foreign court, which has already established the paternity, against a foreigner. There is no need of more proof in such a case, and the protection of the foreign family in these circumstances can only be undertaken by their personal law.¹⁵ A foreign judgment of that kind could not, however, be pleaded against a Frenchman in France.¹⁶

But if the judge throws out the action on this ground solely, that by the *lex fori* all proof on the subject is excluded—*e.g.* if a French judge rejects a suit at the instance of a Saxon woman against a Saxon paramour—this judgment does not prevent the claim being advanced before the courts of some other State. The court has not said that there is no such claim, but merely that it must not be made before the courts of that particular country.

§ 206. But is it also necessary that the personal law of the fornicator against whom the claim is made should allow it, before any suit can be brought before the courts of some other country, *e.g.* a suit by the child in the country to which the mother belongs, which is also the place of the child's birth?

Weiss (p. 729) answers this question decidedly in the affirmative. He rests his judgment upon the point of view of the personal law, the law of the family, and refuses to recognise any obligatory tie in the matter, except in so far as the personal law on both sides allows it. But the claims, which *e.g.* the common law of Rome and the law of Prussia¹⁷ allows to the bastard, are not claims to be received into the family of the alleged father,¹⁸ a thing which could only be done in accordance with the personal law of the father; they are—although they may be based upon the assumption of a relationship which is nothing but a natural relation-

¹⁵ Fiore, § 142 *ad fin.*; Laurent, v. § 262; Weiss, p. 730; Asser-Rivier, § 58, note, p. 127; C. Pau, 17th Jan. 1872 (J. i. p. 79). In France a suit by a bastard against his alleged father has been allowed, if by the personal law of both parties *possession d'état* was sufficient proof, and further investigation was excluded. Cf. the decisions cited by Weiss, and the decision of the C. de Paris of 2nd Aug. 1866 (Graf Civry v. Duke of Brunswick, Haus, p. 140), which in its grounds seems to go further.

¹⁶ Cf. C. d'Appel Neuchâtel of 26th March 1881 (J. xiv. p. 115), Bard, § 152 *ad fin.*, and still more, Fiore, § 143, will in certain circumstances give effect to the foreign judgment. Fiore thinks effect should not be given to it, if in the foreign court the proof of paternity is lightly taken. But that is too indefinite, and therefore unlaywerlike.

¹⁷ On the other hand, a claim of succession, such as the Allgem. Preuss. Landr. ii. 2, §§ 652, 654, gives bastards, if they can judicially establish their character against the alleged father's succession, will be universally inoperative unless the last personal law of the father, the law, that is, which regulates his succession, recognises it. On this point, see the judgment of the Supreme Court of Bavaria, 22nd October 1883 (Seuffert, xxxix. § 84), which, on the other hand, quite rightly recognised a bastard's right of succession, as his claim was good, not by the law of the place of conception, but by the law of the father's last domicile. A distinction is to be taken between claims of succession and claims for aliment.

¹⁸ The matter is different in the case of the special circumstances of the so-called *Brautkinder* [*i.e.* children born of persons who are betrothed, not married]. In these cases the personal law of the father must decide. Deutsch. R. Ger. iii, 15th June 1887 (Bolze, *Praxis*, iv. § 25 p. 7).

ship, albeit effectual as an impediment to marriage—simply claims *ex obligatione* for support, or for a contribution towards support. If, then, the legislation of any country approves of claims of the kind being made against the alleged father, it is not to be expected that it should give foreigners an exemption in accordance with the law of their own country, a privilege of seducing its own subjects for whose interests it pretends to provide. Fiore says very soundly (§ 143), although the Italian code has adopted the principle of the French law: “The Italian who has had sexual connection in a foreign territory with a foreigner, must be regarded as subject to all the legal consequences of his conduct.”

§ 207. On the other hand, the child can make no claim against a relative of his alleged father, *e.g.* against his father again, unless such a claim is allowed by the personal law of that relative. The father has not subjected himself to the law of the foreign country, and the son by his stay in that foreign country can only subject himself to its laws. The obligation of being responsible for the son is a pure matter of family law, and depends therefore on the personal law of the father.¹⁹

But, on the other hand, would it be enough if—always supposing that the *lex fori* allowed the action—the personal law of the mother as well as that of the father of the child approved of the claim?²⁰ If the child's claim is put upon natural kinship, we must say yes; and several German authors, on the ground of natural kinship, decide these claims generally according to the *lex domicilii* of the father.²¹ We believe, however, that unless you have a real recognition by the father you may speak of a possible relationship, but cannot describe it as a real relationship,²² especially if, as is the case in the prevailing theory of the common law

¹⁹ Supreme Court of Berlin, 1st November 1850 (Entsch. xx. p. 300, *pracs.* pp. 307 and 304): “Foreign bastards cannot found on an interpretation of a disputed passage in the common law which has been enunciated in Prussia, if the interpretation of that passage which is received in their own country gives them no such right. . . . In the converse case, if by the law of this country there is no obligation upon the father of him who has begotten the bastard to aliment it, although there is by the law of the child's domicile, it will be of importance that in no case can obligations be laid upon a native of this country by the laws of another without his own co-operation, which he should have to satisfy in this his own country, albeit these obligations are unknown to its law.”

See, too, judgment of the Supreme Court of Bavaria, 5th May 1874: “The law of the family is to be tested by the law of the domicile, and the obligation to aliment which is here in question is to be derived from the relation of grandparent and grandchild, *i.e.* from the rules of family law.” Resolution of the same court on 24th February 1875 (Seuffert, xxx. § 222; xxxi. § 1). Stobbe, note 34 *ad fin.*

²⁰ Gunther, p. 732, v. Martens, p. 317, and Weiss, p. 729, set store substantially on the agreement of both of these laws.

²¹ So Gengler: *Lehrbuch des deutschen Privatr.* p. 1227; v. Wächter, *Württemberg R.* ii. p. 111; *Hamburger Prax.* (Baumeister, *Hamburg. Privatr.* i. p. 432); Unger, too, p. 197, ranks among these authors, except that he does pay some respect to any prohibitive provision of the *lex fori*.

²² See, in this view especially, the exposition by Windscheid, *Pand.* ii. § 475, note 18.

of Rome, and also *e.g.* in the code for Saxony, § 1872, the *exceptio plurimum concubentium* is not recognised, the objection, that is, that the mother within the critical period has had connection with several men.

The outcome of our views then is : Such claims are only permissible in so far as they exist, 1st, by the personal law of the mother ; 2nd, by the law of the place of *concubitus* ; and lastly, 3rd, by the law of the place where the action is brought. As a rule, the action will be brought at the domicile of the defender, and again this defender will, as a rule, be a citizen of the country in which he has his domicile. Thus in practice many of our difficulties will solve themselves, while, on the other hand, the reasoning on which many of the judicial sentences on this matter are based must be received with caution, since in many cases it happens that the points of distinction between the case on hand and some one theory are allowed to influence the judgment, while the points of distinction between it and a second theory are left out of account.

Again, there is a conflict of legal systems in all cases connected with this subject not merely when one system excludes a child's claims as a general rule and admits them in particular and exceptional cases,²³ but also when both systems admit the child's claims in principle, but differ in their way of regarding the particular case : for these exceptions, too, rest on considerations of morality, *e.g.* the exceptions made by the Prussian law of 24th April 1854.²⁴

III. GUARDIANSHIP AND CURATORY.

A. GUARDIANSHIP.

EXTRA-TERRITORIAL RECOGNITION OF A GUARDIAN APPOINTED UNDER THE PERSONAL LAW OF THE WARD.

§ 208. According to the theory of law which has come to the front in modern times, guardianship exists solely in order to ensure a permanent protection to the person of the ward, and this protective care must be

²³ The Code Civil and the *Cod. Ital.* recognise these exceptions.

²⁴ For instance, the Prussian statute of 24th April 1854 (G. S. 1854, p. 193, §§ 9, 13) provides that the claim recognised in other cases should not hold in the case of the children of persons who were censured for incontinence. In the judgment of 4th October 1858, already quoted, the Supreme Court rejected the plea of a Prussian subject founded on these provisions, advanced by him in an action raised by a woman of Brunswick, because the paragraphs cited only give rise to an *exceptio*. It cannot, however, according to my view, signify whether the defender is obliged to aver the circumstance in question and to prove it (to advance it *ope exceptionis*) or not, in order to establish that a particular action is to be held *immoral*. The defender must also guard against the *exceptio metus*, and in the same way an action proceeding upon an extorted promise is held to be *contra bonos mores* (Puchta, *Pandects*, § 56). The provision of § 9, 2a of the Prussian law already cited, whereby the claim falls if the mother has taken money or a present for the act of intercourse, may be referred to considerations of morality.

entrusted to the State to which the ward belongs, and regulated by its law. This theory, which preponderated even in older times, may now be said to be universally recognised in the practice and in the legislation of the Continent of Europe,¹ while the jurisprudence of England and of the United States at least recognises it in principle as sound.²

The person who, by virtue of his relationship, enters directly on the office of guardian under the personal law of the ward, or who is appointed guardian in the State in which the ward has his home, is charged with the administration of the ward's property, whether it be in his own State or in another,^{3 4} and that without requiring any special authorisation by the State in which he is to act.⁵ The

¹ Savigny, p. 380; Guthrie, p. 303; Stöbbe, § 34, No. ix.; Fiore, § 174; Laurent, iii. § 311; vi. § 40 and § 49; Asser-Rivier, § 52; Weiss, p. 595; v. Martens, § 75; Daireaux, Jour. xiii. p. 297; Chavegrin is particularly thorough and careful on this subject, "*De la tutelle des mineurs en droit international privé*," in the *Revue critique de législation et de jurisprudence*, 1883, pp. 497-523; 573-587. Loiseau, *Traité de la tutelle en droit international*, Paris 1887.

² Wharton, § 212; Westlake Holtzendorf, § 7; Dudley Field, §§ 557, 558.

³ This is the decision of Argentræus, No. 19; Hert, iv. 29; Everhardus, Consil. vol. ii. cour. 28, No. 82; Andreas Gaill, Observat. ii. obs. 123, No. 6; Stockmanns' Decis. Brabant, decis. 125, No. 6; Petr. Peckins, *De Test. conjug.* iv. c. 28, § 7; Molinæus in Leg. 1, C. de S. Trin.; Boullenois; Merlin, Rép. Autorisation Maritale, § 10; Vattel, ii. 7, cap. 7, § 85: "*Le droit des gens qui veille au commun avantage et à la bonne harmonie des nations, veut que cette nomination d'un tuteur ou curateur (par le juge du domicile) soit valable et reconnue dans les pays, où le pupille peut avoir des affaires.*" Holzschuher, i. p. 86; Thöl, § 81; Schäffner, p. 55; Schmid, p. 91; Stöbbe, § 34, note 39; Roth, *D. Privatr.* § 51, note 80; Fœlix, ii. p. 466, cf. i. § 33 and § 89; Fiore, § 174; Laurent, vi. § 118; Durand, § 173; Bard, § 172; Weiss, pp. 603, 604; Loiseau, p. 142; Asser-Rivier, § 59. The treaties collected in Krug (pp. 26-29) provide without exception that, as regards all moveables, the guardianship should be constituted by the court of the domicile, and recognised in the other State.

Kraut (*Vormundschaft nach d. Grunds. des D. Rechts*, i. p. 284) describes the theory adopted in the text, according to which the guardian appointed by the personal law or by the judge who controls the personal *status* of the ward, *i.e.* according to the tenor of German practice the *judex* or *lex domicilii*, has the right of managing real estate abroad, as the common practice of the German courts, from which some particular systems diverge.

One such divergence takes place with regard to the real estate of a foreigner which lies in Austria (Unger, p. 198; Vesque v. Püttlingen, § 75), and another by way of reprisal in Brunswick (cf. Steinacker, *Privatr. des Herzogth. Braunschweig*, p. 67, § 6).

All the treaties collected by Krug (*Internationalr.* pp. 26-29) from German States go to this, that the guardian who shall be named by the *judex domicilii* is to be recognised as regards all moveable goods within the territories of other States. But if there are foreign immoveables in question, then, according to some of these treaties, the guardian appointed by the courts of the domicile is to be recognised by the authorities of the other countries as having right to the estate. Others give the authorities of the court where the estate lies the power of appointing special curators as far as it is concerned, or of confirming the foreign curator, who must, however, in all his dealings with the estate in question, observe the conditions which the law of the place requires. (For the interpretation of this latter provision, see *infra*, note 25.) According to these treaties, the courts of both countries shall account to each other for the application of the income.

⁴ Cf. judgment of the Supreme Court of Appeal at Kiel, 8th January 1840 (Seuffert, viii. § 148), which lays special stress upon this recognition by foreign courts as a general proposition of law.

⁵ Of course, we do not deny the competency of appointing separate guardians, on considerations of convenience, for different masses of property situated in different and distant countries. But these guardians will all the same be subject to the personal law of the ward, and to the

same thing is to be said of the power of representing the ward in court.⁶

The opposite view, by which the validity of the appointment made at the domicile of the ward is not recognised, even as regards the moveables situated abroad,⁷ cannot be logically carried out. If that appointment is not recognised by the State, it has the right and the duty of appointing a guardian so soon as any piece of property belonging to the pupil falls into its territory. Otherwise, not only would the person who stands in need of representation by a guardian be deprived of all protection, and of the capacity of making contracts, but the subjects of that State would be placed in a most dangerous position if they desired to make contracts with such a person. A special guardian will probably not be appointed unless the rights of the ward are to be pleaded in some court.⁸ To require such an appointment in every case seems to be a mere oppression of one from whom the State exacts stamps and duties without making any return therefor, as it does when it appoints guardians to its own subjects. It is impossible, as we have seen in practice, to appoint a guardian for every foreigner who happens to be for a time in the country, or to possess moveable property there; and the matter, as a rule, is reduced to this, that it becomes necessary to appoint as guardian the person appointed at the domicile, who alone has the necessary information as to the circumstances of the ward.

It may be objected that, where a practice of this kind has grown up out of reasons of convenience, it should be maintained, and that where that is not the case, the principles that hold as to the sovereignty of individual States should rule; and that as the guardian is clothed with the character of an official of the Government, no one who is nominated to that office by a foreign Government can act in this country unless confirmed by the Government of this country. But although the guardian in modern times holds his position by appointment of the Government, yet that does not by

court which has the control of all guardians at the home of the ward. Chavegrin, p. 576 (*Protutelle*).

Cf. e.g. L. 20, § 2; D. *de excus*, 27, 1. The provision in this passage, that the *præsides* of the various provinces where the property of the wards lies should appoint guardians, is to be treated as a rule of convenience which can only be applied within one territory. Provisions for the care of the pupil and his estate will be dealt with in a similar fashion by all courts within the same territory (and in the Roman empire the whole territory was one); and, therefore, it matters not which of the various offices appoints the guardian and superintends him. It is a different matter when the officers of different States are in question, who may be under different systems, and regulate their superintendence of guardians by different principles. In this case, too, it may seem convenient to appoint different guardians. The administration, however, must be managed through the judge of the pupil's domicile, and in accordance with the law of that domicile.

⁶ The modern English practice recognises the right of tutors and curators named abroad to appear in court. Westlake, Rev. vi. p. 402.

⁷ Story, §§ 540a, 499. So, too, the practice of the courts of England, America, and Scotland. See, too, Mittermaier in *Archiv. für Civil Praxis*, 14, pp. 304, 305. [See *infra*, p. 478 *et seq.*]

⁸ This is the result of the practice of England and the United States. Burge, iii. pp. 1010, 1011. See *infra*, p. 478 *et seq.*

any means prove that he exercises any of the functions of a Government official.⁹ The truth is rather that, under certain limitations, he exercises a family authority which belongs to the father, as head of the family, in other cases. The difference merely consists in this, that the father holds his authority by direct provision of law, while the guardian holds his position by an act of the Government, proceeding likewise upon the ground of the common law of the country which regulates his personal status, and importing, therefore, the same effects as the paternal relation.¹⁰ It cannot, therefore, be said that a special license should be required in order to give a guardian appointed by Government officials the right to exercise the same powers which the father can undoubtedly exercise over the moveable property of his child in a foreign country.^{11 12} One might just as well require that the officials of a foreign Government should be confirmed, in order to entitle them to represent the subjects of that Government and follow out their rights in a foreign country.

An intermediate view proposes that the office of guardian should be recognised as far as regards the moveables situated abroad, but requires the appointment of a special guardian for the real property which the ward may have in another country.¹³ This is the theory which at the present day rules the practice of England and of the United States.

⁹ This mistaken theory is refuted at length, with reference to the law of France, by Loiseau, pp. 91-127.

¹⁰ In Roman law, as is well known, there were many cases in which the guardian did not require any authority from the Government for the administration of the ward's property; he was by direct operation of law vested with all the powers of a guardian. Burge himself (iii. p. 1002) recognises that the appointment of a guardian or curator by the *judex domicilii* is to be recognised everywhere as far as the person of the ward is concerned.

¹¹ The person of the ward must be given up to the guardian if he demands it. Cf. English decisions cited by Wharton, § 263, and Westlake Holtzendorff, § 7. But the English practice (see Alexander, Jour. vi. p. 521), of which Wharton does not disapprove, seems often to avail itself of the expedient of confirming the appointment of the guardian who has been appointed in the country to which the minor belongs. [As to English practice and theory, see *infra*, p. 478 *et seq.*] Phillimore finds fault with English jurisprudence as unsatisfactory, and sets himself in theory to recognise out and out the personal law and the guardian named by it. It cannot, however, be gainsaid that the law of England, in reserving to itself a discretion whether it shall or shall not recognise a foreign appointment, has this advantage, that it can vigorously resist any abuse of the rights of guardianship on English soil. But, even by the Continental rules, restraints upon the personal liberty of the ward may be prevented as contrary to the *jus publicum*. If, again, *dolus* on the part of the guardian is supposed to exist, the court may refuse to give up the ward until correspondence has been had with the officials of the ward's domicile charged with the superintendence of curatories, and a provisional curator may be appointed. See *infra*, § 212.

¹² The analogy which Story, § 504, draws of the confirmation of foreign executors and administrators who wish to get possession of moveable estate belonging to a foreigner, and situated in a territory where the common law of England prevails, cannot be approved. In that case we have to deal with the institution in possession of one who previously had no rights; in the case of guardianship we have to deal with the exercise of a family authority over the pupil's person, and the representation of him by his guardian.

¹³ Burgundus, ii. 18; Martens, § 98—the latter upon the ground that the question is one of an act of voluntary jurisdiction, which will not take effect abroad without special provision by treaty. The rule, however, is that acts of voluntary jurisdiction are good in a foreign

This theory may be carried out in practice,¹⁴ but it cannot, any more than the second theory, derive any support from the argument that the exercise of the office of a guardian, without previous confirmation by the authorities of the country where it is to be exercised, is an invasion of the sovereign rights of that country, any more than the second view, already dealt with, derives support from that argument. Moveables, so long as they are in any State, are subject to the sovereignty of that State no more and no less than immoveables: the distinction merely consists in this, that in the one case the hold of the State over the property is temporary; in the other it is permanent.

EXPLANATION OF THE ORIGIN OF THE OPPOSITE VIEW, BY WHICH FOREIGN REAL ESTATE IS NOT SUBJECT TO THE PERSONAL LAW.

§ 209. This view, however, may be historically explained as follows:—
In the first place, according to older German law, the nearest male

country. Even in France there is a *consensus* of opinion that a decree by a foreign judge nominating a guardian does not require, in order to come into operation in France, to be declared "executory," i.e. to receive an *exequatur* as a decree in order processes does. Cf. Laurent, vi. § 53, p. 164. Cf. Fœlix, ii. § 466. P. Voet, 9, c. 2, No. 17, remarks: "*Quamvis regulariter ab illo magistratu detur tutor, ubi pupillus domicilium habet ubi parentes habitarent: etiam qui dat tutorem, cum primario personæ non rei dedisse censetur, adeoque is, qui simpliciter datus est, ad res omnes etiam in diversis provinciis sitas datus intelligitur, id quod plerumque jure Romano obtinebat, quo diversarum provinciarum magistratus uni suberant imperatori. Ne tamen videatur Juxta domicilii quid extra territorium fecisse, non præjudicabit Judici loci, ubi nonnulla pupillaria bona sita, quin et tutorem pupillo ratione illorum bonorum scilicet immobilium recte dederit. Unde etiam si de prædiis minoris alienandis contentio, si quidem in alia sita sint provincia, tutius egerit tutor, qui datus est in loco domicilii, si decretum ab utroque Judici curet interponi et domicilii pupilli et rei sitæ.*" Cf. too, J. Voet, in Dig. 26, 5, No. 5: "*Non autem in loco originis vel situs rerum pupillarium, sed tantum in loco domicilii pupillaris tutores a loco illius camera pupillari aut magistratu creari, moris est, qui hoc ipso dati intelliguntur universo pupilli patrimonio, ubicumque esistenti. Quod tamen ex comitate magis quam juris rigore sustinetur; quum in casu, quo pupillus immobilia habet sita in eo loco qui non subest eidem magistratui supremo, cui pupillus subest ratione domicilii, magistratus loci, in quo sita immobilia, rebus in suo territoris existentibus peculiarem posset tutorem dare.*" Malthæus, De Auction, i. c. 7, No. 10, is of another view: "*Sic enim et tutor hodie a judice domicilii datus: nec tamen universorum negotiorum ad bonorum administrationem consequitur, nisi cessit iudex ejus territorii, in quo prædia sita sunt.*"

¹⁴ Wharton, § 263; Phillimore, § 554; Westlake Holtzendorff, § 156. This principle is recognised in the Argentine Republic, although the law of succession here, even in real estate, is furnished by the last domicile of the deceased. Cf. Dairea, J. xiii. p. 297, who finds fault with this as illogical. Unger, in Austrian law, seems to take this view. But it does not follow from § 225 of the Austrian Code. Vesque v. Püttlingen remarks, § 75: "If a foreign ward, to whom a guardian has been appointed in another country, owns real estate in Austria or Hungary, a curator for this estate (not a guardian) will be appointed by the proper Austrian or Hungarian official, while the acts of the officials of the foreign country, who are charged with matters of guardianship, are not allowed operation." The Saxon Code, § 1877, is peculiar and illogical: "Guardianship extends to property which is in another country, unless a special guardian for it is appointed," and § 1878: "If one who is under guardianship in another country has real property here, a special guardian for it must be appointed."

agnate of the ward,¹⁵ that is, the person who was entitled to succeed to his real property, either solely or at least for the greater part, was entitled to be appointed guardian;¹⁶ it was, therefore, no great step to hold that the right of guardianship was merely one of the effects of the succession to which the guardian was entitled; the influence was all the easier that by older Germanic law, in which the guardian merely protected the next heirs and rendered an account of his intromissions to them,¹⁷ guardianship truly existed, in the first place, in the interest of those next entitled to the succession, while, according to the provisions of many particular systems, the guardian actually drew the income of the estate for himself during the subsistence of the curatory.¹⁸ If, then, succession in real property was by that older law subject to the *lex rei sitæ*, we have an explanation of the fact that the position of the guardian is determined by the *lex rei sitæ*, and the operation of any appointment of a guardian is confined to the immovables situated in his own territory.¹⁹

In the second place, however, feudal law required the guardian of the vassal to pay the vassal's prestations to the overlord. It naturally depended upon the *lex rei sitæ* who could and should fulfil these duties, and it was necessary that the overlord should confirm any appointment to the office of guardian made abroad, especially as the older law made him the guardian himself of the feudal estate, and gave the office of guardian in other matters to another vassal. As the feudal relation was more widely prevalent in earlier times, we can understand that older writers could not distinguish accurately between this feudal guardianship and guardianship proper, which existed merely for the interest of the pupil; and, again, that the practice of England and the United States, since in theory the doctrines of the common law of these countries as to real property rest entirely upon feudal principles, should require the appointment of a special guardian, or at least the confirmation of the guardian appointed by the *judex domicilii*, for property situated in a foreign country.²⁰

Modern law, on the other hand, holds that guardianship has no other object than the interest of the ward; it cannot, therefore, be regarded as being derived from the law of succession or from feudal law; even in England the rights of the overlord in landed property have disappeared except in the case of real feudal holdings, which can be shown to have been given out by the Crown for a definite period, and to have fallen

¹⁵ Kraut, *die Vormundschaft nach den Grundsätzen des Deutschen Rechts*, i. p. 165.

¹⁶ Beseler, ii. p. 489.

¹⁷ Kraut, *Vormundschaft*, i. pp. 92, 93.

¹⁸ Kraut, ii. p. 54. By the law of the Longobardi, the guardian had as such a claim of succession to the ward's estate (Kraut, i. p. 390).

¹⁹ The judges named by the same lord in one country act in his name, and therefore with authority recognised all over his territory. See note 22 with regard to Great Britain.

Boullenois, iii. p. 30, and Bouhier, chap. xxiv. Nos. 63, 64, distinguishes ordinary guardianship from the *Garde noble*, which occurs in French customary law, and is a rule of the feudal system. See, too, Thöl, § 81 *ad fin.*

under the right of reversion.²¹ There is, then, no other tenable ground left to support the nomination of a special guardian by the officers of the State in which the property lies; and we must abandon that position all the more certainly that the result will be either that unnecessary expense and trouble will be incurred by confirming the guardian nominated by the *judex domicilii*, who will follow the principles recognised at the ward's domicile in the administration of the estate, or that the interest of the ward, in place of being advanced, will be exposed to the utmost disadvantages by the appointment of a special guardian, who will act according to the principles of the *lex rei sitæ*, and independently of the guardian appointed at the domicile of the ward.²²

No doubt, grounds of expediency may recommend the appointment of special guardians at the place where the estate is; but it must be administered according to the law of the ward's domicile. Loiseau takes the view that if different tutors are appointed in different countries the unity of administration, which is so much for the ward's advantage, will be likely to be imperilled, and the administration will be apt to be subjected to the *lex loci actus*, i.e. the law of the guardian. Accordingly, he recommends the appointment of simple agents, for whom the guardian who has been appointed in the country to which the ward belongs shall be jointly answerable. Perhaps that is a still more practical course: but, then, the appointment of these agents, who must in my opinion be salaried, will require to take place with the approval of the court that has the duty of superintending all such matters, in order to lighten the responsibility of the guardian. It seems not to be in accordance with our legal theories that there should be an unlimited responsibility for all the actings of an agent, which take place, it may be, in a distant quarter of the globe. Provisions of the law of Rome on such matters cannot, at this time of day, be appealed to as absolute rules.

PARTICULAR POWERS OF THE GUARDIAN. ALIENATION OF THE PROPERTY OF THE WARD IN PARTICULAR.

§ 210. It follows from these principles that the guardian has all the privileges which the personal law of the ward gives him, and no others.

²¹ The curatory which some of the German legal systems give over the estate of one who has disappeared (cf. Kraut, ii. pp. 217-266), which belongs, along with the right to the income, to the next heirs, must be regulated by the law which determines the right of succession to the estate of the person who has disappeared, and therefore in certain circumstances by the *lex rei sitæ*, but as a rule in Germany by the *lex domicilii*. So, too, by French law, Fœlix, ii. pp. 116, 205.

²² The matter is otherwise when different guardians are appointed by courts which are all in the same State, since both courts and guardians act on the same principles. It is, however, only recently that the Lord Chancellor of England has been empowered to name curators of lunatics to administer property in the colonies. Burge, iii. p. 1000. The courts of Scotland and England treat the appointments of guardians made by each other in the same way as if they had been made by some foreign State. Cf. Story as cited. [*Infra*, p. 480 *et seq.*]

This, for instance, will determine whether the guardian can alienate any subjects without the sanction of the court, and if so, what subjects, and again what payments he is entitled to receive.²³ The question, too, to what extent contracts of lease with reference to real estate belonging to the ward are good beyond the term at which the guardianship expires, is to be settled solely by the personal law of the ward. The other party has full opportunity of informing himself on this law: he cannot protect himself by appealing to the *lex rei sitæ*.²⁴

The alienation of the property of the ward, and the burdening of it with securities or hypothecs, constitute questions of importance, which are much disputed. Many authorities who desire that in other matters the *lex domicilii* should decide, and give the guardian appointed by the *judex domicilii* the right of administration even in a foreign country, make an exception in this case, because the question here is one as to the power to dispose of property, and does not affect the person of the ward.²⁵ But if, as Savigny remarks, a statute ordains that the property of a pupil is only to be alienated under certain restrictions, that constitutes a protective regulation for the person of the ward, who stands in need of protection; it is no mere regulation for the protection of the property, as an object of commerce which it is desirable to set on a firm basis, so as to assure the

²³ Unger, p. 198, note 153.

²⁴ Argentræus, Nos. 19, 20; Burgundus, i. § 16; Cocceji, *de fund.* vii. 8; Molinaus in L. 1, C. de S. Trin.; Merlin, *Rép. Majorité*, § 5; Burge, ii. p. 270, i. p. 14; Schäffner as cited—are all in favour of the *lex rei sitæ*. See, on the other hand, Savigny as cited.

²⁵ Rodenburg, i. 3, § 7; Bouhier, cap. 24, No. 10; Walter, § 46, are for the *lex domicilii*. P. Voet, i. 9, c. 2, No. 17, declares that he is doubtful. "*Tutius egerit tutor, qui datus est in loco domicilii, si decretum ab utroque judice curet interponi.*" Judgments of the Supreme Court at Berlin, of 25th March 1883 (Simon and Strampf, vol. i. p. 279); and of the Court of Cass. and Rev. for the Rhine at Berlin, 5th July 1847 (Seuffert, ii. p. 2); Ct. of the Emp. 6th Oct. 1886 (Bolze, iii. § 29; Thöl, § 81; Fiore, § 180; Laurent, vi. § 120; Weiss, p. 603; Clunet, J. v. p. 520, and vi. p. 271; Esperson, J. ix. p. 157; Modern Belgian practice (Dubois, Rev. xiii. p. 65). The C. de Liège, 31st Dec. 1879 (Van der Rest, Rev. xvi. p. 141), pronounced the sale of real estate of a person, who by his personal law was under age, but by the law of Belgium was of full age, to be null, in respect that the requirements for the sale of a ward's property were not observed. The Civil Court of first instance in Mexico, in 1874, proceeding upon a mistaken conception of the idea of sovereignty, refused to carry out the requisition of a Spanish court, the object of which was the sale of certain real property, which belonged to a female ward in Seville (J. i. p. 276). In England, in the United States, and in Scotland (see Story, § 504; Wharton, § 268; Westlake Holtzendorff, § 156; Fraser, p. 605), a guardian or a curator appointed abroad has no power over real estate. But it is doubtful whether (at least in England and Scotland) [Lamb, 1858, Ct. of Sess. Reps. 2nd ser. xx. p. 1323] the powers and the actings of the guardian will not be tested by the *lex domicilii* of the ward. There seems to be some inclination in that direction. But see Foote (ii. 6, p. 153), who takes rather the opposite view. See, too, Krug, *Internationalr.* pp. 27, 28, on some treaties as to jurisdiction: "Among the statutory provisions which hold good at the seat of the property," and which the foreign guardian in his dealings with that property must observe, are to be understood the statutes which relate to that real property as such (*statuta realia*). On the other hand, the question, for instance, whether the estate can be alienated, is in every case to be settled by the principles of the law of the country where the chief curatory depends. Everhardus, jun., Const. ii. cons. 28, No. 82; Stockmann, Decis. Brabant, decis. 125, No. 10; Peter Peckins, *de Testam. Conjugum*, iv. c. 28, § 7, declare that a decree of the *judex domicilii* is sufficient.

most advantageous return from it; such a theory would make the law a real statute. In order to ensure the true object, we require, for instance, the consent of the court which is charged with the superintendence of such matters, or of the family council, which can only be given after enquiry into the case on hand. It is only after such consent has been given that an act of alienation by the guardian is allowed to have the same effect as if it had been done by an owner of full age. The object of such a law is to give effect to the acts of the guardian: it is a personal statute, and not a real statute.²⁶ Again, it is out of the question to apply the rule "*locus regit actum*." For we are here concerned with a restriction upon the will of the guardian, and if we use the word "form," we must remember that it is not a question of form in this sense that the guardian may make up his mind to do what he pleases, so long as he observes a particular form of doing it.²⁷

If, on the other hand, the personal law of the ward prescribes a judicial sale, then the court of the place where the thing to be sold is, if it has the means of carrying out such sales, must observe the forms required by the *lex rei sitæ*, which are enacted in the interest of third parties (*e.g.* for the security of buyers).²⁸

On the other hand, other legal principles must determine whether a person under guardianship, or who has been under guardianship, shall be restored against prejudicial alienation, and what shall be the method and the extent of this restoration. Where we are dealing with real estate, the *lex rei sitæ* is primarily applicable. The question here is as to the general legal security of third parties, in truth as to the existence of a real right.²⁹ But there is no doubt much to be said for the view that, in so far as the personal law of the ward allows him a more restricted power of challenge

²⁶ The judge of the domicile or the personal law is therefore competent to pronounce decree *de alienando*. Kraut, ii. p. 147. Supreme Court of Austria, 4th Jan. 1870 (J. iii. p. 53). See Loiseau, p. 228, who, quite soundly, applies this to the question of taking up or rejecting a succession, even although the succession should *per se* be subject to the *lex rei sitæ* (*e.g.* according to the Franco-Russian treaty of 1874), or although questions as to the succession were assigned to another court; further, p. 236; Laurent, vi. § 123, and the judgment of the C. de Liège of 22nd Nov. 1864, cited by him.

²⁷ French law in such cases speaks of "*formes habitantes*."

²⁸ Laurent, viii. § 86, and Chavegrin, p. 580, discuss cases of this kind. If the personal law prescribes a sale at the place where the thing is situated, or if the court to which the ward in accordance with his personal law is subject orders such a sale in its discretion, special difficulties may arise. But still the decision is generally to be found by following the criterion in the text. The court which governs the personal status of the ward must eventually, if the two forms are irreconcilable, in our opinion choose, on an estimate as to which course will best insure the ward's interests, whether a sale shall take place according to his personal law, *i.e.* at his domicile, or at the place where the thing is situated, *i.e.* according to the rules of the *lex rei sitæ*. The law did not contemplate the case of a foreign and a divergent *lex rei sitæ*. To the same effect, C. de Bruxelles, 4th May 1886, J. xiii. p. 732. The court of the personal law ordered a sale in accordance with the rules of the *lex rei sitæ*. See, too, the discussion J. vii. p. 292; Sup. Ct. of North Carolina, J. xv. p. 143, and the editor's note.

²⁹ See decision of the Ct. of Cassation for the Rhine at Berlin, 1847 (Seuffert, ii. § 2).

than the *lex rei sita*, to that extent the personal law of the challenger is to be the rule.³⁰

Further, we must distinguish the question of the validity of the alienation from the question as to the responsibility of the guardian. The alienation may be quite valid, let us say of moveables, and yet the guardian may be answerable to the ward, if he has neglected the proper form of alienation, *e.g.* sale by public auction, or after valuation by a sworn appraiser, which is prescribed by the personal law of the ward in his interests, a form which, it may be, is not necessary by the law of the place where the thing is, or where the alienation took place, but yet might have been observed (*cf.* Loiseau, p. 225).

DOES THE NATIONALITY OR THE DOMICILE OF THE WARD DECIDE?

§ 211. In our view, and in the view of most of the modern French and Italian authorities, the nationality³¹ and not the domicile of the ward must as a matter of principle rule in cases of guardianship.

But in the law of guardianship we find it specially to be the case that, in carrying out this principle, practical difficulties have to be overcome.³² The ward may, if, for instance, the father has died abroad, have his residence in a locality at a very great distance from the country to which he belongs. In such a case his interests may suffer real prejudice. It will, too, often be impracticable to supply at the ward's domicile the legal arrangements which his national law postulates as being in operation. For this reason, there has recently been a plea set up by the Swiss jurists Curti³³ and Martin³⁴

³⁰ This is overlooked in the judgment of the C. de Liège of 1879, reported in J. viii. p. 87, which allowed a Dutchman an action of reduction according to the provisions of the 1304th article of the Code Civil within the period of ten years, whereas his personal law allowed him a period of no more than five. See Renault's note (J. viii. p. 88).

³¹ Fiore, § 174; Lomonaco, p. 98; Durand, § 173; Bard, § 172; Weiss, p. 596; Trib. Seine, 31st January 1861 (J. ii. p. 380); Lyon-Caen (J. viii. p. 168); Chavegrin, p. 501; Loiseau, p. 137; v. Martens, § 75, p. 318. Nationality is the rule in Austria. Cf. Starr, *Die Rechtshülfe in Oesterreich*, p. 227.

³² Brocher, i. p. 346, points this out, and asks whether we should not, as an exception, give the preference to the law of domicile in this matter over the law of nationality.

³³ The treaty of 15th June 1869, between Switzerland and France (Zurich 1879), p. 112. This treaty unmistakably takes the principle of nationality as its basis.

³⁴ J. vi. p. 129, with special relation to the Franco-Swiss treaty of jurisdiction of 15th June 1869, the 10th article of which provides thus, viz.: "*La tutelle des mineurs et interdits Suisses, résidant en France, sera régie par la législation de leur canton d'origine et réciproquement, la tutelle des mineurs et interdits français, résidant en Suisse, sera réglée par la loi Française. En conséquence les contestations auxquelles l'établissement de la tutelle et de l'administration de la fortune pourront donner lieu seront portées devant l'autorité compétente de leur pays d'origine, sans préjudice toute fois des lois qui régissent les immeubles et des mesures conservatoires que les juges du lieu de la résidence pourront ordonner.*" A decision of the Swiss Federal Court of 1st June 1877, and also one of the Swiss Federal Council, have accordingly laid down that the judge of the domicile cannot name a guardian either to a Frenchman domiciled in Switzerland, or to a Swiss domiciled in France. This supersedes the former rule of practice at Geneva. Martin infers that the result is that in many cases guardians are not named at all. On the other hand, Brocher, *Commentaire pratique et théorique sur le traité Franco-Suisse du 15 Juin*

on behalf of the application of the principle of domicile;³⁵ the French writer Gerbaut (§ 402) has taken the same line. But it is feasible either to provide that the last domicile which the ward or his father possessed in their native State, should come in place of the real domicile,³⁶ or else—and this would be undoubtedly a more practical course where the distances were great, although it could only be carried out by means of statutes or treaties—the consul of the State of nationality might be allowed to take the place of the judge of that country, and to set up and carry on in the State of the domicile the guardianship in accordance with the law of that other State. A provision of that kind actually exists in a large number of modern consular treaties, concluded by France with other countries,³⁷ and in some of the consular treaties very recently concluded by the German Empire it is provided³⁸—after the treaty has spoken of the powers and privileges of the consuls as regards the contract of successions—thus, viz.: “They (the consuls) shall likewise have the power of instituting a guardianship or

1869, p. 73, and Lehr, J. vi. p. 533, take up the principle of nationality, which is adopted by that treaty just as much as the principle of the unity of the guardianship. Here the indistinctness of the conception of domicile in Swiss legal usage is insisted on, while Martin, on the other hand, overlooks the fact that it happens that the canton of Geneva has a statute book, which in its material provisions is identical with that of the other party to the treaty [France]; hence there is no difficulty in substituting domicile for nationality. At the same time, if we once assume that guardianship is dependent on the national law of the ward, and not on the law of his domicile, it would be wrong to commit the power of guardianship, as Loiseau proposes to do (p. 167), to the foreign *judex domicilii* where the material legislation of the States in question is to the same effect. According to the principle of nationality, the competency of the *judex domicilii* has no existence except it is recognised by the judge of the nationality, and the likeness of the two legal systems can make him or the officials of the domicile competent. In practice, too, it may be noticed that in spite of the similarity of two systems of law—which, as a rule, is not a complete similarity—the rules of practice take very different shapes in different countries.

³⁵ In the so-called Concordat Cantons of Switzerland [*i.e.* cantons of Zürich, Bern, Luzern, Solothurn, St Gall, Aargau, and Turgau], the proper jurisdiction for matter of guardianship and curatory is the State of the citizenship, but on the request of this State officials of the domicile may act. They can, too, always supplement and assist the powers of the jurisdiction possessed by the State where the citizenship exists. But the merits of every case are determined by the law of the State where citizenship exists (Huber, *Schweizer. Privatr.* i. 1886, p. 89). Gerbaut proposes that the *judex domicilii* shall apply the national law of the ward. But in cases of protracted administrations that would often lead to very great and often insoluble difficulties, since questions of competency and material rights are often inseparably mixed up, particularly as regards the sanctioning of contracts.

³⁶ *Preussische Vormundschaftsordnung*, 5th July 1875, § 5: “If there is no such jurisdiction as is required by §§ 2-4, then the court in which the father, or the unmarried mother, or the *incapax* who is to be put under guardianship had his last domicile, and, failing such, any court appointed by the Minister of Justice is competent.”

³⁷ See Chavegrin on these treaties, pp. 503, 504.

³⁸ In our view, if the subject is closely considered, no international treaty would be necessary, in so far as the consul does not exercise any coercive powers (*e.g.* impose penalties as an official charged with guardianship would, and see that they are exacted). It is in the last resort immaterial whether a State has the affairs of its subjects superintended by an official from its own territory, or whether it entrusts some one in another territory with them. Loiseau (p. 169) lays down that functions of this kind cannot be exercised without the permission of the State in which the consul resides. That may be *communis opinio* in France. No special reason for it is given.

curatory over subjects of the country they represent, in accordance with its laws, in so far as concerns the successions in question.”³⁹

PROVISIONAL GUARDIANSHIP FOR PERSONS WHO ARE NOT CITIZENS.

§ 212. It is, however, admitted even by those⁴⁰ who take up the principle of nationality or citizenship,⁴¹ that the State may name a provisional guardian in cases in which the person has his domicile,⁴² or, where there is special reason for despatch, has a mere temporary residence in the State in question. This may be described as a duty of humanity, which the State in question—the country to which the child belongs as a citizen being at a distance—must now and again discharge: it must also, no doubt, be discharged if the nationality of the child cannot be established, or cannot at the moment be established.⁴³ Such a provisional guardianship must come to an end, when the State to which the child belongs sets up

³⁹ See treaty with Greece, 26th November 1881, art. xxii. subsec. 4; with Servia, 6th January 1883 (*Reichsgesetzblatt*, 1882, p. 118; 1883, p. 68); treaty with Italy, 21st December 1868, art. ii. *ad fin.* (*Gesetzblatt des norddeutschen Bundes*, 1869, p. 122). It may be gathered, however, from these treaties that the nomination of a guardian by the consul is confined to the case in which that is necessary in connection with the management of a succession, and where all parties concerned belong to the State which the consul represents, and to which the deceased himself belonged. This is expressly provided *e.g.* in the 21st article of the German Brazilian consular treaty of 10th January 1882. In other cases the consul, on his own motion, and if there are no special grounds for opposition, is to be appointed guardian to persons who belong to his own State by the officials of the country.

⁴⁰ Gand, § 489; Vesque v. Püttlingen *ut cit.* In Austria, accordingly, a guardian is named to every child who is left by a deceased foreigner in Austria. Fiore, § 174 *ad fin.*; Aubry et Rau, i. p. 264.

⁴¹ See the proclamation of the Austrian Minister of Justice, of 10th October 1860, given by Starr, pp. 227, 228. In accordance with it the Austrian courts must, as circumstances require it, appoint a guardian or a curator for foreigners in Austria until the proper steps shall have been taken by the foreign officials.

⁴² The principle of domicile is the prevailing principle both in the doctrine and the practice of Germany at the present time as regards guardianship. (Cf. Sup. Ct. of Celle, 29th May 1873, Seuffert, xxviii. § 141; but in Austria the principle of nationality is recognised, Vesque v. Püttlingen, § 74, p. 257, and judgment of the Supreme Court of Austria, 21st November 1876, J. viii. p. 167, and so, too, the Saxon Statute Book, § 16, 1877-1879.) The Prussian ordinance of 1875, §§ 2-5, subjects all Prussian subjects, as occasion shall arise, to the provisions of their ordinance and to the Prussian courts which are charged with such matters, and also non-Prussians who have a residence in Prussia (§ 6). On the other hand, the last subsection of § 6 provides: “Guardianship of a non-Prussian must be surrendered to the officials of the State to which he belongs upon their demand.” That means that the principle of nationality is recognised as the regulative principle, and that of domicile is only invoked as a subsidiary principle. It is a doubtful and disputed point, whether a guardianship can be set up in Prussia over a non-Prussian who has his domicile too in some foreign country. Although Dernburg, § 16, note 15, does not desire to see a guardianship set up in Prussia, at the last residence of the father in Prussia, if there is one set up at the child’s own domicile, others are of opinion that the Court which is competent according to the terms of the 5th article of the ordinance may make good its right to deal with the matter.

⁴³ Cf. C. D. Bruxelles, 4th June 1873; Dubois, Rev. vi. p. 279.

one for itself.⁴⁴ On the other hand, it will not be excluded by the bare possibility that the consul of the State to which the child belongs may organise a guardianship according to the provisions of some treaty. In such provisional curatories the fact of the provision which must be made for the ward's welfare comes into play, and it may very well be that a consul, who has his residence at some distance, should omit to set up any guardianship.⁴⁵ The questions of competency must, it is plain, be determined by the court which is to award the curatory or guardianship, and legal proceedings which have been taken under the authority of the provisional guardianship, cannot be attacked on the ground that they are not in accordance with the laws of the State to which the ward really belongs,⁴⁶ if these proceedings are within the limits of a provisional administration,⁴⁷ or if they are set on foot while it is not as yet shown to be likely that the ward has any nationality in another country. The opposite view⁴⁸ would make it as a matter of fact impossible, or at least in the highest degree perilous for general legal intercourse, to put into operation this international duty to humanity. If, however, a guardian brings an action for debt on behalf of his ward, the debtor who is sued must be free to plead that the appointment of the guardian was made by some officer who was not entitled on principles of international law to make it,⁴⁹ for the question

⁴⁴ Trib. Civ. Seine, 6th August 1885 (J. xii. p. 685). In France the form of declaring the decree of the foreign court to be executory is observed. Cf. Clunet, J. *ut cit.* Sup. Ct. at Lübeck on 20th November 1877 (Seuffert, xxxiv. § 154) as to the competency of awarding a curatory.

⁴⁵ Chavegrin, p. 509.

⁴⁶ Cf. Gianzana, ii. § 229. The App. Ct. of Turin (6th April 1881) expressed the opinion that if it should subsequently appear that the Italian court had no jurisdiction to award a guardianship, the acts which the Italian guardian had done would not be null on that account, especially if the ward was generally reputed to be an Italian.

⁴⁷ To the same effect a judgment of the Sup. Ct. of App. at Lübeck, 6th March 1827 (Seuffert, iv. § 131). In this judgment the resemblance to a *negotiorum gestio* is suggested.

⁴⁸ It may seem doubtful whether, in a guardianship thus set up for a foreign ward *in subsidium*, the material provisions of the law of the State to which the ward belongs are to be observed. In strictness this question must be answered in the negative. As it is difficult in the law of guardianship to distinguish between provisions which are formal and those which are material, it is scarcely possible to tie down a guardian, or a court which is exercising the duty of guardianship, strictly to the provisions of a foreign law, and the reasons which recommend the recognition of the competency of a foreign State to undertake a *negotiorum gestio*, must to a certain extent also recommend the recognition of the material provisions of its law upon guardian and ward. Of course, we should not forbid all reference to the native law of the ward, when it is known. See note, § 34, as to the Swiss practice in this respect.

⁴⁹ Cf. the judgment of the Hanseatic Supreme Court of 5th March 1881 (Seuffert, xxxvii. § 126). I cannot altogether adopt the grounds of this judgment, which in my opinion are rather rash. The rules of the Roman law as to the invalidity of the acts of a *tutor falsus* to bind the minor do not apply to this case. The State authority which acted for the minor whose nationality is not ascertained, is, according to international principle, competent to do so until it is ascertained. But, on the other hand, there is no *presumptio legalitatis* in favour of its competency, as the judgment imports, not even in the relations of the German courts *inter se*. The common organisation given to these courts by the Imperial statutes of 1879 has reference merely to matters of contentious jurisdiction, not to those of voluntary jurisdiction.

in this case is not one involving the challenge of an act which has been completed, but is concerned with an act which is yet to come, viz. the payment of the debt, and an error committed in the past cannot interfere with the rectification of the matter for the future. Again, a provisional guardianship is not to be set up,⁵⁰ if, by the law of the State to which the ward belongs, there is no guardianship at all to be constituted, but all the responsibility of providing for the person who requires protection, and the duty of representing him, passes over without enquiry to some relative, it may be the mother. If the State to which the ward belongs holds that this is a sufficient measure of protection, there is no occasion for the other State to proceed further in the matter.⁵¹

CHANGE OF NATIONALITY BY THE WARD.

§ 213. If the ward becomes naturalised in another State, the duty of guardianship must be transferred to it.⁵²

Apart from any special statutory or treaty provisions, there is no longer a duty of carrying on the guardianship for these persons who have become foreigners.⁵³ (Of course, a different case is presented if the principle of domicile is the ruling principle.) The question how the guardianship is to be wound up is a question entirely for the court by which it was set up.

CAPACITY FOR GUARDIANSHIP AND RIGHT TO DEMAND IT.

§ 214. What law rules the capacity for guardianship and the right to demand it?

Since guardianship exists in the personal interest of the ward, the personal law of the ward must settle all questions as to the capacity of any person to hold the guardianship, and also all claims by particular

⁵⁰ Provisional guardianships of this kind not unfrequently turn into permanent guardianships. Cf. Chavegrin, p. 508: "In this respect the law of guardianship attaches some importance to the principle of domicile." An universal and extra-territorial effect is to be attributed to the provisional guardianship. Chavegrin, p. 574.

⁵¹ Cf. Dernburg, *Preuss. Vormundschaftsordn.* p. 65, note 6a; Chavegrin, p. 506. *E.g.* In accordance with the law of the town of Bremen, in the principality of Lippe-Detmold, guardianships will not be set up in Elsass-Lothringen for bastards, so long as their mother lives, and remains unmarried.

⁵² Folleville, pp. 498-500. Decision of the Saxon Minister of Justice (reported in J. x. p. 68), which established that, where a Saxon female subject in minority marries a foreigner, the guardianship will cease. In the same case the Austrian courts, with approval of the Court of Appeal, refused to take up the duties of guardianship.

⁵³ Hitherto the practice in Prussia has been that guardianship in the Prussian courts shall last until the proper foreign court assumes it. On the other hand, by Prussian law the guardianship must be given up to the foreign court, if a woman who is minor by the law of Prussia marries a foreigner, and thus becomes a foreigner, and the guardianship will be dissolved if, and so soon as, the law which now regulates her *status* pronounces her to be major. Cf. Philler, *Vormundschaftsordnung*, § 49, note 225.

persons to do so.⁵⁴ We must not, however, be led astray by the expression, "capacity of the guardian."⁵⁵ If the law negatives the capacity of certain persons to be guardians, that is at bottom equivalent to saying that these persons cannot become guardians, and perhaps even that acts done by them in the character of guardians are to be regarded as invalid,⁵⁶ and it is plain that the exclusion of certain persons, who are considered unfit for the office, is done in the interest of the ward. If his personal law, which is charged with the permanent protective care of him, admits certain persons to act as his guardians, who would be excluded by the State to which they themselves belong, that is a matter of perfect unconcern to this latter State. Besides, we have here to deal with a general incapacity to have rights, and not with incapacity to do particular acts, and the rule which we laid down *supra*, § 137, in regard to general incapacity to have rights, leads naturally to this conclusion. Nor can we admit any exception to this rule,⁵⁷ in the case of incapacity arising from a criminal sentence.⁵⁸ The correct view rather is to admit exceptions only so far as the person who would otherwise be selected or summoned, or be entitled to be summoned, to be guardian is under an incapacity to do particular acts. To appoint such a person to be guardian is absurd, and capacity to act is no doubt to be tested by the personal law of the man who is to act, or who has acted.⁵⁹

But another result of what has been said is, that any one who desires to be appointed guardian cannot appeal to his own personal law as giving him any special right to claim it. The appeal must be to the personal law of the person who is to be put under his care.⁶⁰

⁵⁴ In particular Chavegrin, p. 512; Loiseau, p. 197.

⁵⁵ Cf. *Preussische Vormundschaftsordnung*, § 21.

⁵⁶ That would be, if the guardian had been judicially and formally appointed, a very important result of the expression, which in my opinion is very inappropriate, "incapacity for guardianship."

⁵⁷ So, too, grounds for depriving the guardian of his office are to be determined solely by the personal law of the ward. Chavegrin, p. 513.

⁵⁸ Cf. e.g. *Preuss. Vormundschaftsordn.* § 21, No. 3; *Deutsches Stafgesetzbuch*, § 84, No. 6.

⁵⁹ The *Preuss. Vormundschaftsordn.* § 21, is right in providing: "All persons shall be incompetent to act as guardians, who are either (1) himself under guardianship or incapable of acting, or (2) has not yet completed his twenty-first year. Under the former category are included persons who are under guardianship in a foreign country, although by the law of Prussia they may be of full age."

⁶⁰ Laurent, vi. § 45; Brocher, i. p. 353; Chavegrin, pp. 513, 514; Loiseau, p. 190; Weiss, pp. 596, 597. The French practice, according to the terms of a judgment of the Court of Cassation (*Chambre Civ.*), of 13th Jan. 1873 (*J. i.* p. 245), is different. Cf. C. Bourges, 4th Aug. 1874; *Trib. Civ. Seine*, 5th April 1884 (*J. iii.* p. 31, and *J. xi.* p. 521). The grounds of these decisions are sharply criticised by these authors, and indeed are untenable. In the decision of the Court of Cassation the question was as to the rights of a mother by § 390 of the Code Civil, who, after having become by her marriage the subject of a foreign State, had, as a widow, regained her French nationality, while her minor children remained the subjects of the foreign State. The proposition is stated that the principles of sovereignty do not allow foreign laws to be pleaded before French courts to the effect of ousting the rights and interests of French subjects. Anything may be proved by this argument. In another of these judgments the sheet anchor, the inevitable "*ordre public*," makes its appearance. Indirectly these judgments are due to the fact that French law does not allow minors to be naturalised.

§ 215. But is a foreigner as such incapable of acting as guardian, or rather excluded from it?

Since the guardian exercises, as we have said (§ 208), no public office, but rather a family duty, it follows from the principles of international law which are recognised nowadays that there can be no doubt of the capacity of a foreigner to hold the office, unless some special provision of the law of the country prevents it. This is the view generally adopted.⁶¹ The opposite theory, which was once largely held by French jurists,⁶² meets nowadays with more and more opposition. The absolute exclusion of foreigners would frequently be very prejudicial to the interests of the ward, if, for instance, the nearest relative happened to be a foreigner. Of course, the fact that a particular person is a foreigner may often be a good reason for not appointing him, if the authority charged with the conduct of these affairs has an uncontrolled discretion in its choice.⁶³

OBLIGATION TO TAKE UP A GUARDIANSHIP.

§ 216. The personal law of the person selected to be guardian must rule his obligation to assume the office, because that obligation is a general duty lying on the subjects of the State.⁶⁴ No one can be bound to assume a foreign guardianship, if in similar circumstances he would not be bound to assume the duty in his own country. The reasons for declining the office must, therefore, be tested by the personal law of the person selected for the office. It is quite true that one could not say that any principle of public law was transgressed, if a State, which in other respects followed the principle of nationality, laid upon all persons domiciled in its territory, so long as they should retain this domicile, the duty of assuming guardian-

⁶¹ Fiore, § 178. In ancient Rome it was of course otherwise: foreigners had neither the *testamenti factio* nor the right of agnation. Laurent, vi. § 45; Bard, § 178; Durand, § 174; Chavegrin, pp. 516, 517; Loiseau, p. 100 and p. 134; C. de Cass. 16th Feb. 1875 (Bard *ut cit.* and J. ii. p. 544); Trib. Civ. Briey, 24th Jan. 1878 (J. vi. p. 285); Trib. Civ. Versailles, 1st May 1879 (J. vi. p. 397); C. Paris, 2nd Aug. 1879 (J. vii. p. 196); and Clunet (J. ii. p. 441). French law now lays it down that the right of guardianship may fall to a foreign relative *ipso jure*. So, to the same effect, C. de Bruxelles, 4th April 1879 (rep. by Dubois, Rev. xiii. p. 64), a decision which recognises in tutory a "*droit de famille*." See, too, decisions from the Netherlands, Hingst, Rev. xiii. p. 412. Foreigners are recognised as competent guardians by the Prussian *Vormundschaftsordn.* of 1875; Dernburg, *Vormundschaftsr.* p. 193. Before its date the *Preuss. Allgem. Landr.* ii. 18, § 256, required foreigners who had no proper *forum* of their own in the country, to obtain the approval of the Minister of Justice (Philler, *Vormundschaftsordnung*, pp. 58, 61).

⁶² But in this view a guardian who is a foreigner may be well appointed, if the ward also is one. Chavegrin, p. 515; Aubry et Rau, i. §.77, notes 5, 6, still adhere to the doctrine of the exclusion of foreigners from tutory: so does Demolombe, i. §§ 245, 246.

⁶³ Cf. Austrian Statute Book, § 192: "As a rule no guardianships shall be entrusted to residents of foreign nationality:" on this see v. Püttlingen, § 76. The old statutes of Goslar (published by Göschen, p. 490) take the proper standpoint, viz. that all the circumstances, and especially the interests, of the ward must settle the question, although in doubt a native of the country will rather be chosen. See Kraut, *Die Vormundschaft*, i. p. 107, note.

⁶⁴ Savigny, § 380; Guthrie, p. 367; Unger, p. 199; v. Püttlingen, p. 260; Stobbe, § 34 note 37; Loiseau, p. 201; Chavegrin, p. 514.

ship if required. But yet this is not a matter of course, and we find that the Prussian ordinance, although it does not by any means apply the principle of nationality in its full force, by its § 20 binds Prussians only to take up guardianships in Prussia, and does not so bind persons who are only domiciled in Prussia.⁶⁵

If we start from this point of view, viz. that certain grounds of declinature are admitted, not merely out of favour to the person who claims exemption, but that in certain cases an appeal is allowed to the judgment of the person, as to whether he considers himself qualified to undertake the office, or holds it to be possible to carry it on along with his own affairs, etc., we must, as Chavegrin does (p. 514),⁶⁶ allow the person who is called to the office to advance the grounds of declinature, which the personal law of the ward recognises, as well as those which are admitted by his own law.

But can a man's own law ever hold him bound to undertake a foreign guardianship?

It certainly cannot do so, if the foreign guardianship involves a heavier burden for the guardian than his own law imposes, be it by way of the caution required, or be it in the amount of business to be done. But it would be sounder to negative the existence of any such duty, even when the two systems of law are the same, because the guardian, by taking up the office, would in many respects be made subject to the foreign courts, or be forced to have recourse to them, and his position would thus be far from being identical with that of a guardian in his own country.⁶⁷ Of course, treaties may alter this, and in the case of different provinces of the same State a different rule may have grown up, although each province has a system of guardianship that differs from that of its neighbouring provinces.

As a consequence, too, we must hold that the obligation to carry on a guardianship, which has been assumed, ceases when the guardian is naturalised in another country and settles there. Only before he gives up his office he must count and reckon, and must give timely notice beforehand to the officials charged with the superintendence of such matters, of his intention to lay down his office.

OBLIGATIONS OF THE GUARDIAN. HIS RIGHTS OF CONTROL OVER THE PERSON OF THE WARD.

§ 217. The obligation of the guardian, arising from the assumption of a guardianship, to give up an inventory, to render accounts, to find caution,

⁶⁵ So the draft of a civil code for the German Empire, § 1639. Cf. the reasons given for it, vol. iv. p. 1063: "On the other hand, foreigners, even if they live in Germany, shall not be obliged to undertake a guardianship."

⁶⁶ Loiseau, p. 203, seems to arrive at the same result.

⁶⁷ In my first edition (p. 359) I made the obligation depend on the discretion of the judge. Loiseau (p. 202) refuses to recognise any distinction in principle between foreign and native guardianship, and therefore, in spite of the use of the word "citizen" in articles 431, 432, he will not lay any obligation on foreigners who are domiciled in France.

and to keep the ward *indemnis*, can only be ruled by that law to which is committed the charge of the ward, *i.e.* the personal law of the ward himself;⁶⁸ the legal system which prevails at the place where the thing in question is situated, must charge itself with providing in this way for the protection of the ward, if it is to appoint the guardian, or regulate his conduct, a thing which in our opinion is unreasonable. All these duties are simply applications and consequences of this protective care, and as they are part of the *jus publicum*, the guardian must submit himself to them; he cannot, as men can do in the case of contract obligations, appeal to his own personal law against them.

The disciplinary powers of the guardian over the person of his ward are primarily dependent on the personal law of the ward, but must not be extended beyond what the law of the place of residence allows, just as is the case with regard to the powers of correction lodged in the father. That is true in particular of the right to require the detention of the ward in a house of correction. Loiseau (p. 206) rightly says, however, that we must not be too ready to discover a transgression of "*ordre public*" in the case of private chastisement, which is inflicted by one foreigner on another in accordance with their own laws. On the other hand, a right of chastisement can never be well founded merely on the law of the place of residence.

As to the statutory right of security over the property of the guardian, which many legal systems give to the ward, reference is made to the discussion of the law of pledge *infra*.

B. CURATORY.

§ 218. Every other kind of curatory¹ must in the same way depend on the personal law of the person who is intended to be protected by it.² Here, however, it will more frequently be necessary for the courts of the domicile, or of the place of residence, to intervene as a provisional measure,

⁶⁸ Bouhier, cap. 26, § 206, cap. 28, § 83; Schäffner, p. 124; Unger, p. 199; Stobbe, § 34, on note 37; Dernburg, *Vormundschaft*, § 58, note 4.

¹ As to all the questions that occur in connection with this subject, see Weiss, p. 616; on the English practice, which is not very distinct, see Westlake Holtzendorff, § 5 *et seq.*

² If, for instance, the personal law requires a curator to be appointed to conduct a process, he must be appointed by the judge who is designated by the personal law of the party, *e.g.* the married woman, and not by the judge before whom the process is dependent. (So Sup. Ct. of App. Kiel, 31st May 1854; Seuffert, xv. § 94.) According to the *ratio decidendi* in a judgment of the Swiss Federal Court, of 10th June 1876, the competency of the Swiss authorities to appoint a curator to a person on account of prodigality, would cease the moment that the alleged prodigal acquired citizenship in the United States (J. iii. p. 231). A decision of the Supreme Court of Austria, of 31st July 1878 (J. x. p. 72), lays down that nationality will determine the competency of a declarator of prodigality. See, too, Ct. of Cass. at Turin, 1st June 1874 (J. i. p. 330). If the nationality be doubtful, of course the *judex domicilii* may intervene, C. de Bruxelles, 4th June 1873 (Dubois, Rev. vi. p. 279). Esperson (J. xi. p. 174) declares in favour of a concurrent jurisdiction in the *judex domicilii*; so the App. Ct. at Milan, 1st July 1872, and Dubois (J. iii. p. 213): but the reasons given support nothing more than a jurisdiction *in subsidium*. It is different where there is danger in delay. In such cases, § 55 of the German *Civilprozessordnung* provides for a provisional appointment of a curator by the court in which the process is pendent.

in cases, *e.g.* in which a foreigner is suddenly seized with mental disease.^{3 4} But, in a sound view, even provisional intervention of that kind will be excluded, if the personal law positively refuses to recognise the circumstances of the case as a reason for setting up a curatory, *e.g.* if an attempt is made in Germany or France to place an Englishman under curatory, on account of extravagance, which is unaccompanied by any mental unsoundness.⁵ But, on the other hand, a curatory which is justified by the personal law will not be allowed to operate to any effect in the country in which the person is resident, if in this latter country a curatory of the kind is regarded as an unwarrantable restriction of personal liberty.⁶ Thus the curator appointed to a prodigal in Germany or France will not be allowed to sue in England on his behalf.

In regard to curatories as well as guardianships, we shall best get rid of difficulties by the co-operation of consuls.⁷ The question whether a person can be taken by force to an asylum, must always be determined by the law of the place in which the constraint and detention are to take place. There is a direct question of personal liberty raised. The right of a curator appointed at the ward's own home, to demand the application of force and detention in an asylum, must be tested by the domestic law of the ward.⁸

There are besides curatories which by no means exclusively, or even mainly, exist in the interest of a particular person, in which *e.g.* some particular estate is to be protected in the interest of a person who has yet to be ascertained. Such curatories are a mere *annexum* to some other legal relation, for the protection of which they are called into existence. Among them we find the *cura hereditatis jacentis*, the *cura ventris nomine* and the *cura ex Carboniano edicto* according to Roman law. These last

³ Cf. Trib. Seine, 7th April 1876 (J. iv. p. 146). Even if jurisdiction be improperly assumed, still, as this judgment declares, the decision may, in accordance with the *lex fori*, acquire legal force, and thus a sale of things belonging to the person placed under curatory, which has been ordered by the court, may become unassailable. Gerbaut, § 404, of course, maintains the competency of the *judex domicilii*. See, too, Laurent, iv. p. 114.

⁴ It may be of practical advantage to appoint a local curator besides the one whom the lunatic has in his own country. On the other hand, the determination by a foreign court that a man is mad, constitutes no *res judicata*; the condition of the person may change. Cf. Wharton, § 268.

⁵ Weiss, p. 617.

⁶ Wharton, § 270.

⁷ Cf. Weiss, p. 618, and Trib. Seine, 26th December 1882 (J. x. p. 51).

⁸ On cases of this kind, see Phillimore, § 563, and J. xiv. p. 449, on the case of Seillière in France, 1887. It is quite properly remarked there, that the laws as to taking lunatics to the places appointed for them belong to the "*lois de police et de sûreté, qui s'appliquent tous ceux qui habitent la territoire.*" If their own Government demands it, persons of unsound men, who are not French subjects, will be conveyed to the frontier at the expense of the foreign Government. This, too, is sound, for the provisional protection must give way to the permanent, which belongs to the native State.

If, however, the law attaches certain legal results to the detention in an asylum in this country, *e.g.* the nomination of a curator with certain powers (as the thorough-going French statute of 1838 does), the same consequences cannot be attached to detention in an asylum in another country, for the reason that the powers of control are not the same. C. Donal, 9th August 1886 (J. xiv. p. 176).

curators are therefore controlled by the law which regulates the succession, *i.e.* the last personal law of the deceased,⁹ and to this extent the distinction which some writers have taken between a *curator personæ*, and a *curator bonis dandus*, is of importance.¹⁰

APPENDIX.

CONFLICTS OF JURISDICTIONS.

§ 219. Questions as to the assumption or award of guardianships or curatories sometimes give rise to conflicts of jurisdiction of a positive and negative description between the supreme authorities of the different States which are charged with the care of such matters.¹ It has been proposed to institute courts of arbitration to get rid of these conflicts, in the course of which the interests of the wards may suffer considerably.² But any attempt to constitute such courts strikes at once on great difficulties,³ and is all the less likely to prove satisfactory, in respect that in civil practice the question is not so much one as to the termination of this or that disputed case, but is rather concerned with the establishment of a certain uniform practice. Accordingly, there is another solution of a less radical character, which seems to be more promising and better. Let these rules, which can be defended on theory, be followed, *viz.* : *1st*, The domicile, and in the last resort the actual residence, of the ward decides where there is a question as to his nationality; *2nd*, In a positive conflict of jurisdiction of this kind, where the one State claims the right of guardianship on the ground of nationality, the other on the ground of domicile, nationality decides; where there is a negative conflict of jurisdictions, arising from a difference of principle of that kind, between the systems of the two countries, the State of the domicile is bound to attend to the interests of the guardianship or curatory; *3rd*, A guardianship or curatory, once set on foot, must be carried on until it is either taken over by a foreign State, or until some legal ground, sanctioned by the territorial law which is concerned in the matter, arises for giving up the guardianship or curatory.

NOTE P ON §§ 208-219. RECOGNITION OF FOREIGN GUARDIANS.

[The general principles of international law which regulate the recognition of the appointment and administration of foreign guardians are identical, whether the incapacity that gives rise to the guardianship is due to incomplete age, to mental weakness or disease, or (where that is a ground for curatory) to prodigality. These three kinds of incapacity may be considered together, since the *incapax* from any of the three causes falls into

⁹ *I.e.* according to the law of the Continent. The laws of England and the United States rest on different principles.

¹⁰ See Fiore, § 175, on this distinction, which he rejects. The *curator* in bankruptcy is affected by this principle.

¹ On conflicts of this kind, see J. ii. p. 380.

² Martin, J. vi. p. 132.

³ These are well pointed out by Lehr, J. vi. p. 534.

the same legal position, and the rules of law in different countries are, generally speaking, the same in all of the three cases.

The principle that the interest of the *incapax* is the first thing to be considered, has regulated the practice as to the appointment of guardians in America and continental countries, and has now been adopted in England also, except where real estate is concerned. Thus, in France a foreigner will not be excluded from the family council, nor from the office of tutor, merely because he is a foreigner, if he is otherwise suitable for the office (*Dunn v. Dupuis*, 1879, Trib. Civ. de Versailles, J. vi. p. 397); a foreign father may be appointed tutor to his son, who is a French subject, if that is most convenient for the interests of the child (*Bonchy v. Antoine*, Trib. de Briey, 1878, J. vi. p. 285); and a foreigner resident in Louisiana has been nominated to be the tutor of his children by the courts of that State (1874, Succession Guillemin, 2 A. 634). The Belgian courts have refused to appoint a foreigner to the office of tutory (*Prince of Rheina-Welbeck v. Comte de Berlaimont*, Trib. de Namur, 12th August 1872); but this decision is pronounced by the Reporter to be of doubtful soundness. The Scots courts have refused, on grounds of expediency, to appoint persons out of their jurisdiction to be tutors or curators, in applications in which they have, by reason of domicile, or the *situs* of real estate, a primary, or an exclusive jurisdiction. But they will recognise the appointments of foreign courts to such offices, where the *incapax* is properly subject to these courts, except where real estate forms the subject which is to be administered. "It is quite unnecessary that a fresh guardian should be appointed to manage personal estate, even when situated in another country. The case of heritage, of course, is different" (per Lord President Inglis in *Sawyer v. Sloan*, 1875. Ct. of Sess. Reps. 4th ser. iii. 271).

It is no doubt the influence of the maxim, that the interest of the *incapax* must be the leading consideration for the court, that has induced the courts of the Continent, in countries where nationality, and not domicile, is generally accepted as founding jurisdiction, to exercise a protective jurisdiction, *ratione domicilii*, in cases of incapacity, and appoint guardians to persons who are of foreign nationality, and have no more than a domicile, or it may be in some cases merely a residence, within the territory of the court. The French law allows a French citizen to change his domicile without changing his nationality, to the effect of submitting the tutory of his children to a foreign law. So, too, a Frenchwoman who has been married to a foreigner, but has, on her widowhood, returned to France and recovered her French nationality, may be appointed tutor to her children who are resident with her in France, although their nationality will be that of their father. The appointment is made by the French courts, and the rights and duties of the tutor on the one hand, and the security given to the wards on the other, over her estate, are those which the law of France allows. This decision bears to proceed upon considerations of social order and public morality (*Sokolowski*, Bourges, 1874, J. iii. p. 29). So, too, from similar considerations of the interests of the wards, in a case where

the father of a family, himself a foreigner, was in jail in a foreign country, and his children, who were with their mother in France, had been left unprotected by her death, the French courts appointed a tutor to them, although no such step had been taken in their own country (De Nau, 1877, Trib. Civ. de la Seine, J. v. p. 275). The courts of Belgium will place a foreigner who is resident in Belgium under curatory as a prodigal. "The court extends to foreigners the benefit of all the laws that have in view the protection of person or of property" (Cour d'Appel de Bruxelles, 9th June 1873). This same jurisdiction, in a case of prodigality, has been exercised by the Italian courts (Dulché *v.* Pirola, 1872, J. iii. p. 213); and in the case of Stocker Kirkhope, decided by the Court of Appeal at Lucca, 1875, J. iii. p. 215, the court laid down that in cases of incapacity in persons who were domiciled or resident in Italy, there was jurisdiction in the Italian courts to assume the administration of the affairs of the *incapax*, but only if the courts of his own country could have exercised a similar jurisdiction in the circumstances that had occurred. In the case of interdiction on the ground of prodigality, the French courts have followed a similar rule, laying down that a process of interdiction will be allowed to proceed in France if it is just and advantageous for the interests of the *incapax* that it should do so (May *v.* Sheppards, Cour de Caen, 1873, J. iv. p. 145).

These were all cases where no competing appointment had been made for the protection of the *incapax* by the court of any other country, and they have been cited for the purpose of showing that the interests of the *incapax* are of such importance that the courts of the country where he is found will not hesitate to exercise a protective jurisdiction for his behoof. But on the Continent the *status* of guardianship, once validly constituted, will be recognised according to the *lex domicilii*, wherever the ward may go, or wherever his property may be, and no distinction will be taken between real and personal property. In Austria, for instance, the courts have refused to sanction a sale of real property situated there, belonging to minors who were of foreign nationality and domicile, and under a foreign guardianship. The necessary authority must be obtained from the court that is charged with their guardianship (Supreme Court of Austria, 1870, J. iii. p. 53). In the case of Willoughby, 1889 (J. xvii. p. 329), the Ct. of App. at Paris recognised the validity of an appointment by the courts of the country to which the ward belonged.

This same case of Willoughby had been under consideration in England, and in giving judgment on it, the judges laid down some broad principles which deserve to be noticed (1885, L. R. 30, Ch. D. p. 324). By that judgment it is expressly decided that it is to nationality, and not to domicile, that the English courts will look in considering whether they have jurisdiction or not. Mr Justice Kay there quotes with approval a dictum of Lord Cranworth in the case of Hope (1854, 4 D. M. and G. 344), to the effect that "the Sovereign as the *parens patriæ* is bound to look to the maintenance and education of all his subjects." Lord Justice Cotton, in delivering judgment, says: "The court has jurisdiction to appoint guardians in a

proper case of any infant who is a British subject, wherever that infant may be residing, or whoever may have the custody of that infant abroad." In the case on hand, the child was born abroad; his paternal grandfather had been a natural born British subject; the infant was resident abroad with his mother; and he had no property in England. It was held that the court had unquestionably jurisdiction in respect of his British nationality, and the appointment was made.

The law of England and the law of America used, however, to hold that if any person *incapax* came within their jurisdiction their courts had power to take up the care of his person and the management of his affairs, although a foreign guardian had been already validly appointed. That they should have jurisdiction in cases of necessity to appoint, on the ground of residence, without requiring a full domicile, is reasonable, and is sanctioned by the principles of the continental decisions cited above, and the courts of Scotland would, in pressing cases, hardly hesitate to make such an appointment *ad interim*. But the law of Scotland always recognised, in so far as the custody of the person and the management of the personal estate were concerned, the appointment by a competent foreign court, without requiring any new appointment to be made or the old one to be confirmed. In England, however, and in America, the courts maintained their exclusive rights of jurisdiction over all such persons within their territory, and have exercised them in such cases as *Johnstone v. Beattie*, 1843, 10 Cl. and Fin. 42. But in more recent times the courts of England have receded from this extreme position, and their attitude as described by Mr Westlake is this: As regards the custody of the person of one *incapax*, he says (§ 7), "now at least the English court, in appointing a guardian or committee of the person, will support the authority of the guardian or committee existing under the personal law or jurisdiction, and not defeat it unless it should be abused," and refers to cases in point (cf. also Wharton, § 260 *et seq.*); as regards the estate, the foreign guardian can sue and give receipts for personal property belonging to his ward, and it will therefore seldom be necessary to appeal to the English courts to make a new appointment for such purposes.

In the case of Willoughby already cited, Lord Justice Cotton, in dealing with the case of a minor coming to England, says: "It would be wrong for the court to act in violation of the wishes of the guardian appointed by a court of a foreign nationality. It may, however, assist or enable the authority of the court to be carried into effect in this country." It would thus appear that the authority of the case of *Johnstone v. Beattie* is no longer binding, for the principle enunciated by Lord Justice Cotton is inconsistent with it. In the case of *Stuart v. Stuart*, a case relative to the custody and education of the Marquis of Bute (1860-1861, 4 Macq. 1861, Ct. of Sess. Reps. 2nd ser. xxiii. p. 902), the House of Lords had already laid down doctrine of a similar character as to the respect to be paid to the title of a foreign guardian, and the duty of the court of the country in which the ward happens for the time to be, to assist the foreign guardian in recovering possession of his ward, or in carrying out any scheme of maintenance or education that the court which appointed the guardian has settled.

As we have pointed out, the courts of Scotland have always recognised the title of the foreign guardian, and would do what was necessary to give effect to it. With regard to the case of *Johnstone v. Beattie*, which for a time ruled the English practice, Lord Justice Clerk Inglis in Stuart's case (Ct. of Sess. Reps. 2nd ser. vol. xxiii. p. 914) says "it involved a violation of the principles of international law, recognised in Scotland and all the States of the Continent of Europe, so direct and unequivocal, that I believe the very last thing that would ever enter into the mind of a Scots judge would be to follow the authority or adopt the principle of *Johnstone v. Beattie*."

The principle on which the English court claims jurisdiction over all subjects of the Queen as *parens patriæ* would, of course, equally authorise the Scots courts to deal with all British subjects. The principle has, however, never as yet been applied by the courts of Scotland, and the principle of domicile is that on which they base their jurisdiction. If the question should, however, arise, the authority of Willoughby's case seems as applicable to the powers of the one court as to the other. In cases of conflict of jurisdiction with the English courts, there is, of course, no room for the application of any other principle than that of domicile.

The courts of Scotland, in the case of lunatics as well as minors, will refuse to make any appointment in the face of one already made by a competent foreign court, to control the person or the personal property (cf. Fraser on Parent and Child, pp. 602 and 609), but a foreign interdiction on the ground of prodigality will not receive effect unless published in Scottish form (*ibid.* p. 588).

In England, as in America, where real property is in question, the appointment will be made by the court of the country, and the administration of that estate will be regulated by the law of the country where the real estate is situated: "There is no question whatsoever that, according to the doctrine of the common law, the rights of foreign guardians are not admitted over immoveable property situate in other countries. These rights are deemed to be strictly territorial, and are not recognised as having influence upon such property in other countries, whose systems of jurisprudence embrace different regulations and require different duties and arrangement" (Story, § 504; Westlake, § 166).

On the Continent, as the author states, the *lex domicilii* will regulate the guardianship over immoveables just as over moveables.

In Scotland the law is thus stated by Lord Fraser (p. 605): "The practice in Scotch courts has been for some time to appoint a special guardian to Scotch heritage belonging to foreign wards;" and the person so appointed will always be a Scotchman within the jurisdiction of the court. In special circumstances the courts have allowed a minor to nominate as his curator a person outwith their jurisdiction, taking all possible precautions and exacting undertakings that the curator shall, in the matters of the curatory, submit to their jurisdiction; but very special circumstances require to be shown. Contrast the cases of Lord Macdonald (1864, Ct. of Sess

Reps. 3rd ser. ii. 1194), where it was sanctioned, and Fergusson (1870, Ct. of Sess. Reps. 3rd ser. viii. 426), where it was refused. "But in regard to the administration of guardians for lunatics, as well as that of guardians for minors, the question is yet undecided whether the *lex domicilii* will be recognised as the law to which the guardian is bound to conform in his dealings with property situated in Scotland," belonging to a ward having a foreign domicile (Fraser, Parent and Child, p. 609). There are indications that the *lex domicilii* of the ward would be held to regulate these (Lamb, 1858, Ct. of Sess. Reps. 2nd ser. xx. 1323); but, on the other hand, it is difficult to suppose that an officer appointed by the courts of Scotland should have wider or narrower powers according as the ward was by domicile a foreigner of this or that country or domicile.

Sixth Book.

LAW OF THINGS.

I. GENERAL PRINCIPLES.

A. RIGHTS IN IMMOVEABLES.

GENERAL AGREEMENT TO RECOGNISE THE *lex rei sitæ*, BUT DIVERSITY OF OPINION AS TO THE FOUNDATION OF THIS RULE.

§ 220. No rule of private international law is less disputed than that which holds that real rights are to be determined by the law of the place where the property lies.¹ The difference of opinion in the modern Franco-Italian school is only apparent. For although it applies its general principle to the law of things as a whole, *i.e.* demands that the personal law of the parties should be applied, it limits, however, the operation or validity of this law by the provisions of the *lex rei sitæ*, in so far as public policy (*ordre public* or *ordre public international*, as the case may be) requires such limitation. It is easily seen that the second principle, which in name is merely a qualification or limitation of the other, completely ousts the other when we come to deal with particular cases, and indeed is the only principle left.²

¹ Argentræus, No. 2; Bartolus in L. 1, C. de S. T. No. 26-32; Mevius, in *Jus Lub. proleg.* qu. 6, § 10; P. Voet, *de statut.* lib. ix. c. 1, No. 2; Burgundus, iv. 12; Bouhier, cap. 29, No. 2; Vattel, ii. c. 8, §§ 103, 110; Merlin, Rép. Vo. *Biens*, § 20, Vo. *Loi*, § 5; Eichhorn, § 36; Glück, Comm. § 76; Seuffert, Comm. i. pp. 246, 247; Göschen, i. p. 112; Mittermaier, i. § 32; Günther, pp. 736, 737; Mühlenbruch, i. § 72; Kierulff, pp. 80, 81; Massé, ii. p. 92; Reyscher, i. § 82; Phillips, i. p. 189; Burge, i. p. 29; Fœlix, i. § 56; Schöffner, p. 65, and p. 82; Wächter, ii. pp. 190 and 200; Savigny, § 366; Gerber, § 32; Beseler, § 39, note 16; Story, §§ 424 *et seq.*; Thöl, § 84; Unger, p. 173; Stobbe, § 34, 1; Dernburg, § 47, 1; Wharton, § 273; Westlake Holtzendorff, § 145; Asser-Rivier, § 41; Bayer. *Landr.* Th. i. cap. 2, § 17; *Preuss. Allgem. Landr. Einleit.*, § 32; Austrian Statute Book, § 300; Code Civ. art. 3; Statute Book for Saxony, § 10; Codice Civ. Ital. art. 7, subsec. 2.

² Fiore, § 195; Laurent, ii. § 136; vii. § 267; Durand, § 194; Weiss, p. 762. Laurent

We cannot, however, say that this concurrence of opinion extends to the grounds upon which the law of things is held to be determined by the *lex rei sitæ*. Most of the authorities assume that these things are subject to the *lex rei sitæ* as a matter of course, without troubling themselves to inquire further. Others again infer, from the conception of the sovereignty of every State, that none will permit the application of foreign laws to things that are situated in their territory.³ Savigny finds ground for the application of the *lex rei sitæ* by assuming a voluntary subjection of themselves thereto on the part of all who claim rights in these things.⁴

The supremacy of the *lex rei sitæ* is not *per se* obvious. We can, as may be seen from the earlier Middle Ages, imagine a state of affairs in which *e.g.* property will be transferred to the new owner, according to the personal law of the person who has hitherto held it: and where, for example, there is no particular territorial law to be applied, as in a country which is in course of being taken up by colonists of different nationalities, one must perforce have recourse to some personal law as regards the acquisition of real property. The sovereignty of a State is just as strictly applicable to persons who are temporarily within its dominions, as to things which happen to be there. There is therefore no speciality applicable to the law of things to be found in that direction; and, in any event, the result of the abstract principle of sovereignty, and the non-recognition of foreign laws, is the supremacy of the *lex fori*, and not that of the *lex rei sitæ*.

The voluntary subjection on which, according to Savigny, the application of the *lex rei sitæ* rests, is a *petitio principii*: on the one hand it must be shown that the laws recognised at the place where the thing is

proposed, in his sketch for the revision of the Belgian Code Civ. § 13, to provide "*les biens meubles et immeubles sont régis par la loi nationale de celui à qui ils appartiennent.*" But those who were in charge of the more recent bill for this purpose (Rev. xviii. p. 452) declared against this misleading provision. For, as they demonstrate, Laurent (cf. Avant-projet, p. 65), by help of his theory of the "reality" of the law of "social interest," finds his way back by a roundabout way to the application of the *lex rei sitæ*. In subsec. 1 of art. 5 of the new bill, it is simply and properly provided: "*Les biens meubles et immeubles sont soumis à la loi du lieu de leur situation en ce qui concerne les droits réels dont ils peuvent être l'objet.*"

³ Merlin, Rép. Loi, § 5, cites the words of Portalis:—"La souveraineté est un droit à la fois réel et personnel. Conséquemment aucune partie du territoire ne peut être soustraite à l'administration du souverain comme aucune personne habitant le territoire ne peut être soustraite à sa surveillance et à son autorité. La souveraineté est indivisible. Elle cesserait de l'être si les portions d'une même territoire pouvaient être régies par des lois qui n'emaneraient pas du même souverain." Cf. Schäffner, p. 65: "The foreigner who wishes to exercise rights over immovable property in this country, enters the sphere of this country's law by that very fact. He makes claim to subjects which, by their very nature, can be under no other law than that of the State whose corporeal basis they do to some extent constitute."

⁴ § 366, *ad init.*; Guthrie, p. 174: "For since the object of these rights in things is cognisable by the senses, and occupies a determinate space, the locality in space in which they are situated is the seat of the legal relation whose object they are to be. Whoever wishes to acquire, possess, or exercise rights over a thing, betakes himself for this end to their seat, and voluntarily subjects himself, for this particular legal relation, to the local law that prevails in that territory."

situated will suffer no interference with their supremacy over rights connected with these things, for otherwise a voluntary subjection to them would not ensure the application of the *lex rei sitæ*; and, on the other hand, if it is true that anyone who wishes to exercise actual rights over a thing must betake himself to the place where it is situated, and may thereby be subjected to the laws of that country, it does not by any means follow that other States must recognise this subjection; if, for instance, a moveable thing be afterwards taken into the territory of another State, or if the question, who is the owner of a thing, should emerge incidentally in the course of a process in some other State as the foundation of a private right.

On the other hand, the following considerations seem to point to the recognition of the *lex rei sitæ* as the only course that can practically be carried out in the long run where intercourse is in some measure developed.

The law of things is commonly defined as the doctrine of the legal dominion of persons over things. This is not quite accurate, since all departments of law must at bottom regulate legal relations among persons, and things in themselves cannot stand in any legal relations to persons: we only express by this definition the negative side of the legal relations that fall under the subject—the proposition that if one who has the legal dominion over a thing deals with it somehow in the exercise of his dominion no legal relations arise, since it is at his command in the way in question.

The most important and the most difficult part of the doctrine of the law of things deals with the protection which he who has the dominion over a thing enjoys as against third parties who have no such right, as against the whole public, who may actually come into contact with the thing, and as against all other persons who have some right, but who must in this or that respect give way to the *dominus*, whose rights in the particular case on hand we are considering. It occurs to one at once that no doubt for a short period it will apparently be feasible to test all these legal relations by the law of one person, who undoubtedly at one time had the exclusive right to it. But when the holders of the property are frequently changed, and when you have to deal with a number of persons with different personal laws, all clothed with rights over the property within the same territory, general confusion must necessarily arise if such an attempt is made. Unless each particular article is accurately registered by authority, so as to certify its original ownership, it would soon be impossible for any one to ascertain with certainty what law should be employed to test the legal acquisition or legal loss of property, and even if it could be ascertained, the application of the personal law would be a fruitful source of frauds and difficulties for everyday commerce. If these complications would soon mount up, so as to be intolerable in the case of moveables, the supremacy of the personal law in the domains of real property law would result in this unfortunate position, that on the one

hand every system of landholding adopted for some particular end⁵ would break down, because of the large number of properties which would be under the control of some other system, and the law of the land would only apply to the real property, which from the first has belonged in full ownership to subjects of the country. And how could courts of law decide such difficulties with any certainty or consistency?⁶ All this explains how the so-called system of personal law as ruling the law of things—at least in so far as immoveable property is concerned—could only prevail for a short time and with countless inconsistencies, and indeed could only maintain itself so long as men had no clear conception of real rights, but treated a real right on the same footing substantially as a personal claim against the possessor, from which the possessor could relieve himself by a simple or qualified oath, of an indefinite enough description, or by an appeal to combat. Again, since the recognition of the *lex fori* as such—i.e. in so far as the *lex fori* and the *lex rei sitæ* are not identical—is opposed, as we have formerly demonstrated, to the idea of an orderly system of private international law, all that is left is to recognise that the *lex rei sitæ* is the only law that can be applied in this subject. This follows not, as the popular belief generally goes, as a merely dialectical or merely logical necessity springing from our conception of the law of things or of territorial sovereignty, but as a real necessity, resting upon the intolerable inconvenience of any other doctrine.⁷

Besides, in speaking of the application of the personal law, one generally thinks not of the personal law of him who can so far be shown to have been the first owner, but of the personal law of him who is the owner at the moment. If, such being our conception of the matter, two persons with different personal laws dispute as to the ownership, an attempt to apply the personal law involves a *circulus vitiosus*. The personal law is to decide which is the owner, but this personal law is itself to depend upon the same question.⁸

⁵ Cf. Wharton, § 278. We cannot of course believe, without further enquiry, that, if some particular positive legal system or development of law has, as a matter of fact, led to certain results in political economy, these results were the moving cause in that development of the law. The exclusive rule of the *lex rei sitæ* was established in the sphere of real property law for a long time before any one had taken thought of any such results in political economy. We are not therefore to regard these as in truth the decisive considerations. We might from this deduce this false inference, that if two different legal systems could be shown to have the same economical results in view, we should not be required to adhere so closely, as in other cases we should, to the exclusive competency of the *lex rei sitæ*.

⁶ There could not possibly be any legal security in alienations of property. Wharton, § 284, notices this.

⁷ In my former edition I attempted a more dialectical proof, which approached that which has now been given. In any case, we see that Savigny's theory of "voluntary subjection" cannot be well founded.

⁸ Wächter, i. p. 293, and after him Savigny, § 366; Guthrie, pp. 178, 179, have used this argument.

PROPER LIMITATIONS TO THE DETERMINATION OF DISPUTED QUESTIONS
BY THE *lex rei sitæ*.

§ 221. Of course, we must not give the operation of the *lex rei sitæ* too wide a field of operation, as the older authors have not unfrequently done. The same error has to some extent been committed by French jurists, but it is becoming less and less frequent among them, whereas, on the other hand, it is found to a much greater extent in the English law, and the law of the United States. It is only those legal propositions which belong to the law of things, and the law of possession or property, that are to be extracted from the *lex rei sitæ*. But that law does not determine all the preliminary points, which in any particular case condition the acquisition or the loss of a real right for some particular person. If all these preliminary questions were to be so determined—*e.g.* whether a person had the capacity to alienate a landed estate—the result would be, either to make the whole personal law dependent on the law of the territory in which the property lies, or to distinguish, by help of a fiction, in one and the same actual person, who has different landed properties with different territorial laws applicable to each, different personalities in the legal sense. This is, no doubt, the system of the feudal law. One who received a subject in feu from an overlord, belonged in a sense to this overlord and his system of law in his person as well as in other senses, and so a vassal may have a different personal law in the court of his overlord and in the court of the country, or it may be a different law in each of several feudal courts. But where there is complete liberty of alienation of landed property this system is untenable, for such freedom requires that the powers of disposal in the person who acquires real property shall be independent of the territorial law of that property. That extensive operation of the *lex rei sitæ*, which we have seen is laid down by the laws of England and the United States in connection with the law of guardianship, is simply a mistake which has its origin in tradition. This error is in its turn most fiercely assailed by another erroneous theory, *viz.* that of the modern Franco-Italian school mentioned above. This theory withdraws all these preliminary questions forthwith from the determination of the *lex rei sitæ*, and only as an ultimate resort puts the question, how far the general result yielded by the personal law of the persons interested must yield to the *lex rei sitæ*. But if we keep in mind that upon the *lex rei sitæ* those legal propositions only which concern the law of things *in abstracto* should depend, and not those upon which the legal destiny of the thing in the concrete case depends⁹—whether,

⁹ It is therefore an inaccurate idea which we find older codes, *e.g.* the Austrian Statute Book, § 300; Code Civil, art. 3, providing that the thing, instead of the real rights in it and questions as to the possession of it, which is what they mean to say, are subject to the law of the place where the thing is situated. This erroneous conception is to be found in the 7th article of the *Dispos. sulla public del Codice Italiano*. On the other hand, the conception of the new Belgian bill cited in note 2 is sound. Still more accurate is the 10th section of the Saxon Statute Book: "Rights in moveables and immoveables, and also the possession of the same, shall be settled by the law of the place where they are situated."

for instance, the thing in the particular case belongs to A or to B; and if we further keep in mind that all rights which are connected with the law of things affect the indefinite body of the public, and so touch the public interest, it will be found quite unnecessary to take this roundabout course of referring the matter to the personal law. Besides, an enquiry as to the public interest is at times misleading, tempted as one is to form ideas of one kind or another of what that interest is, which are quite foreign to the subject.

But it by no means follows, from the exclusive application of the material law which is recognised at the place where the thing is, that it is necessary that the court of that place should be the only competent court. According to the older common law of Germany, the *lex rei sitæ* was recognised; but it was lawful *e.g.* for a man to bring a vindication at the domicile of the defender, and the judgment pronounced *in foro domicilii* was recognised at the place where the immoveable property was situated, unless it involved a determination which, by the law of that place, was absolutely inadmissible.^{10 11}

B. GENERAL PROPOSITIONS CONNECTED WITH RIGHTS IN MOVEABLES.

PRINCIPLE OF THE APPLICATION OF THE LAW OF THE PLACE OF RESIDENCE.

THE RULE "*mobilia personam sequuntur*."

§ 222. The reasons we have set out speak in favour of the application of the *lex rei sitæ* to real rights in moveables as well as in immoveables, and some of them more strongly in the former than in the latter case.

It must, therefore, appear all the more surprising that far the larger number of the older authors, and even many modern writers, especially English and French, take a distinction in this respect between moveables and immoveables, and lay down a rule, that while rights in immoveable property are to be determined by the *lex rei sitæ*, rights in moveables are to be determined by the *lex domicilii* of a person¹ (*Mobilia ossibus inhaerent*).

¹⁰ Wharton seems to lay this down, § 273.

¹¹ See, too, the ordinance for civil processes for the kingdom of Hannover, 1850, which is now displaced by the *Civil processordnung* for the empire. In Hannover at that time, and in part even still, very different laws of immoveable property were recognised in different parts of the country. The recognition of judgments pronounced *in foro domicilii*, even in real suits, has never been doubted. The American decisions cited by Wharton, § 276, are to this effect. [An action for the price of heritage may be brought at the domicile of the debtor (Girard Delorme v. Bergeron, Trib. civ. de la Seine, 1874, J. iii. p. 268).]

¹ Barthol. *de Salic.* in L. 1, C. de. S. Trin. No. 14. Argentæus, No. 31. Burgundus, i. 41, 42; iv. 26. Rodenburg, ii. p. 1, c. 2, § 1; iii. p. 1, c. 4, § 1; ii. p. 1, c. 5, § 16. Mevius, *Proleg.* qu. 6, § 23. P. Voet, iv. 2, § 2; ix. 2, § 8; x. § 2. Cocceji, *de fund.* viii. 4. Jo. a. Sande, *Decis.* iv. tit. 8, defin. 7. Matthæus, i. 21, No. 35, 36. Christianæus, vol. i; *Decis.* iii. 5, No. 1. Gaill, ii. obs. 124, No. 17. Witzendorf, *de statut.* xv. No. 11; xxiv. No. 6. Colerus, *proc. execut.* i. c. 3, No. 253. Chassenæus *in consuet. Burgund.* Rubr. ix. § 16. Boullenois, i. p. 121, p. 833. Bouhier, cap. 24, No. 177; cap. 25, No. 1. Pothier, *Des Choses*, § 2, No. 3 (in his posthumous works, ii. p. 650); Hofæker, *principia*, § 140. Danz.

Most of them do not expressly say to what person they refer, but they mean the person of the owner.² The view that holds the domicile of the possessor as regulative—a view which is more easily carried out in practice, because the rules dealing with the possession of things are more generally alike among different peoples than those which determine property—is more rare.³

The reason assigned for this view is, that moveables must be held, in a legal sense, to be at the place where the person has his domicile,⁴ because it is quite accidental where they may be, and it is in the absolute power of the owner to take them from one place to another. (According to the theory of *statuta personalia*, *realia*, and *mixta*, it was assumed that the laws which dealt with rights in things were *statuta realia*, but as the laws recognised at the domicile of the owner were said to rule the case of rights in things, these laws were, for shortness, described as *statuta personalia* when they referred to moveable things.⁵) But even putting out of sight the impossibility of carrying out in practice the rule of determining rights in moveables according to the *lex domicilii* of one of the parties concerned, this ground cannot be considered as apposite, since the existence of a right is very often due to accident; while the provisions made by the owner or possessor for his property may be of little importance, since in the law of things the actings of third persons who, in a question with the good right of the owner, have no right at all in the thing, can often disturb or encroach upon the owner's rights. It is still less possible to lay stress upon the principle recently laid down, that the person acquires a power of attraction over the thing;⁶ by such means anything could be proved.⁷

If we enquire more closely what import the older authors mean to assign to the rule, we can scarcely find one instance adduced of a real right to a particular article as an illustration of the theory, although facts lay so near at hand. On the contrary, as a rule, they take the relations of the law of inheritance and of the property of married persons, cases in which the rule is applied in order to avoid the result that would ensue from the consistent determination of their problems by *lex rei sitæ*—viz. that a different law of inheritance or of matrimonial rights might apply

i. § 53, p. 178; Hommel Rhaps. vol. ii. obs. 409, No. 4; Titius, i. c. 10, § 43; Oppenheim, p. 396; Thibaut, § 38; Schweppe, *Römisches Privatrecht*, i. p. 52; Maurenbrecher, i. § 144 *ad fin.*; Mittermaier, § 31; Massé, p. 93; Mailher de Chassat. No. 63; Fœlix, i. p. 125, § 61; Burge, i. p. 81; Story, § 374; Holzschuher, i. p. 63; Heffter, § 38, p. 73.

² Cf. Savigny, § 366; Guthrie, p. 175.

³ Haus, pp. 26, 34; Story, § 383; and Kierulff, specially declare themselves in favour of the rule of the law recognised at the domicile of the owner.

⁴ The older writers say, "*Mobilia ossibus inhaerent*," or "*Mobilia personam sequuntur*." English and American authors and courts say, "Personal property has no locality."

⁵ So, for instance, Fœlix, *loc. cit.*

⁶ Holzschuher, p. 63.

⁷ Passages from the Roman law have been cited in proof of this. L. 32, D. *de pign.* 20; 1, L. 35, D. *de hered. instit.* xxviii. 5. These passages refer to the interpretation to testamentary settlements, and have nothing to do with a conflict of different laws. Cf. Wächter, i. pp. 250, 251, and *supra*, p. 13.

to each single moveable article that belonged to the estate. This result seemed so absurd and impracticable, that it was thought necessary to avoid it by the introduction of a special rule of law; and, as in these two departments of law, instead of laying stress upon the cardinal point—viz. whether and to what extent the different systems of law looked upon the estate as a whole,⁸ or upon each asset that belonged to it separately,—these departments were universally held to supply a separate class of rights in things, while the *lex rei sitæ* was declared to be supreme over rights in things as a general rule, the only way to extricate matters without a contradiction was to set up the fiction that moveables were to be held to be present at the domicile of the owner or the possessor without consideration of their actual situation. In these two categories the question that must inevitably arise in the application of any rule dealing with rights as to particular things—viz. whether the domicile that is to be taken shall be the domicile of the owner or other person who had the real right, or of the possessor—could not be raised. Since in any dispute as to inheritance or the property of married persons, all those who took part therein founded their rights upon a succession to the estate of one and the same person, or upon a right to represent one and the same person, it is only the domicile of this one person that can come into question; the suit as to the inheritance or the estate of the spouses will not touch the real rights of any other persons, apart from and independent of the rights of the deceased, or of either of the spouses. Some writers, again, who go so far as to determine the capacity to act by the *lex rei sitæ*, use the rule for the purpose of confining their theory, which, if applied to moveables, would lead to results that could not be carried out in practice, to the power of disposing of immoveables.⁹

This is confirmed by the many exceptions taken by authors of foresight. Mevius points to the case of an arrestment laid upon a moveable as a case where it would not be possible to apply the law of the domicile of the person to whom the thing arrested belonged,¹⁰ and J. Voet will only sanction the rule in the restricted sense of a practical regulation, and not of a legal principle, so that it would be necessary to inquire into the practicability of its application in every case.¹¹ Among the modern authors who defend the theory in general, Fœlix and Massé except from its operation the law of things in almost all its special applications.¹²

⁸ Older German law treated succession in moveables as a universal succession, the theory of modern English law; one who falls heir to the moveables is liable for the debts in so far as these are not expressly laid upon the landed property.

⁹ Cf. Unger, i. p. 156. The cases reported in §§ 3, 7, 9 *et seq.* of Story, in which the rule "Personal property has no locality," was taken by American and English courts as the basis of their judgments, appear without exception to refer to cases of succession or of property of married persons.

¹⁰ *Proleg.* qu. 4, § 27. If the rule were consistently carried out, arrestments, depending upon the fact of the owner and debtor being a foreigner, would be inconceivable, for no man is held to be a foreigner by the law of his domicile.

¹¹ *Comm. ad. Dig.* i. tit. 4, p. 2, Nos. 10-13.

¹² Massé, p. 96, No. 70; Fœlix, i. p. 134. Schäffner, p. 82, expresses himself to this effect.

Demolombe,¹³ Aubry and Rau,¹⁴ and also Brocher (i. § 48), lay it down that, in cases where a thing has to be considered as a single isolated object, the *lex rei sitæ* is the only law that can be applied. Fiore (§ 199) and Asser-Rivier pronounce against any difference in principle between moveable and immoveable things with the greatest emphasis,¹⁵ and Weiss (p. 754) notes that the theory "*mobilia personam sequuntur*" is more and more losing ground. In Germany, since the well-founded attacks of Wächter and Savigny,¹⁶ it may almost be said to be displaced. Westlake, too (p. 164, etc.), and Wharton¹⁷ declare in the most decided way against the theory, which is rejected by v. Martens.¹⁸

As regards legislation, the Austrian statute book still stands (§ 300)¹⁹ on the rule "*mobilia personam sequuntur*." The Italian statute book²⁰ is quite indistinct in its conceptions, it has reproduced the modern Franco-Italian theory in a way which is very ill-suited for legislation. On the other hand, so long ago as last century the *Codex Maximilianeus Bavaricus* i. in its 2nd and 17th sections pronounced distinctly against any difference being made between things moveable and immoveable, and the 10th

¹³ *Titre préliminaire*, ch. iii. § 96.

¹⁴ I. § 31. So, too, Lyon-Caen, J. ix. p. 234. See, too, Pradier Fodéré (with reference to legal rights in Peru), J. vi. p. 45; Haus, § 42; Cour Bruxelles, 9th August 1876 (J. v. p. 519). See, too, the Judgments of French Courts cited by Weiss, p. 762.

¹⁵ Mühlenbruch, in his *doctrina pandectarum*, § 72, pronounced against any distinction without giving any reasons. See, in this sense, R. Schmid, p. 56; Beseler, i. § 39, note 21; Windscheid, § 35, note 3, Supreme Ct. at Munich, 9th May 1868 (Seuffert, xxiii. § 103); Supreme Ct. of Comm. 26th April 1872 (Seuffert, xxviii. No. 2); same court 5th Sep. 1873 (Entsch. R.O.H. xi. § 7).

¹⁶ P. 164.

¹⁷ § 304; Foote, p. 177. See, in this sense, Halleck, i. p. 154, who no doubt proposes to make an exception in the case of a transference of the right of property. Wharton, § 343, says as to the practice of the United States: "*Dicta* indeed enough are to be found declaring that all personality follows its owner, and is to be judged by the law of his domicile. But, when we scrutinise these *dicta* two features will be observed, which, in a great measure, destroy their effect," and § 346. "Undoubtedly, we have innumerable opinions of American judges in which the same obeisance is paid to the *lex domicilii*. But this obeisance is only titular."

¹⁸ Eichhorn, § 36; Thöl, § 84, and Gerber declare against the enactment of any general rule as to real rights in moveables. Laurent's exposition (vii. §§ 141, 160, 190, 213, 240) is rather confused; in every particular case which he takes up, however, he ends in applying the *lex rei sitæ* in spite of his predilection for the personal law.

On the other hand, the rule "*mobilia sequuntur personam*" has lately found at the hands of Lorimer, i. p. 416, a defence which is more ingenious than apposite. Lorimer is, however right in treating with some ridicule Savigny's distinction of the different kinds of moveables.

¹⁹ "Immoveable property is subject to the law of the district where it is situated, all other things fall under the same law as regulates the person of their owner."

²⁰ *Disposiz. prelim. art. 7*: "*I beni mobili sono soggetti alle legge della nazione del proprietario, salvo le contrarie disposizioni della legge del paese nel quale se trovano.*" See on this Esperson, J. viii. p. 211. The Editor of the Journal takes his stand on the somewhat obscure theory (developed by Mancini in the reasons given for the statute) that in principal the personal law of the owner ought to decide, but must still give way to the *lex rei sitæ*, unless where it is in some "intimate relation" (Esperson) to the person of the owner.

section of the Saxon statute book makes a like declaration,²¹ as does also art. 5 of the new Belgian draft code.²² The Code Civil makes no special provision as to moveables.

But even in the territory of the Austrian Code it has at times been found necessary to allow some recognition to the *lex rei sitæ*: this has been forced upon the courts by the nature of the subject, by the contradictions which frequently were disclosed in decisions based exclusively on the law of the person. Thus, for instance, on 12th December 1876, the Supreme Court of Upper Austria held that an arrestment of a moveable article belonging to a foreigner must be tested by the law of Austria. Theorists, too, have given to § 28 of the introduction to the Prussian *Allgem. Landr.* viz.: "A man's moveable property shall be subject to the law of the jurisdiction to which he regularly and generally belongs, without regard to his place of residence at the time," the meaning that "property" is to be understood as "property as a whole." Accordingly, as Förster says, one has a free hand to determine rights in particular things by the common law of the land, and the *lex rei sitæ* is generally taken as the rule.

EXCEPTIONAL APPLICATION OF THE *lex domicilii* OF THE PERSON WHO HAS RIGHT TO THE THING (OR IS POSSESSOR OF IT) ACCORDING TO THE VIEWS OF SAVIGNY AND OTHERS.

§ 223. Savigny, however (§ 366, Guthrie, p. 179), believed that the validity of the *lex rei sitæ* could not be affirmed without certain concessions to the principle of the law of the domicile, and many eminent German authors have followed him in this view²³ in this or that application of it.

1st, In the first place, says Savigny, the position in locality of the moveable thing may be so indefinite and fluctuating as to exclude the possibility of knowing where that position is, and consequently what is the territory the local law of which applies, and to exclude, too, the assumption of a voluntary subjection to that law; to this class belong a traveller's luggage or goods in transit. 2nd, A moveable article may also be so dedicated that it becomes attached to some permanent resting-place, as, for instance, the stocking of an estate or the furniture of a house. 3rd, Between these two opposite classes of moveables there lie many intermediate cases in the most various gradations. The general rule of the supremacy of the *lex rei sitæ* will be applied to real rights in things of the second class, as is admitted by many authors, who in other respects take the rule "*mobilia*

²¹ "Rights in things moveable and immoveable, as well as the possession of them, will be tested by the law of the place in which they are."

²² The Zürich statute book, § 2, says: "In judging of rights in moveables also the situation of the thing for the time and its natural relation to the different local and provincial laws are to be taken into account."

²³ So particularly Stobbe, § 32, 11, and Dernburg, *Pandekten*, § 47 *ad fin.*

sequuntur personam " as their principle.²⁴ With regard to the former class to which belong the cases of a traveller with his baggage passing through several countries in one day in a mail coach or in a railway train, and that of a merchant despatching goods upon a long sea voyage, the *lex domicilii* will always rule. Savigny thinks it impossible to lay down a general rule for the intermediate class. It depends on circumstances whether the *lex domicilii* or *rei sitæ* is to rule; and it is not merely the longer or shorter stay of the thing in one place that is to be considered, but also the nature of the legal rule with the application of which we may be concerned. For example, a very short period will be sufficient to determine the question as to the appropriate form of alienation of the thing, *e.g.* whether it shall be tradition or mere contract, to the effect of making the *lex rei sitæ* the rule, whereas, on the other hand, as Savigny remarks, prescription may be considered in another light.

We can, however, only assent to these limitations to a very small extent. The very principle on which they rest, the principle of referring the application of the *lex rei sitæ* to the voluntary subjection of the parties to it, is unsound.

But, apart from that, we have the following criticisms to urge. The first exception, of which Savigny speaks, is only apparently an exception, and this deceptive appearance arises from a confusion of the will or intention of the parties with the form of the constitution or transference of a real right. If the acquisition of a real right in a thing rests upon a voluntary transference on the part of the owner, or of any other person who may have the right to it, the intention of the party making the transference (apart from the other requirements of the law in cases of transference or grant of such right) to make that transference or grant must be clear; and there may be a doubt as to this intention in case it should happen that the requirements for the constitution or transference of the right in question are different at the place of the domicile of the granter from those in use at the place at which the thing happens for the moment to be. If, then, as is assumed in the instance, given in illustration by Savigny, of the traveller's luggage, or the cargo upon a voyage, the owner does not know where the thing is, or what the law of the place is, his intention cannot be ascertained, if, in the transaction that is in question, the forms required by his *lex domicilii*, or by that of any other person having right to the thing, are not observed. As, however, the right in question cannot be transferred unless that intention exists, the alienation of the thing, although conceived in a form that is recognised as valid by the *lex rei sitæ*, will be ineffectual in such a case. For instance, take the case that, by the law of the domicile of a merchant who sends a cargo of goods through different countries, tradition is required to transfer property in moveables, but is not required by the law of the place which these goods at the moment of the contract happen

²⁴ *E.g.* Mevius, *Proleg.* qu. 4, 20; Carpzov, *Jurispr. for.* P. iii. const. 12, defin. 15; Story, § 382; Pothier, *Des. Choses*, § 1.

to have reached upon their transit. If the question is raised, it cannot be asserted, so long as tradition has not taken place, that there was any intention of transferring the property.²⁵ That the thing has remained in any particular place for a shorter or for a longer time is in such cases important only with a view to ascertaining the intention of the contracting parties, and decides nothing as to the objective requirements for the transference or constitution of real rights. We cannot, therefore, by this enquiry into the intention of the contracting parties, which must always be matter of fact, set up a special rule of law applicable to a particular class of moveables. This error, in Savigny's case, runs in connection with his theory of a voluntary subjection, and thus indeed he expressly limits himself to cases in which the primary enquiry is as to the will of the parties, and in which, as we see, although the basis of his reasoning is wrong, the decision of the particular cases is undoubtedly right. Stobbe, however, and Dernburg, and perhaps even to a greater extent Fiore (§ 199), seem to reject the theory of voluntary subjection—being, in our opinion, so far well advised—and thus in their expositions Savigny's error appears in a more thorough and positive form. They are actually of opinion that, with regard to all rules of law which touch upon real rights, a strict separation must be made between things which are intended to remain at a particular place, and those which are meant to change their locality constantly, although they will always in the end return to some particular place. The locality which is to rule in their case is not the place in which they actually are, which is constantly changing, but the place from which they are sent out, and to which they return or will be brought back. In this class of things railway trains and steamboats are to be counted, and a commercial traveller's portmanteau must be governed by the same rule. But why not also his watch, his coat, and his trousers? Why not, also, the milk-van, or the hand-barrow, which is used to carry provisions over the frontier of two countries? and why not a private carriage, with its horses, if the owner is in the habit of making daily journeys across the frontier? In such cases the purposes of the possessor or the proprietor with reference to the article may undergo a change. If the fur cloak or overcoat which the traveller used to wear on his journeys is degraded to being a dressing-gown, it is at once brought under the *lex rei sitæ*, and if some clever furrier or tailor makes it fit to go on its travels again, it must once more be subjected to an entirely different treatment in the eye of the law. If the travelling cloak is stolen, the owner must vindicate it according to the rules of his *lex domicilii*; if his dressing-gown is stolen and carried by the thief into another territory, and has to be vindicated there against a third party in whose possession it is, this third party may appeal to the limits placed upon the right of vindication by the law of the place in which the thing now is. It is obvious that such distinctions are impossible to accept as legal doctrines,²⁶

²⁵ A similar observation must be made in reference to the rule "*locus regit actum*."

²⁶ That is particularly plain from the fact that Stobbe *e.g.* counts luggage among things that are exempt from the *lex rei sitæ*: but that which to-day is luggage has perhaps to-morrow

and that it would be better to accept the old rule "*mobilis personam sequuntur*" in its full breadth.

And what is the result of treating a real right in a moveable thing by the rules of the personal law of the possessor? In truth we are landed in a kind of extra-territoriality, or, at least, we must in a fashion personify these things, if they are to be either altogether released from the operation of the law of the territory to which they belong, or at least are to be invested in some measure with the personal law of a country in which they are supposed to have their home, this personal law operating beyond its own territory. Now that is a legal possibility, but only in the case of things, which as a matter of fact in virtue of their size and importance have a kind of recognisable individuality, *e.g.* seagoing ships and the larger kinds of river ships.²⁷ The former are in the positive legislation of the world treated on a different footing from the great mass of other moveables, and the Institute of International Law, as we shall again have occasion to mention, recommended not long ago that the law of their home port should be applied to them. We may, too, notice that from the point of view of existing law, a ship is in the eye of public law, while it is on the open sea, held to be a part of that territory whose flag it is entitled to carry; and that therefore, on this ground, if the owner has placed his goods upon a ship belonging to his own country, the *lex rei sitæ* and *domicilii* coincide until the ship has reached a port of some other country.

§ 224. Savigny's doctrine, that the character of the legal rules which it is proposed to apply must be taken into consideration, is much more sound. There are, in fact, rules of law which in their very nature postulate a permanent subjection of the thing to some particular territorial law. To this class belong the legal rules as to prescription positive and negative. In connection with these doctrines, it is impossible to look upon the *lex rei sitæ* as furnishing the exclusive rule with regard to moveables. Who shall say in how many different territories any moveable subject you like to select has been during the years of prescription, and if it were proposed to allow the prescriptive period settled by each system of law to have a certain proportional effect, how could it be exactly ascertained how long the stay in each different territory endured? Here we are

another character. The distinction made by the statute book of the Argentine Republic (art. 10 and 11) is perhaps sounder and more practically useful; everything that serves for the personal use of the owner is subject to his *lex domicilii*. (Paper by Daireaux, J. xiii. p. 295.) Böhlau, § 74 (note 621), is of opinion that luggage, etc., is not subject to the *lex rei sitæ* at every point of a journey, but only at a halting-place. But how long must the halt be?

²⁷ The interesting judgment of the Imperial Court of Commerce of 26th April 1872 (Seuffert, xxviii. § 2) has reference to the case of a large river ship. The exposition of the grounds of judgment no doubt goes further, and reproduces the theory which has been criticised in the text as to things which serve for transport and return to a particular place. There may, too, be serious doubt whether any exceptional treatment of the shipping on the Elbe can be founded on the extracts from the acts for regulation of that shipping, and the recent legislation on that point, which are cited in the judgment. That the vessel belongs to a company of a particular nationality, and is inscribed with their name and with its home port, proves nothing.

perforce driven to the law of the domicile of the possessor.²⁸ This can be done without falling into a *circulus vitiosus*, because in such cases the fact of possession will be quite certain, and because the possessor²⁹ has it in his power at any moment to take the thing to his own domicile, while that domicile is the centre of all his legal relations with his property. If, however, in an exceptional case the possessor allowed the thing to remain, during the whole period which could be of importance in the particular case, within a territory where a law different from that of his own domicile prevailed—take *e.g.* the case of a valuable collection of pictures owned by a rich man in some country house beyond the limits of his own country—in such a case it would be proper to allow the primary rule, the application of the *lex rei sitæ*, to come into play. The result then comes to this: the *lex domicilii* of the possessor gives the rule in the case of these doctrines of law. The possessor may, however, if it is to his advantage that the *lex rei sitæ* should rule, show that the thing has remained uninterruptedly in the territory of the *lex rei sitæ* for the whole time of the prescription which is required by the law of the *lex rei sitæ*.

We must not, again, in this connection attempt to set the national law of the possessor in place of the law of his domicile, although we are of opinion that it is nationality that fixes personal law. We are dealing here simply with a presumption of fact. The question we put is—Where may we suppose that the possessor has enjoyed his possession, or, if this possession is exercised in different places, where may this possession be said to have had, as a matter of fact, a kind of centre? The same circumstances are involved in this question as in matters of jurisdiction, as we shall see again in another connection. Jurisdiction is, as a rule, not determined by nationality, but by actual domicile.

If the possessor has changed his place of domicile within the period of time applicable to the case, we may reckon the time proportionally to his different domiciles.³⁰ (So soon as the possessor shifts his domicile to a territory by the laws of which no prescription, negative or positive, would

²⁸ In this way are resolved the doubts expressed by Story, § 377 *ad fin.*, and urged by him against the application of the *lex rei sitæ*, and the decision of the Supreme Court of Louisiana cited by him in § 391 is explained.

²⁹ By the term possessor is to be understood he who actually determines the situation of the thing, and therefore, as a general rule, the legal possessor, since the custodier merely carries into effect the instructions of the legal owner. If any one, without leave from the legal possessor or the owner, is exercising some right of use upon the thing, and for this purpose has it in his possession, he determines the place where the thing must be, and his domicile therefore supplies the legal rule.

³⁰ Thus, if a thing is brought out of one country (*e.g.* France, Code Civ. 2279), where the period of prescription as regards moveables is three years, into another in which the period is two years (*e.g.* Italy, Codice Civ. 2146): two years in France then = $\frac{2}{3}$ of two years in Italy = $\frac{12 \cdot 2 \cdot 2}{3}$ months = 16 months: the possessor must add eight months of possession in Italy to the two years possession in France, in order to be able to appeal to the provisions of the law of prescription. But see Windscheid, *Pandekten*, § 32, note 10, as to the calculation when there has been a change of the law applicable to the negative or positive prescription.

in the circumstances run, prescription must necessarily cease for the time.) It would be possible, too—and perhaps this would be simpler and juster—to test the right of the possessor by that one of the two systems of law which is more favourable to him. The operation of the law of the later domicile can of course only begin from the time at which this domicile is acquired.³¹

APPLICATION OF THE *lex rei sitæ*, IN CASES IN WHICH THE MOVEABLE ARTICLE CHANGES ITS LOCALITY. PREFERENCE GIVEN TO THE LAW OF THE PLACE WHERE IT HAS LAST BEEN.

§ 225. We have already noticed (p. 79 *et seq.*) that every person, like every thing, must primarily be subject to the law of the place in which he or it is at the time, to the law, that is, of the last situation, which he or it happened to have at the time the legal process was instituted. But this proposition is of less importance in the sphere of the law of persons and the law of obligations. This is so, on the one hand, because of the wide recognition by foreign States of other personal laws. It is so, again, because any man's obligation, be it by contract or by delict, permits the existence of an indefinite and unlimited series of further obligations, which in themselves need never come into collision, or, at the utmost, may come into collision with each other, if the obligant has not in fact the means of discharging all his obligations. One and the same person may, as regards one obligation, be subject or may have subjected himself to this local law, and to that local law as regards another obligation. But with the law of things it is otherwise. It is not possible for different laws to rule the same thing at the same time. Thus it is that the law in whose territory the thing happens to be at the time, or, as we may say, with a view to the decision in some process that is to be or has been instituted, the law in whose territory the thing last was, will be supreme. But its rule is not, be it observed, altogether exclusive. In the abstract it is possible that it might reign alone, to the exclusion of all other territorial laws, and by itself dispose of the thing. But considerations of the security of international trade and intercourse interpose. The legal destinies of the thing, which have been impressed on it at some earlier period, are respected, in so far as they do not conflict with the operation of the law of the territory where it now is; the law of that territory, to further the unconditional security of all acquisitions of property within its own limits, must give effect unconditionally to the operation of its own rules, without respect to any legal destiny that may have been impressed on the thing at an earlier date. (A judgment of the old Supreme Court of Jena³² very soundly lays down that, in general, a right acquired in accordance with the

³¹ The law assigns the thing to the possessor who is domiciled within its own territory under certain conditions that are to be fulfilled in the future, without regarding the question where the possessor may subsequently have his domicile.

³² 7th July 1853, reported in Seuffert's *Archiv.* xvi. No. 1.

law of one State does not cease to operate, by the thing being brought into another State, by the laws of which that right in the thing would not have been acquired, but that the objective import, *i.e.* the exercise of this right, can only be applied in questions with third parties, or can only be maintained in so far as that is permitted by the law of the place where the thing then is.) If, for instance, the law of the subsequent situation of the thing³³ recognises no security rights in moveables without possession, a right of pledge acquired on other conditions in another State, without any change of possession, cannot be allowed any effect in a question with a third party, who is in possession of it in the country where it is, or in questions of bankruptcy.

If it is demonstrated that it is the theory of the legislature, so far as concerns the law of things, that it shall in certain relations deal with all things that are at any moment within its own territory, it would no doubt be conceivable that the State, while claiming this right for itself, giving the like right to other States, at least in relation to things which belong to their subjects, should provide that rights in things which belong to one of its own subjects, or were acquired in its own territory, should only be lost even in another country by processes known to its own law; and that the rights of others in those things should only there be recognised, if they were acquired in accordance with the law of the domicile of these persons. This would, however, be a denial of the principles on which the whole of modern private international law rests (see *supra*, p. 82). Civilised States allow trade and commerce, and allow moveables to be taken from one territory into another, and they concede to each other this much in addition, that these things shall be subject to the legal system of the State into whose territory they are by any means brought. What monstrous uncertainty for commerce would arise, if one State were not bound to recognise the acquisition and the loss of real rights in things which have taken place within the territory of another State in accordance with its system of law, may be imagined. All the less can we fall in with the theory of a voluntary subjection of the parties assumed by Savigny; taken up strictly, it would lead to this result, that the application of the *lex rei sitæ* must cease, if the thing in question had been brought against the will of the possessor into the territory of another legal system.^{34 35}

³³ Savigny (§ 368, Guthrie, p. 191), who did not see clearly the length to which the preference to be given to the place where the thing last was reached, arrives, no doubt, at substantially the same results in the cases we are here considering, but on grounds which are unsound, and in certain circumstances would be misleading. Besides, he fails to see that we are here really concerned with a principle, and not with a mere isolated exception from the application of the *lex rei sitæ*. See on this subject below.

³⁴ This extreme view, which does away with all security of intercourse, and cannot be reconciled with the theory of territorial sovereignty, we find in Riccius, p. 592.

³⁵ In maritime warfare the belligerent powers recognise that a ship, which has really fallen into the enemy's hands, belongs to the enemy and is subject to his system of law, and that, if it be again taken from the enemy, the right of the former owner does not revive, the "*reprise*" falls to the "*reprenneur*." Grotius, iii. c. 6, § 3, No. 1; Massé, i. § 417; Vattel, iii. § 195.

FORMULATION OF THE RESULTS OF OUR ENQUIRY.

§ 226. All this discussion, if summarised, yields these propositions for the law of moveables :—

First, Real rights³⁶ are to be tested by the law of the place where the thing in question was at the time the act or the fact, by which the right in question is said to be affected, took place.

Second, If a moveable thing falls under some right of property or possession within the territory of another law, then all rights, including rights of possession in the thing which existed before that date, are extinguished in so far as they would be in conflict with that subsequent relation of property or possession. This latter relation claims absolute effect.^{37 38}

³⁶ The provisions of two ordinances of Bremen, of 25th Aug. 1848, to which Stobbe, § 32, note 15, directs attention, are peculiar. According to these enactments, which deal with the acquisition of property and with the right of pledge in moveables, they are to be applied to property if the person who has acquired right is a citizen of Bremen, and to a right of pledge if the pledger is a citizen, even although the contract or the delivery of the subject, or the constitution of the right of pledge, as the case might be, did not take place within the territory of Bremen. These provisions become explicable, if we remember that in the former law the point which it is really desired to deal with is that the *pactum reservati domini* shall have no operation, while in the latter the object is, apart from isolated exceptions, to deny effect to any kind of pledge but pledge by way of actual delivery. Such enactments acquire practical importance particularly in bankruptcy and in processes or diligences of that character, and the place of acquisition of the right matters not, if the things are afterwards brought into the territory of Bremen. The provisions are not, however, altogether correct.

³⁷ I made various applications of this proposition in my first edition. I, however, thought that it was reasonable to formulate it anew in connection with the first proposition. See the commentary on subsec. 3 of art. 5 of the new Belgian Code (Rev. xviii. p. 452): "*Lorsque, à raison du changement survenu dans la situation des biens meubles, il y a conflit de législation, la loi de la situation plus récente est appliquée*," and the important decision of the Supreme Ct. of the German Empire of 26th April 1872 (Seuffert, xxviii. § 2). See, too, the grounds of judgment of the English Ct. of Exchequer [Cammell v. Sewell, 1860, 29, L. J. Ex. p. 350] cited by Piggot, p. 251, viz. "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." In truth, the question in every case is simply as to the application of this rule for conflicts where, as the expression goes, the law of the place where the thing subsequently is, does not recognise the right which took its origin at the place where it was at an earlier date (see Sup. Ct. at Berlin, 1875, Seuffert, xxxi. No. 194; Trib. Comm. Cannes, 27th July 1874, J. ii. p. 436. French law formerly recognised no securities over ships). The right of the possessor or the creditors in a bankruptcy comes into collision with a right which had been acquired at an earlier date.

³⁸ As Laurent, viii. § 245, and Weiss, p. 768, point out, the following important result affecting the international operation of the well-known rule of the Code Civ. § 2279 (see, too, Codice Ital. art. 707), "*en fait de meubles possession vaut titre*," will arise. A man who acquires a thing, supposing it not to be stolen or lost, is protected against vindication at the hands of the former owner, not merely by a *bona fide* acquisition which has taken place in France, the former owner being e.g. a person who had acquired the thing within the territory of the common law of Rome, say in the town of Hannover; he is also protected, if he acquires the thing in the territory of the common law of Rome, and has subsequently brought it to France; he becomes in that case full owner. That would be sound, if the 2279th article did not, by implication and according to its historical origin, lay weight on the acquisition of the thing within the territory of the law of France. The literal reading of the section allows another construction. The fact

Third, In so far as we have to deal with rules of law, the application of which implies a protracted subjection of the moveable thing to the territorial law, the law which prevails at the domicile of the possessor has to be applied. But we must still adhere to the ordinary rule of the application of the law of the place where the thing is, if it is shown that the thing has really been at some particular place uninterruptedly for the necessary length of time. If the possessor has changed his domicile, the law which is more favourable to the possessor is in the first case decisive: but the effects of the law of a subsequent domicile cannot be allowed to be taken into account until the time when that subsequent domicile is acquired.³⁹

C. INAPPLICABILITY OF THE RULE "*locus regit actum*" TO THE LAW OF THINGS GENERALLY.

NECESSITY FOR OBSERVING THE FORMS OF THE PLACE WHERE THE THING IS, EVEN IN THE CASE OF MOVEABLES. CONTRACTS AS TO THINGS *in transitu*.

§ 227. The rule "*locus regit actum*" has no application to the law of things.¹

One proof of that is the general demonstration which we have already given, that the *lex rei sitæ* should be applied to the exclusion of all other laws in connection with the law of things. The application of the *lex loci actus* is allowed out of favour to the contracting parties, or to parties making some declaration. They cannot, at their own pleasure, subject themselves to any forms they please in entering on their legal transaction. But indirectly, it is in the end their good pleasure, or at least their individual habits and manner of life, to which the validity of the transaction done in accordance with the *lex loci actus* is to be referred, for, to

that possession is exercised for a moment in France, can certainly not be enough. If it were, a man who has *bona fide* acquired a thing in the territory of the common law of Rome, but is apprehensive of a vindication being brought against him, would only require to take the thing for a moment over the French frontier, in order to have a good defence against the vindication even in his own country. This result seems somewhat serious, too much calculated to provoke open evasion of the law.

³⁹ Many authors apply in this case the rule, which rests upon a circle, that rights well acquired are to be defended. According to the conception of the general principle which we have adopted, it is obvious that things, which a man has acquired in some other country, do not cease to be his property by being taken into the territory of another law, where the acquisition of property is possible only under other conditions than those which are necessary in the country where he acquired it. For the acquisition of property must be tested by the law of the place where the thing actually was at the time of the transaction by which it was acquired, and not by the law of any other place to which it may subsequently be taken.

¹ But we must not confuse the legal process of acquiring a real right directly with a legal act, which invokes the acquisition as one of its subsequent effects, *e.g.* the retirement of one of the partners of a trading firm, in whose estate there are some parcels of real property, with the transference of the rights of property in these assets and its effect in questions with third parties. See, in this sense, judgment of the Court of the Empire, 6th Oct. 1886 (*Entsch.* xviii. No. 8, p. 39).

give rise to its application, they betake themselves to some particular place, or reside at some particular place. But, in the law of things, questions arise also as to the effect upon indefinite or unknown third parties: they cannot be deprived by the contracting parties of the protection, which is guaranteed to them by the special forms for transferring the right recognised at the place in which it is situated. Confidence in these would be completely broken up, if a residence in another country, of which third parties need know nothing, were to release the contracting parties from the necessity of observing the *lex rei sitæ*. Even so simple a form, and one that offers so little protection as *traditio* of the thing, still under certain circumstances provides a measure of security against the simultaneous acquisition of it by others, or against fraudulent antedating of the transference, not to speak of the requirements of public instruments, or of registration in public books.

That the rule "*locus regit actum*" is not applicable to the law of immovable property, may be proved with considerable certainty by a reference to history.

In the Middle Ages, to acquire landed estate in property or in feu was held equivalent to being received into the community or feudal union under whose authority that estate lay. This explains how, at first, such rights had to be transferred in presence of the community, and afterwards before the *judex rei sitæ*,² and thus the application of the *lex loci actus* was necessarily excluded. Although this rule disappeared in many districts as the Roman law advanced, yet the rule of customary law, "*locus regit actum*," was never applied to real rights to landed estate.³

² Cf. Beseler, ii. p. 78.

³ This, too, is undisputed. For instance, we may name the following authors who specially reject the rule "*locus regit actum*" as regards the acquisition of landed property and other real rights in the soil: Argentræus, No. 3; P. Voet, c. i. § 9, No. 2; Alef, No. 44; Cocceji, vii. 14; Ziegler, Dicastice, Cond. 15, No. 12; Boullenois, i. pp. 501-503; Reinhardt, i. 1, p. 31; Mittermaier, § 32; Burge, ii. pp. 843-871; Wächter, ii. p. 383; Story, §§ 435, 363; Savigny, § 381; Guthrie, p. 320; Unger, p. 176. Although Story, in the passages cited by him, § 439, finds a large number of authors who take the opposite view, the reason of that is that these authors—viz. Rodenburg, tit. 2, c. 3; Vinnius, *ad Instit.* 2, 10, § 14, No. 5; Molinæus, *Consilia*, 53, § 9; Huberus, i. tit. 3, § 15; J. Voet, *ad Dig.* i. tit. 4, p. 2, §§ 13, 15—discuss the validity of a testament executed according to the forms of the *lex loci actus* to affect immovables situated elsewhere; and that this question must, no doubt, be answered in the affirmative as regards those territorial laws where there is an universal succession, and the immediate right to the real estate is not considered as the subject of the disposition; while, according to English law, from which Story starts, the notion of an universal succession has no application to immovables, and therefore there is no distinction between the acquisition of a landed property by testament and acquisition by a conveyance *inter vivos*, so far as the question of form goes. In spite of other recognitions of the rule "*locus regit actum*," all the German State treaties given by Krug make an exception of rights of real property, and subject them to the *lex rei sitæ*. Krug, pp. 50, 51. See, too, Laurent, vii. §§ 287, 294; Stobbe, § 32, note 7; Förster, *Eccius*, § 11, note 22; Duguít, *Forme*, p. 102; Asser-Rivier, § 41 (pp. 90, 91); Wharton, § 275; Weiss, p. 765. (According to modern French law, property can only be transferred *inter vivos* by "*transcription*." Judgment of the Supreme Court of Spain, 21st Jan. 1871 (Torres Campos, p. 287.) "According to the principles of private international law, the effect of contracts which directly touch real property is regulated by the real statute.")

In so far, however, as public instruments are necessary for the transference of real rights in immoveables, these may, according to the general rule, be executed in a foreign country, and then as regards their form the rule "*locus regit actum*" will apply.⁴

More modern German doctrine⁵ inclines more and more decidedly to the conviction that the form of the transference of real rights, even in moveables, must be exclusively determined according to the *lex rei sitæ* at the date of the transference. But Westlake and, with special emphasis, Wharton,⁶ and similarly v. Martens, are also all upon this side. It seems as though the majority of the Franco-Belgico-Italian school were of the same mind.⁷ [The law of Scotland is to the same effect, for it was held so long ago as 1868 (*Connal & Co. v. Loder and others*, Ct. of Sess. Reps. 3rd ser. vi. p. 1095) that the question whether the right in certain pig-iron was or was not carried by the mere indorsation of the iron warrants, must be settled by the law of Scotland, the iron being actually in Scotland, and not by the law of England, in which the indorsation took place.]

THE INTENTION OF THE PARTIES TO BE CONSIDERED.

§ 228. Of course, in the case of a contract from which it is said that a real right is to arise, the intention of the parties must be directed to that end. There may be a doubt about that intention, or it may miscarry altogether, if the parties enter on the legal transaction in a country in which some special form is required for the constitution of a real right, and do not observe that form.⁸

⁴ Cf. Duguit, *Forme*, p. 107. It is a legislative error to provide in § 2128 of the Code Civ. that a deed dealing with a security over a piece of French real property cannot be executed in another country. Cf. Duguit *ut cit.*

⁵ Cf. Savigny, § 366; Guthrie, p. 178; Schmid, p. 60; Stobbe, § 32, note 15; Förster, *Eccius*, i. § 11, note 23. A moveable thing which happens to be in the territory of the common law of Rome, or of the Prussian Allgem. Landr., only becomes the property of a buyer when the *traditio*, which these systems require, has taken place, even although two Frenchmen conclude a bargain about it on French territory. See judgment of the Supreme Court at Munich, 9th May 1868 (Seuffert, xxiii. § 103); Sup. Imperial Court of Commerce, 5th Sept. 1873 (Entsch. xi. § 7); C. Brussels, 9th Aug. 1876 (Transference of property by bill of lading), Rev. viii. p. 497. Judgment of the Sup. Ct. of the Empire (v.), 6th June 1884 (Blum. Annal. ii. No. 207, p. 440), with reference to the Russo-German Consular treaty. As the judgment notices, this treaty modifies the application of the rule "*locus regit actum*," by giving consuls the power of officiating as persons who can execute legal instruments, but the rule "*locus regit actum*" is to have no application to the constitution of such rights in moveables.

⁶ Westlake-Holtzendorff, § 141; Wharton, § 308.

⁷ Fiore, § 205; Laurent, vii. §§ 213 and 221; Duguit, *Forme*, p. 104, note; Asser-Rivier, § 43, p. 99; Weiss, p. 765; Trib. de Comm. de Vannes, 27th July 1874 (J. ii. p. 236).

⁸ Cf. Stobbe, Asser-Rivier *ut cit.* This is the ground of judgment in the decision of the Supreme Court of Berlin, 13th Nov. 1868 (Seuffert, xxiv. § 102), although the result is at the same time deduced by the Court from the unsound arguments of Savigny already pointed out. There is, of course, no doubt that it is not necessary in other circumstances that the contract-

Are we not, however, to make an exception at least in the case where the thing is *in transitu*, and it is unknown at the moment where it is?⁹ This question must be answered in the negative. This is a necessary result, if we remember that a third party, *e.g.* by arresting the thing, may have acquired rights over it, and these rights, acquired as they were in conformity with the *lex rei sitæ*, can never be denied effect because the other contracting parties were not aware of them. But it is not so difficult as it is supposed to be to find the solution which will be satisfactory in practice. The bargain between the two contracting parties, which to begin with constitutes a mere obligation, acquires effect as a real contract the moment the thing reaches a territory in which the form which the contracting parties have adopted is sufficient for the constitution of the real right. It will, therefore, as a rule be sufficient if the parties observe the law which is recognised at the place¹⁰ to which the wares are consigned.¹¹

ing parties should have any special intention as to employing permissive or dispositive rules of law in order that they should come into operation; it is sufficient that they should by implication have had such intention, or even should have had it in their minds. But, in the cases we are here concerned with, the transmission of the property according to the law of the contract is not a matter of permissive or dispositive law, while by the law of the place where the thing is, a bargain is required according to which the transference of the property is *ipso facto* legally complete.

⁹ So *e.g.* Rivier, *ut cit.*

¹⁰ But the intention of the parties, in order that it may have effect in conformity with the law of the place to which the goods are consigned, must subsist up to the moment at which the thing reaches the territory of that country. That is substantially the foundation of an interesting judgment of Lord-Chancellor Selborne, of 7th Nov. 1873 (J. i. p. 200. *Ex parte Cote*, L. R. 9, Ch. App. p. 27), although the grounds of the decision are put on a different *ratio*. The plaintiff had posted a letter in France with bills addressed to a person domiciled in England. Before the letter had started news was brought by telegram that the person to whom the letter was addressed had failed. The rules of the French post-office allow a person sending letters to get them back before the mail is despatched, under certain formalities. The writer of the letter observed these formalities, but in consequence of an oversight of the officers of the post-office, the letter was nevertheless sent off and was delivered. In England a letter cannot be got back from the post-office: the post-office authorities regard themselves as mandatories of the receiver. The bills, however, were allowed to be vindicated by the Lord Chancellor's judgment. "The intention of the parties, and the acts done by them, are more important than the omission of the precise form in which their intention ought to have been expressed."

¹¹ That is particularly important for the sale of floating cargoes. On the open sea the law of the country to which the ship belongs is, in so far as the ship and cargo are concerned, the *lex rei sitæ*. Laurent, ii. § 223, thought that the decisions given in the text are little better than absurdities. I cannot, in this place, go more deeply into Laurent's theory, which is very confused, and has been thrown overboard by those who are responsible for the new Belgian bill. I must leave it to those who desire to inform themselves further on the matter to say where the absurdities are to be found.

Dudley Field, § 573, is inexact in saying, "property in shipping is governed in respect to the title thereto, the modes of transfer . . . between living persons by the law of the nationality of the vessel." The decisions which he himself cites seem not to bear out that statement. A judgment of the Imperial Court (i.) of 1st October 1887 (Bolze, *Praxis*, i. § 30, p. 8) is more interesting, and, in my view, is altogether apposite. The pursuer, who lived in Vienna, had sold meal to some one in Frankfurt O.M., and had despatched it from Vienna. The Court held that the question whether the property passed to the defender when the goods were handed in to the carrier's office at Vienna must be determined by the law of Austria. If

But the contract, in so far as its real operation is concerned, will be checked, in so far as a third person has already acquired a real right which comes into conflict with it, that real right being acquired in accordance with the *lex rei sitæ*. We cannot, therefore, think it necessary to set up any special legal rules for things which are said to be subject to a constant change of place in their nature: any such rules would simply give rise to confusion.¹²

We must, besides, remember that a contract which had for its object the constitution of a real right, but failed to effect that object because the forms of the *lex rei sitæ* were not observed, may very often constitute a binding covenant to grant the real right that is in question.¹³ This obligatory contract would have to be upheld in accordance with the rule "*locus regit actum*,"¹⁴ and would give a right of action to compel the constitu-

it were found that the property had passed, but on condition always that the goods should not be rejected as disconform to contract—to the effect of rescinding the transmission of the right of property, as if it had never taken place, the moment that rejection was legally made, or was accepted by the seller as so effected—the question whether the rejection had been validly effected in Frankfurt was a question for the law of Frankfurt.

¹² From what has been said, it follows, too, that a hypothecation or arrestment executed on the demand of a foreign judge cannot give any higher rights than belong to it by the *lex rei sitæ*. It cannot give the rights which would be created according to the law of the judge who makes the demand. The law of the judge is to some extent in the same position as the contract executed in another country (cf. decision of the German Imperial Court (iii.) of 20th Oct. 1882, *Entsch.* viii. § 28, p. 113). [See, too, judgment of the Scots Court in *Donaldson v. Ord* (5th July 1855, Ct. of Sess. Reps. 2nd ser. xvii. 1053), in which it was held that, when funds had been arrested in Scotland, any other diligence professing to compete with that arrestment must satisfy the conditions required by the *lex rei sitæ*, the law of Scotland. "In what way," says the Lord Justice Clerk (p. 1096), "can funds in Scotland be attached except under the law of Scotland?" But see below note on § 275.]

¹³ The points for consideration are—(1) Whether the parties intended, at least in the long run, to enter into a binding contract; (2) whether they have observed the form which is recognised at the place where the transaction was entered into, or some form that will settle the question of intention. The former must be ascertained on a consideration of the circumstances of the particular case, and is not at once to be assumed, especially in the case of contracts which are without consideration. *Burge*, i. p. 24, ii. p. 865; *Story*, § 436; *P. Voet, de stat.* c. 1, § 9, No. 2; *Burgundus*, i. 15, 16, 37; *Rodenburg*, ii. c. 5, § 9; *Wächter*, ii. p. 383, note 181. By the Hannoverian Ordinance of 18th December 1843, § 3, it is required in several provinces that contracts, by which it is intended to secure, divide, transfer, or discharge full or limited rights of property, or rights of succession over real property, should, to be formally valid, be executed in the form of public documents. In my opinion a contract concluded abroad without complying with that formality does not transfer the real right. On the other hand, we are not to apply the provision of § 6, which requires, for the constitution of a binding obligation for the transference of any of the real rights mentioned, a private document signed by both parties, to contracts of this kind concluded abroad, if we have plain evidence that the mind of the parties is directed to the constitution of a binding contract. See judgment of the Appeal Ct. of Geldern, 6th May 1856 (*Hingst, Rev.* xiii. p. 410).

¹⁴ This distinction is frequently too little regarded. In the judgment of the Ct. of App. at Lübeck, of 30th December 1839, reported by *Seuffert*, viii. § 2, it is rejected on the ground that an obligatory contract itself "virtually" contains the transaction by which the property is changed. In this sense contracting of debts, or any other obligations, would "virtually" contain a change of the right of property.

tion of the real right.¹⁵ [This is the doctrine of the law of Scotland. See Erskine, iii. 2. 40.]

D. WHAT LAW DETERMINES THE CHARACTER OF A THING, WHETHER IT IS MOVEABLE OR IMMOVEABLE?

§ 229. The distinction of moveable and immoveable things is more important for the law of each particular State, than for private international law. Sometimes, however, as these territorial laws draw different boundary lines between moveables and immoveables, it is important to consider which territorial law decides the question whether a thing, or a right, as the case may be, is to be viewed as immoveable or moveable.

That question is to be determined on the following considerations. The assertion that a particular thing, or a particular right, is to be treated as moveable or immoveable, is simply a shorthand form of asserting that a number of legal propositions should be applied to the one or the other, *i.e.* all the propositions which are applicable to other moveables, or to other immoveables, as the case may be. The question, then, finds an answer so soon as we know what territorial law it is that is to rule the thing or the right, even although there shall be in that law no special provision as to their quality—whether they are moveables or immoveables.

The result is, then, that as regards things which have a material existence, in so far as the question is one as to rights that are directly real, the actual place where they are will decide;¹ but as regards other rights, the territorial law which rules these rights in other respects will rule this question also.² We must not forget that the division into moveables and immoveables is frequently of importance merely for certain legal categories,

¹⁵ Yet even here the rule "*locus regit actum*" may be shut out by special provision. If the obligatory contract in question can only be validly executed before the competent judge, then the form of the obligatory contract must be determined by the *lex rei sitæ*.

The Prussian Allgem. Landr. i. 5, § 115, however, contains this general provision: "In all cases where immoveable things, or the property, possession, or enjoyment of these, is the subject of a contract, the forms required by the law of the place where the thing is must be observed."

The *lex rei sitæ* controls even the material provisions of obligatory contracts of this kind as to land and houses, and may therefore exclude the rule "*locus regit actum*." Cf. Stobbe, § 32, note 7, and Roth, *Bayer. Privatr.* § 17, note 81.

That is not, however, to be assumed, even although the object of the prescribed form shall be "to do away with abuses that have occurred in connection with alienations of property." At least I cannot concur in the *ratio* of the judgment of the Supreme Ct. at Mannheim, of 1st February 1866, reported in Seuffert, xxiv. No. 204. (The rule "*locus regit actum*" was in that case, as it has been more recently by Laurent, restricted to the form of the public instrument and not extended, as it should be, to the question whether any such instrument was necessary.)

¹ The place which rules is always the last place in which the thing was, or, more exactly, the place where it was when the event happened that raises the question. The bee hive, which a Dutchman takes to his estate in France, becomes therefore, according to the Code Civ. § 524, *Immeuble per destination*, although by Dutch law it was not so. Asser-Rivier, § 45; Weiss, p. 764.

² According to Boullenois, i. pp. 358, 360-364, the *lex domicilii* of the deceased rules in this question, in so far as the right of succession is concerned. Bouhier, cap. 29, § 41, takes

and its operation as confined to these categories, *e.g.* the law of the property of married persons, or the law of succession to a certain extent.³ In these cases we have to deal with a proposition of matrimonial or of succession law, expressed in short form, and thus the system that regulates generally the law of marriage, or the law of succession, will give the rule.⁴ In this way we explain the divergent views of authors on the subject. For instance, if this question arises as to the acquisition of a right to rents by way of succession, then, if there is, according to the provisions of the legal systems in question, an universal succession, the personal law of the person in right thereof, whose succession is in question, prevails; as the *lex rei sitæ* does, in case succession to immoveables is held to be a singular succession by the laws recognised at the domicile of the ancestor, or by that which rules at the place where the thing is. If, on the other hand, the question is as to the effect of an assignation as against the debtor in a bond, then the personal law of the debtor will rule, in cases in which the assignation is, with a view to his protection, made to depend upon the observance of the forms that

the domicile of the spouses as regulative of all matters connected with the *communio bonorum* of married persons, in so far as the rights of third persons are not touched. Christianæus (vol. i. decis. 252, § 7) takes the *lex domicilii creditoris* as his fundamental principle, if the legal relation in question concerns "*favorem et utilitatem ipsius creditoris vel eorum qui ex ejus capite causam et successionem asserunt.*" General answers are attempted by Rodenburg, tit. 2, No. 1; Burgundus, ii. No. 29; Dumoulin, in *vet. Consuet. Paris.* § 11, No. 10, No. 28; Burge, ii. p. 78; Story, § 447; Demangeat (note to Fœlix, i. p. 137, § 64); Beseler, i. p. 154; Renaud, i. § 42, p. 106; Roth. *Bayer. Privatr.* § 17, note 72; Asser-Rivier, § 45; Weiss, p. 764. These writers propose to regard the *lex rei sitæ* only. Fœlix involves himself in a contradiction; in § 64 the *lex domicilii* is to decide universally, in § 61 the *lex rei sitæ*.

³ So express enactment of the *Frankfurter Reformation*, ii. 3, §§ 1, 2; on similar cases in the law of England, see Westlake, §§ 157, 158; Wharton, § 287 *ad fin.*

⁴ *E.g.* if by the law of matrimonial property prevailing at the domicile of the spouses, immoveables are excepted from the *communio bonorum*, while claims secured on dispositions of real property, rents, etc., count among immoveables. [In questions of taxation the actual *situs* will rule. C. de Cass. 1887, J. xvi. 827.]

[In the case of *Monteith v. Monteith's Trs.* 1882 (Ct. of Sess. Reps. 4th ser. ix. 982), it was held that, in a question of succession to a deceased Scotsman, whose personal estate was subject to a claim of legitim at the instance of his children, sums secured over English land by mortgage, which are, by the law of England, personal property, must have their character fixed by that English law, were therefore moveable, and so subject to the children's claim. This determination was arrived at on the authority of *Newlands v. Chalmers Trs.* 1832 (Ct. of Sess. Reps. 1st ser. xi. p. 65), and *Downie v. Downie's Trs.* 1866 (Ct. of Sess. Reps. 3rd ser. iv. p. 1067). In the latter case, Lord President Inglis says: "The principle has been recognised and settled that the character of a subject as heritable or moveable depends on the law of the country where it is placed." This character of moveable property was therefore held to attach to money so secured, and it was held to come into the Scots succession with that character impressed on it, the speciality as to the form of the investment being altogether thrown out of account. Lord Young, however, in *Monteith's case*, dissented, on the ground that this succession, being succession to a Scotsman, must be ruled by the law of Scotland, that by that law children have no such claim over money secured upon land, money so secured being, for this purpose, by the law of Scotland distinguished from other moveable property. This latter view seems more in accordance with the doctrine in the text; his lordship's reasoning may be thus summarised: The question of the quality of the asset must be determined by the law which, in other respects, governs the succession; all moveable succession is regulated by the law of domicile of the deceased (or, as the author would say, moveables are massed together to form an universal succession); this succession is moveable whether you look to Scots or to

regulate the conveyance of real rights in immoveables.⁵ By the bankruptcy statute of the German Empire, § 39, subsec. 2, the character, *e.g.* of a thing or a right as immoveable, will depend on whether the law of the place, in which the thing happens to be, provides as a step legal execution against these things and these rights, the right of public sale, which is applicable to other moveable property, and has nothing to do with the consideration whether these things are counted as immoveable in any other relation.⁶

E. PERSONAL CAPACITY TO ACQUIRE RIGHTS IN THINGS.

§ 230. The personal capacity to acquire particular things, or rights in them, a question which in practice only comes up for consideration in connection with real property, is to be determined, not by the personal law of the individual concerned, but by the *lex rei sitæ*.¹ On this point a general consensus of opinion prevails. After what we have said in regard to legal capacity generally, this proposition requires no further investigation. Those, however, who take no distinction between capacity to have rights, and capacity to act, can only justify it by having recourse to "*ordre public*," to what they term the coercitive, politico-economical, or moral character of the rules of law that deal with the capacity to acquire and to possess.² But, if we go strictly to work, we shall, by following this abomination, as we may call it, of politico-economy or morality, and applying, not the *lex rei sitæ*, but the *lex fori*, a result which is obviously a mistake.³

F. PARTICULAR LEGAL RELATIONS.

1. POSSESSION.

§ 231. That the possession of a thing, and the possession of a right in a thing, must be determined by the *lex rei sitæ*, scarcely admits of doubt,

English law; therefore it is ruled by the Scots law of succession, and that law says that children shall have no such claims over money so secured, moveable though it be. Its character of moveable succession brings it within the scope of Scots law, but, once in the grasp of that law, it will be given out to the successors whom Scots law calls to it.

As regards the matrimonial law, it was settled by the cases of Chalmers and Downie already quoted, that while you will determine the respective rights of the spouses in property falling to them by the law of their domicile, you will go to the *lex rei sitæ* to ascertain what the character of the property is. *E.g.* you will enquire whether bonds bearing interest, left by a testator who died domiciled in Jamaica, are by that law, *i.e.* the law of England, heritable or moveable, and if they are moveable, they will, by the law of Scotland, fall into the *communio bonorum* of spouses domiciled in Scotland, to one of whom they have come by succession.

In the case of *Egerton v. Forbes*, 27th Nov. 1812, F. C. the Court of Session held that the question whether certain moveable funds, investments in English stocks, to which no title had been made up, vested or did not vest in a child of the owner by mere survivorship, must be determined by the *lex rei sitæ*, *i.e.* the law of England. But once vested in that child by that law, they would pass *jure mariti* to the child's husband, a domiciled Scot, agreeably to the law of Scotland, although the law of Scotland would have held that they had not vested.]

⁵ To the same effect Stobbe, § 32, notes 2, 3. On the other hand, Roth, *D. Privatr.* § 51, note 58, and Asser-Rivier, § 45, make the rule of the *lex rei sitæ* too absolute.

⁶ See particularly *v. Völderndorff*, *Die Concursordn. für das Deutsche*, R. 2nd ed. § 39, note 8.

¹ Story, § 430; Fölix, i. § 58, p. 105; Schäffner, p. 68; Savigny, § 367; Guthrie, p. 183.

² Savigny *ut cit.*

³ According to what we have said, the *lex rei sitæ*, and it alone, will decide as to the capacity of juristic persons, *e.g.* religious foundations (the dead hand) to acquire property: the

even when the thing in question is moveable.¹ The foundation of possession is the physical control of the thing, and that can only be exercised where the thing is.² It would lead to insoluble contradictions, if in private international law possession and property were to be dealt with on different principles. The following remarks are all that need be made :—

1st, As Savigny suggests, the questions as to whether recompense is due, and if so, what recompense and what penalties can be enforced by private persons for illegal encroachment upon their possession, are to be determined by that law which is applicable to relations of obligation arising from delict or *quasi delict*.

2nd, A legal proposition or rule which deals with the rights that arise from permanent possession cannot, as we have already said, be applied to things which are only found temporarily in the territory of a State.

In my former edition I applied this rule not merely to prescription, but to the rights that a possessor might have to the produce of a thing, and to his rights in respect of expenditure upon it. It seems more correct, however, to allow these latter questions to be determined by the law of the place in which the thing actually was when the possession began.³

One practical advantage of this course is that any other rule would necessitate enquiries and calculations, which would be always difficult, and sometimes impossible to carry out. But it is also sound on principle, because the circumstances under which any man has acquired, *e.g.* bought, will give his whole conduct its characteristic complexion. It may reasonably be expected that an honest man will not buy, if he thinks that the seller is not entitled to sell. But it would be unreasonable to ask a man who has honestly acquired anything, and who subsequently becomes aware of circumstances which create a doubt as to the legality of his possession, to offer the thing of his own accord, to avoid the disadvantages of dishonest possession, to the person who is entitled to it, or to seek out this person at great trouble and expense. In the same way, then, the law under which a man has acquired possession, must determine the character of that possession, unless, as the local situation of the thing is changed, new facts come into play, which, by the local law of the place in which the thing is

same holds with regard to the capacity of foreigners to do so. Judgment of the Sup. Ct. of App. at Cassel, 3rd September 1836 (Heusser Annalen, ii. p. 752): "The laws of Prussia (the law of the person's home) cannot give the rule, if the capacity to acquire property in Hesse is limited to certain classes of persons."

¹ The right of the possessor is simply a transitory right in the thing, or, in other words, the right of actual *de facto* connection with it. Both doctrines, that of possession and that of right in the thing, are much involved one with the other, and, more closely considered, the one cannot be thought of without the other, as we may see from the ordinary definitions of the two terms. The definition of property as legal dominion or mastery is only intelligible by means of the correlative idea which must form itself alongside the former, viz. actual *de facto* dominion or mastery, and so, conversely, the definition of possession as actual dominion is only thinkable by the help of the contract with the notion of legal dominion.

² Savigny, § 368 ; Guthrie, p. 193 ; Burge, iii. p. 126 ; Unger, i. p. 175.

³ So Eccius, in Eccius-Förster, *Preuss. Privatr.* i. § 11, note 22 ; Stobbe, § 32 *ad fin.* "because the provisions of law that are recognised at the place where the thing is acquired, necessarily qualify the right of the person who acquires in good faith."

found after its change of situation, effect some change (*e.g.* unless this latter law gives some special effects to the fact of the institution of an action). Of course, in so far as the *lex fori* imposes certain prestations upon the possessor as consequences of the institution of the action, the pursuer can require no more under this head than what that *lex fori* awards him.⁴

3rd, Special restrictions often arise as regards the competency of possessory actions. The French "*Code de procédure civile*" contains, for instance, this provision (art. 23): "*Les actions possessoires ne sont recevables, qu'autant qu'elles auront été formées dans l'année du trouble par ceux qui, depuis une année au moins, étaient en possession paisible par eux ou les leurs, à titre non précaire.*" We must separate the enactment merely referring to procedure from that material enactment which touches the right of possession; this article provides: 1st (and this is a material provision as to the law of possession), That a right of possession, unless the possession has lasted for a year, cannot be vindicated by action. This applies only to things situated in France, but to them without exception. 2nd (and this is a mere rule of process), That unprofitable suits as to possession of shorter duration are to be avoided—a provision that applies to all suits brought before French courts for the possession even of things that are situated abroad. If, in obedience to this rule of process, a suit for possession of a thing situated abroad be thrown out, it does not bar an action for the same end in the country where the thing is, if the laws of that place do not require the same length of possession, unless the judgment in France specially bears that the pursuer had no possession at all.

2. PROPERTY.

§ 232. The capacity of a person to have property is, as we see, to be determined by the *lex rei sitæ*, as being a part of his general capacity to have rights. On the other hand, the capacity to dispose of the property, in so far as the question is a question of the protection of the person concerned, is subject even in the case of real property to the personal law, as being a question of capacity to act. The divergent view of this point⁵ taken by the law of England and of the United States, which apply in such matters the *lex rei sitæ*, cannot be justified in argument. It makes a confusion *inter alia* between the capacity to dispose of property *inter vivos* and *mortis causa*.⁶ The application of the *lex rei sitæ* in the latter case can be defended on the principles of the law of England and of the United States, but it cannot be defended in the former case.

§ 233. In like manner the *lex rei sitæ*⁷ must determine questions as to the capacity of a thing to become the subject of private ownership;⁸ and

⁴ Stobbe *ut cit.*

⁵ Story, § 431; Wharton, § 296. In England, however, this mistaken theory seems to be somewhat shaken. Cf. Westlake Holtzendorff, cap iii, § 2, p. 51.

⁶ See the law of succession on this subject.

⁷ See Stobbe, § 32, p. 1, on the circumstances in which this rule is applicable.

⁸ Fiore, § 201, c. 1; Weiss, p. 764.

also whether that which has no owner becomes the property of him "*qui occupat*;" that which is newly constructed the property of him who constructed it; or that which is found the property of the finder.^{9 10} It also rules the question as to whether the thing can be alienated (except in so far as the prohibition of alienation is confined to particular persons), and questions as to reductions of sales by certain privileged persons.

The will of the parties may in some measure be considered as giving the rule for determining the question whether one thing is to be regarded as the pertinent of another or not: to this extent the law which determines questions as to the intention of parties, *e.g.* that local law under which the bargain affecting the thing falls, has to be applied. Apart from this, however, no law but the law of the place in which the thing claimed as a pertinent actually is, can decide: this must hold in the case of moveables as well as in the case of real property. The essence of the notion of a thing as a pertinent is simply the application of a rule of law that it to a certain extent must follow the legal fate of the principal thing. This rule is a real rule, in so far as third persons are affected by it, and therefore, in so far as it does not yield to the will of the parties, it is necessarily dependent on the *lex rei sitæ*.¹¹

Confiscation, too, which has taken place in conformity with the *lex rei sitæ*, must be recognised by a foreign State, without regard to the reason for which it was carried out.¹² It may be, for instance, failure to

⁹ Savigny, § 367; Guthrie, p. 183; so, too, the question whether a treasure-trove becomes the property of the finder or of the public treasury.

¹⁰ The Prussian *Allgemeines Land Recht*, i. 9, §§ 299-303, 315-323, 304-306, makes considerable deviations from the doctrine of the Roman law as to the requisites for acquiring property by specification (Koch, *Preussisches Privatr.* i. § 251). It cannot be doubted that if a thing is sold in a place by the laws of which it becomes, under the existing circumstances, the property of the buyer, irrespective of whether the seller was owner or not—for instance, if it is sold in the open market, or in an open shop—this acquisition of property must be recognised even by the State to which the real owner belongs, although there may be no such law in existence there. [So L.J.C. Moncrieff and Lord Craighill in *Todd v. Armour*, 1882, Ct. of Sess. Reps. 4th ser. ix. p. 901.] The question, too, whether by the union of a moveable thing with real estate property in the first is lost or become irrecoverable (*cf. e.g.* Code Civ. 554), must be determined by the *lex rei sitæ*. Cf. Laurent, vii. § 259; Durand, § 196, p. 407; and Weiss, p. 769; starting from the view that the only question here is as to the private interests of different proprietors, and that "*Ordre public*" is not concerned, arrive at untenable results, which imperil all legal intercourse. From the point of view of a *quasi contract* I reach again the *lex rei sitæ*.

¹¹ See judgment of the Supreme Court of Bavaria, of 11th November 1882 (Seuffert, § 161). The court, proceeding on the law of Bavaria, refused to give effect to the doctrine of Austrian law by which railway waggons arrested in Bavaria were parts and pertinents of Austrian property. The Supreme Court of Wolfenbüttel, 17th September 1833 (Seuffert, xxi. § 3), laid down that the pertinents of a farm in Brunswick which had been seized in Prussia were subject to the constitutional laws of Brunswick in so far as services to the sovereign were concerned. The very short report in Seuffert leaves it doubtful, however, whether this judgment is not to be justified on other grounds.

¹² The public treasury may vindicate in a foreign country goods which were imported contrary to regulations, and are liable to seizure and confiscation (Hert, iv. 18). It is another question whether the State has a right or a duty to carry into operation a sentence of confiscation pronounced by another State. Cf. *infra*, § 146.

pay State duties. Everything that is brought into the territory of any State lies under its protection and the power of the laws there recognised.

Conversely, however, confiscation can only receive effect as regards things situated in the territory of the State itself.¹³ So if, at the date of the judgment imposing the penalty of confiscation, the thing in question is not in the country, then, in spite of that judgment, any alienation by the possessor remains good, and must be recognised even by the State whose officers have decreed the confiscation of the property. If anything shall have been adjudged to the person who found it, this mode of acquisition must also be recognised in a foreign country.

In accordance, however, with the rule already laid down as to the decisive weight to be given to the law of the last place where the thing was, the question whether a moveable thing can or can not be alienated, must always be answered by the law of the place in which it last was.¹⁴

In the same way the *lex rei sitæ* will rule the law of compulsory acquisition of property for public purposes, and will prescribe the statutory limits of ownership: e.g. the limits of that right as regards the erection of manufactories, or those that are necessitated by the requirements of mining statutes, or involved in a statutory prohibition of subdivision. In like manner limitation of the right of property in the interest of neighbours, of adjoining properties, and of upper or inferior heritors, are all dependent on the *lex rei sitæ*.¹⁵ It is plain that rules of that kind have no bearing upon things that lie beyond the territory, and that they would completely miss their mark, if any privileges in connection with them were to be given to foreigners who happened to own property in this country.

¹³ So Bartolus in L. 1, C. de S. Trin. No. 51; Chassenæus *Comment. in Consuet. Burgund. Rubr. ii. tit. des Confiscations*, No. 11; Mevius, *proleg. qu. 6*, § 14; Petr. Peckius, *de Testament. iv. c. 8*, § 8; Bouhier, chap. 34, No. 28; Ricci, p. 553; Casarejis, disc. 43, No. 17; Danz, i. § 53, p. 179. Wharton, § 383. This rule has a special application in the case of maritime war. The condemnation of a ship by a prize court transfers the property, in so far as the ship at the date of the condemnation was in the power of the State to which the court belonged. Of course, the decision must not offend openly the principles of international law. See reports of the decisions of English courts on this point in Piggott, pp. 252-264. Although the older writers make an exception in the case of confiscation imposed in terms of the *jus commune*, this is explained by the idea which prevailed in the Middle Ages, and frequently comes into notice in later times, that the Roman law was *de jure* good all over the world, and all other systems were mere deviations by statute from it. They do not, even in that case, claim the confiscated property for the sovereign whose courts have imposed it, but for him who is supreme at the place where the thing is situated.

¹⁴ It was thus lately determined in a very interesting case by the Trib. Civ. Seine, of 17th April 1885, that a vase which belonged to a Spanish Church, and which by the law of Spain was inalienable, had become alienable in France (J. xiii. p. 593). To the same effect Weiss, p. 768, note 2. Of course, the personal responsibility of the person who alienates the property illegally is not affected.

¹⁵ In these cases the locality of that piece of real property, against which an appeal is made to the limitation, must decide. The limitation cannot, however, be invoked in favour of any estate, by whose own territorial law a similar prohibition would not be recognised, since limitations of that kind rest on considerations of mutual convenience and comfort. See judgment of the Sup. Ct. of App. at Kiel, of 4th Sept. 1849 (Seuffert, vii. § 2), the grounds of which go still further: "An estate which is not governed by the law of Lübeck can no more have duties cast on it by that law than it can have rights conferred on it."

§ 234. The *lex rei sitæ* will exclusively govern the form of the transference of property, as we have already shown. Some other law may very well have to be taken into account to determine the import or meaning of the contract of transference, although that will not very frequently be so. But statutory provisions which limit freedom of contract, in the interest of the security of third parties, are to be recognised in accordance with the *lex rei sitæ*. An instance is the provision that rights of redemption or re-purchase shall not be capable of enforcement, so as to affect third parties, beyond a specified period (cf. Code Civil, § 1660).¹⁶ According to the principles here assumed, it is a necessary result that, if property has once been validly acquired by the laws of the place where, at the time of the conveyance, the thing was, then that acquisition is not thereafter rendered invalid by the removal of the thing to another place. According to Savigny's principle, which holds the place of the thing as the locality of all its legal relations, it is impossible in strictness to protect rights which have been acquired in any other way than by the rule that vested rights shall be respected—a rule already condemned by him.

The acquisition of property by prescriptive possession is plainly connected closely with the prescription of actions for the vindication of property; the latter, so far as moveables are concerned, cannot properly be discussed in this connection just at present. The prescription of moveables can only be determined by the *lex rei sitæ*;¹⁷ this is the universal opinion of the jurists,¹⁸ and must obviously follow from the principles we have laid down. If, however, the law of the place where the property is gives minors privileges, by which any estate belonging to them cannot be made the subject of prescriptive possession in the ordinary way, then, no doubt, we are to assume that a law of the kind is meant to be for the advantage of all persons who, by reason of their minority, are under guardianship, and therefore, even of those who, being resident abroad, are minors there, although by the *lex rei sitæ* they would be of full age.¹⁹

ACTIONS RELATING TO PROPERTY.

§ 235. Questions as to actions relating to property present more difficulties, and a very careful investigation is of importance on this head,

¹⁶ Laurent, viii. § 157. Esperson, J. ix. p. 278 (with reference to the Codice Ital. § 1515).

¹⁷ The view that foreigners cannot acquire by prescription is now generally abandoned even in France. Cf. the citations in Fiore, § 202, note 2.

¹⁸ Molinæus in L. 1, C. de S. Trin.; J. Voet, Comment. in Dig. 43, 44, § 12; Bouhier, chap. 35, Nos. 3, 4; Boullenois, i. p. 364; Merlin, Rép. Prescription, sect. 1, § 3, No. 7; Pothier, *de la Prescription*, Nos. 247, 248; Haus, pp. 33, 34; Günther, p. 737; Mühlenbruch, i. § 73; Massé, pp. 102, 103; Gand, Nos. 731-733; Burge, iii. p. 221; Wheaton, § 86, p. 118; Wachter, ii. p. 386; Oppenheim, p. 398; Schäffner, p. 75; Fœlix, i. § 63 *ad fin.*, and Demangeat's note; Stobbe, § 32, 1; Laurent, viii. § 332; Fiore, § 202; Weiss, p. 767.

¹⁹ Cf. the remarks with reference to restitution (§ 154). Gand, Nos. 731-733, is of a different opinion.

both because there is so much difference among the different systems of law as to the duties and obligations of the possessor as against an owner vindicating his property, and because special restrictions with regard to moveables have often been introduced in the interest of commercial security in general. Very many of these rules, which seem merely to affect the process for the acquisition of the legal right, are truly, as Savigny remarks,²⁰ part of the legal right or relation itself. In strict accuracy, an action for property is nothing but the right of property under the special shape which the judicial claim requires it to take. The consequence is that, as the right itself is subject to the *lex rei sitæ*, so is the action, and the law that prevails at the seat of the court only steps in to regulate the duties of the parties in so far as these are mere matters of procedure.

The distinction which exists between the nature of moveables and immoveables is nowhere seen so clearly in operation as in the *Rei Vindicatio* and actions of the same kind. In the meanwhile, we shall first consider the simpler case of immoveables.

The *lex rei sitæ* is the rule not merely as to the essentials of an action claiming property, or any action on the same model founded upon some particular kind of possession (e.g. the *Actio Publiciana* of Roman law), but also determines the obligation of the possessor to keep the subject of the action scatheless, or to answer for its loss; to account for the increase and not to part with it fraudulently; and at the same time the right which he has to demand reimbursement of his expenditure on it, and to enforce this by detention; to take certain of the increase for himself, or to demand repayment of the price he paid for the property. This view derives special support from the consideration that, if possession and the rights arising from it are to be determined by the *lex rei sitæ*, the view which assumes this, but makes the *lex fori* decide the questions we have suggested, falls into a self-contradiction; for if the possessor, for instance, has a right to consume the increase before the action is raised, or before any *mala fides* arises, without being bound to make reparation, the result is that the pursuer can have no claim to it.²¹ According to the view which takes the *lex fori* as regulative, the pursuer will have a dangerous option in his hands, assuming that a real action can be brought in the *forum rei sitæ* and in the *forum domicilii* of the possessor as well.

An action for damages, or for the value of the article vindicated, against a person who, to prevent the success of a claim made against another, maliciously, and in spite of having no right of possession in the thing, throws himself into the action (*liti se obtulit*), is a pure question of a fine for a matter of procedure arising *quasi ex delicto*, and consequently to

²⁰ § 361, pp. 146, 147, of Guthrie.

²¹ Savigny is of the opposite opinion, § 367; Guthrie, pp. 186, 187. See, on the other hand, Burge, iii. p. 126; Holzschuher, i. p. 66; and the essay in Seuffert and Glück's *Blätter für Rechtsanwendung*, vol. xiv. p. 187, there cited.

be determined by the *lex fori*. But it is different with the obligation of him *qui dolo desinit possidere*, in so far as his possession was given up before litis-contestation.²² We find confirmation of the latter statement in the fact that, by the general theory of the Middle Ages, the *forum rei sitæ* constituted an exclusive jurisdiction, and in more modern systems has been retained, especially in State treaties for insuring mutual legal remedies.²³ If, therefore, an action shall be raised in some other court than that where the thing is situated (which is quite exceptional), all the less can we assume that the law recognised at the seat of that court are to have any effect upon the material relations of the possessor who is sued.²⁴

LIMITATIONS ON THE VINDICATION OF MOVEABLES IN PARTICULAR.

§ 236. With the vindication of moveables it is quite the reverse. The possessor can take these from one place to another at pleasure, and the stay of any article in any particular place seems, as a rule, to be merely accidental and temporary. Therefore, without any regard being had to the temporary stay of the thing in another place, the *forum domicilii* is always recognised and considered as regulative.²⁵

This circumstance is recognised in the interpretation of the law as to the vindication of moveables to this extent, that all limitations of the vindication introduced for behoof of the possessor, and not those alone which belong to a permanent relation of possession, are applicable in all real actions for delivery of moveables raised *in foro domicilii*. Laws of this kind, which limit the right of vindication, mean to say something like this, viz.: "We shall protect the defender, in so far as the institution of the

²² L. 25-27, D. de Rei Vin. 6, 1.

²³ See the numerous citations in Wetzell, p. 355, § 41, notes 47, 48; cf. J. Voet, Comm. in Dig. 5, 1, No. 77; Vattel, ii. ch. 8, § 103; Burge, iii. pp. 125 and 397. (The courts of common law in England and America declare that they are incompetent to deal with real rights connected with property that is not within their jurisdiction. Wheaton, § 86, p. 118; Story, §§ 551, 552.) Code de Procéd. Civ. art. 59. German treaties collected by Krug, pp. 40, 41. Civ. Proc. Ord. for the German Empire, § 25, is to the same effect.

²⁴ It is the natural result of this reasoning that the *lex rei sitæ* determines the prescription of actions in the case of immoveables. As a rule, too, it will coincide with the prescriptive acquisition. Yet some—as, for instance, Story, §§ 576 and 582—although they would determine prescription for the purposes of acquisition by the *lex rei sitæ*, would have the *lex fori* rule the case of negative prescription. Yet, since by English law *actiones in rem*, which have to do with immoveables, can only be brought *in foro rei sitæ*, this view in its result coincides with that taken by us, in so far as English and American tribunals are concerned—Story, § 581 *ad fin.*

²⁵ Even according to Roman law in its modern form, the *forum rei sitæ* is to be limited to such moveables as are to remain in some particular place, according to the intention of the possessor, either expressed or reasonably to be inferred, and therefore cannot be extended to goods upon a journey or ships put into port. It is only of things of the first kind that it can be said they are "*res in aliquo loco constitutæ*." It cannot be said of the latter kind, and that is the test demanded by L. 3, C. *ubi in rem actio*, 3, 19, the passage by which the *forum rei sitæ* was introduced. (Nov. 69, c. 1, applies only to the *forum delicti commissi*, and under this fall cases of disturbance of possession.)

action in our courts was not entirely accidental or capricious: we shall thus indirectly protect the importation of goods into the country, for, as a rule, the possessor will bring the things he has in possession to his domicile." *E.g.* the rule, "possession is nine points of the law," must be applied in the *forum domicilii*, although the thing claimed may be temporarily situated in some other country where this rule is not in force.²⁶ But, besides these limitations, the possessor may also appeal to those limitations of the right of action which are inseparably involved in the acquisition of the possession according to the laws of the place where it was acquired.²⁷ (Such rights often appear in the form of limitations of the right of action, by way of regulations as to procedure; *e.g.* "Things sold in open market are not, as a rule, subject to vindication." If one has bought an article in open market abroad, where this rule is in force, he may appeal to it *in foro domicilii*, or in any other jurisdiction, although there is no such limitation to be found there.)²⁸ [This rule has been recognised in Scotland in the case of *Todd v. Armour*, 1882 (Ct. of Sess. Reps. 4th ser. ix. p. 901), where it was held that a horse bought in open market in Ireland, where sale in open market cures the *vitium* of a theft, could not be vindicated in Scotland by the true owner, albeit the law of Scotland attributes no such efficacy to the sale in open market.] That is in consequence of the rule given above (§ 226, 1) as of universal application in the law of

²⁶ We may no doubt reach a different result if we go back to the historical origin of this limitation of vindication, and try to determine its international validity by reference to its origin. There was no action at all in older German law for recovery of moveables, and if an attempt to recover them was associated with an averment that possession had been lost by delict, the place where the delict was committed, *i.e.* the law of the place where possession was lost, would decide. But it is no longer possible, now that the idea of the vindication of property has become general, and, on the other hand, the idea of protecting a *bona fide* possessor in his possession has been introduced, to go back to that historical origin with a view to establish a rule for the international treatment of the legal propositions on this subject.

²⁷ The law of that place is now regarded by many as the only competent rule: see Eccius or Eccius Förster, *Preuss. Privatr.* i. § 11, note 25. Asser-Rivier, § 44; Weiss, p. 768; Preface to the new Belgian Bill, Rev. xviii. p. 462.

²⁸ The notion that such limitations upon the right of action as, "*Hand muss hand wahren*," *i.e.* "possession is nine points of the law," or, "You must look for your credit where you left it," are given to the possessor of the thing claimed as material rights, is confirmed by the shape which these rules—belonging originally to German law, and arising from the peculiar shape which the process in such cases assumed—have taken in modern systems of legislation, where they bind the *bona fide* possessor to restore the thing only upon payment of the price he himself gave, or assign him the right of possession altogether. (Cf. Prussian A.L.R. i. 15, § 25: "If any person comes into possession of a thing that has been lost by the proper owner or possessor, through an onerous bargain with a person who is not open to suspicion, he must restore it." § 26: "He may, however, on the other hand, claim in return all that he gave for it." Austrian Statute-Book, § 367: "There is no action against a *bona fide* possessor of a moveable thing if he can show that he came into possession of it either at a public auction, or from a tradesman dealing in things of that kind, or paid a price for it to any one to whom the pursuer himself had intrusted it for use, or for custody, or for any other purpose. In these cases, the *bona fide* possessor has acquired the property of the thing.") The object of such restrictions upon vindication is the special security of the traffic of the country where they exist. They

things. This rule is the only one that can be applied, too, if the action for recovery of the thing happens purely by accident to be *in foro domicilii*—i.e. if the thing itself is intended to remain permanently in some particular place (*res in aliquo loco constituta*, L. 3; C. *ubi in rem actio*, 3, 19). It is also the only possible rule in cases where the possessor cannot appeal to the restrictions imposed upon such actions by the laws of his domicile—when, without any voluntary prorogation, or any jurisdiction given *revindicatione*, the real action for delivery of the moveable article can be, and as a matter of fact is, brought *in foro rei sitæ*. In such cases he cannot appeal to the limitations of the *lex domicilii*, because the plea that a *vindicatio* is, as a rule, brought *in foro domicilii*, and that, therefore, these limitations must have place, is rejected by the *lex fori*; but if the *lex fori* makes provision for the conflict of territorial laws, the judge must follow its instructions (e.g. if a thing is stolen from a person in country A, where it is competent, as in the common law of Rome, to bring a *vindicatio* of any moveable against any third party who may be in possession of it, an action may be brought in country A while the thing is still there, as in the *forum rei sitæ*, without the necessity of any voluntary prorogation or jurisdiction *revindicatione*; and if this is done, the possessor cannot appeal to such limitations of the vindication as are recognised only in his domicile and not in country A).

On the other hand, the defender cannot avail himself of any such limitations of the right of action, if they are not recognised either at the place where the thing was acquired, or at the place of his domicile, although they may be recognised at the place of action. The rule, that under certain circumstances it is incompetent to vindicate moveables, does not

comprehend, therefore, all moveable things which are subject to commerce in that country—i.e. everything the possession of which is acquired in any such way in that territory. *Allgem. deutsch. Gesetz*, vi. § 306: "If goods or any moveables are sold or transferred by a merchant in the course of his business, the person who honestly acquires them acquires the property of them, although the seller was not owner. Property rights of an earlier date are extinguished. All rights of pledge or other real rights which were constituted at an earlier date are extinguished, if the person acquiring the thing was ignorant of them when he acquired it."

"If goods or other moveables are pledged and delivered by a merchant in the course of business, a right of property or any other real right of an earlier date in these things cannot be pleaded to the prejudice of the *bona fide* holder of the pledge, or those deriving right from him."

"This article has no application if the things were stolen or lost."

These provisions are so expressed as to protect the person who acquires such things, only where they were acquired within the territory, and not in cases where the acquisition took place abroad, while the action is brought in the territory, the defender belonging to that territory. The right thus acquired, which in substance is full enough, is limited in the area of its operation by the failure to limit the right of action in the statute. It may be doubted whether the provision of the Code Civil, § 2279, "*En fait de meubles, la possession vaut titre*," has any more extensive operation, at least in so far as the thing may have been brought into a territory subject to the law of France after the person who claims it has lost possession; see *supra*, § 226, note 37. See C. de Bruxelles, 9th Aug. 1876 (Dubois, *Rev.* viii. p. 497): The rule, which in the general case excludes vindication of moveables in Belgium, releases cargoes, which have been secretly withdrawn from an arrestment in another country, and are subsequently sold in Belgium, from all the effects of that arrestment.

mean that the law will hold such an action, if it be raised, as inadmissible on grounds of morality or public interest, as an *actio injuriarum æstimatoria* is declared inadmissible because no one should allow his honour to be salved with money; the simple object of limiting the right of vindication is the security of the *bona fide* possessor of a thing that does not belong to him, and can in reason only be applied to things that have been the object of legal commerce in the country, or are in the occupation of a person who is domiciled there.²⁹

The view now taken by us will in many cases give results in conformity with that which takes the *lex fori* as its groundwork,³⁰ for actions for delivery of moveables are as a rule brought *in foro domicilii*. It differs from it, however, in so far as it assigns no weight to the purely accidental circumstance what court may be competent, in consequence, perhaps, of the right of revindication, or by a voluntary prorogation of jurisdiction; and it also avoids the contradiction that takes place when the *lex fori* as such is expressly applied, viz. that the rights of the pursuer and the possessor, which stand in indissoluble connection with each other, should be determined by different laws, the former by the *lex fori*, the latter by the *lex domicilii* or the *lex rei sitæ*.³¹

The rules which we have thus worked out must of course be applied to the case of vindication of documents conferring rights on the bearer of them, although with certain modifications resulting from the fact that these documents are at the same time vehicles for relations of obligation. We reserve the discussion of this subject for our chapter on commercial law.

PRESCRIPTION OF MOVEABLES.

§ 237. We have already (§ 223) touched upon the prescription of moveables, and maintained that, as a general rule, the *lex domicilii* of the possessor must give the rule.³² We may again point out that prescription and the limitation of actions for recovery of property must necessarily be subject to the same law, but we must examine the theories which are opposed to our own somewhat more closely.

According to one opinion, the *lex domicilii* of the possessor is the

²⁹ Stobbe comes nearest the view taken in the text, § 32 *ad fin.* The limitations which are good at the place of acquisition, and those which exist by the *lex fori*, will both, according to him, be available to the possessor.

³⁰ So Savigny, § 368; Guthrie, p. 192; Unger, p. 178; Beseler, § 39, note 21; Roth, *Bayer. Privatr.* § 17, note 84. Laurent, vii. § 240, on the other hand, pronounces against any attention being paid to the *lex fori*. Even a French judge is, according to him, never to apply the *lex fori* to things which are in another country.

³¹ See this contradiction *e.g.* in Roth *ut cit.* notes 81 and 84.

³² For the view taken in the text, which rests partly on the application of the *lex domicilii* and partly on that of the *lex rei sitæ*, Massé, pp. 102, 103, and Wharton, § 381, note 7, both pronounce.

universal rule; this opinion³³ will in most cases give the same results as that which I have adopted in the text. Others propose that the *lex rei sitæ* shall be universally applied.³⁴ This latter opinion rests on the consideration that continuous possession is the fact at the bottom of prescription, and that this possession must be governed by the *lex rei sitæ*.³⁵ It is true that it is a permanent possession that is the foundation of prescription; the laws, therefore, which regulate prescription must have reference to some other possession than that which is merely for a time exercised in our country.³⁶ If a thing has been temporarily in different places, then, according to the opposite view, there must be a separate calculation of the proportional time during which the thing remained in each of these different places. This calculation of proportions can be carried out in applying our theory, by which the law of the domicile is applicable, and the *lex rei sitæ* only applicable in exceptional cases, to things, or aggregates of things, where these are permanently attached to some particular place, and by which at the same time the *onus* is laid upon the possessor, who invokes this exceptional application. But the calculation cannot be carried out if we attempt to follow the changes of locality to which moveables of all kinds are subject, changes which no one can control. That is the true reason why those writers who regard the *lex rei sitæ* alone, following Savigny's lead, take as their guide simply the law of the place in which the thing last was.³⁷ But then an active effect is thus attributed to that law for a period during which the thing was not, as a matter of fact, within the territory.³⁸ In this way it would be possible for a thing, the possession of which had not yet run for the full time, to be at once transferred to the

³³ J. Voet in Dig. 43, 4, No. 12. Pothier, *Traité de la Prescription*, No. 242. Merlin, *Rép. Vo. Prescription*, sect. 1, § 3, No. 7. Haus's theory (p. 34), that the *lex domicilii* of the owner rules, has very little influence. It can only proceed upon the untenable assumption that the owner can only be deprived of his property by the operation of the laws of his domicile. By this means, it might be that, under certain circumstances, an intolerable privilege might be conferred on foreigners, *e.g.* if it should be that there was no such thing as prescription by their law, or only under conditions very hard to realise.

³⁴ So Molinæus in L. 1, C. de S. Trin.; Günther, p. 737; Mühlenbruch, i. § 73; Oppenheim, p. 398; Wächter, ii. p. 385.

³⁵ Savigny, § 367; Guthrie, p. 186; Unger, p. 176. But both of these authors speak of prescription only, and not of limitation of actions.

³⁶ The question, whether at a particular moment of time one became possessor, is of course to be settled by the law of the place where the thing then was; and the *lex rei sitæ* may indirectly be of great importance, although in general the *lex domicilii* must, as we have said, give the rule.

³⁷ So Roth, *Deutsch. Privatr.* i. § 51, note 99; Bayer, *Privatr.* i. § 17, note 85; Stobbe, § 32, note 17; Fiore, § 204; Laurent, § 246 (who, however, reads the provision of § 2279 of the Code Civ. simply as an extinctive prescription); Asser-Rivier, § 44; Weiss, pp. 766, 767. Of course, this theory will respect the prescriptive possession which has already, according to the law of the previous residence, been completed, see Savigny as cited. The theory which I have adopted (cf. § 225) is partly in agreement with Roth's and Stobbe's views.

³⁸ The same reason prevents us from agreeing with Schäffner (pp. 84, 85). He proposes to regard exclusively the law, within whose territory the conditions of the prescription first came into existence.

possessor in full ownership by a change of locality, that change being a matter which would be entirely under his own control.³⁹

Lastly, there is a theory by which a marked distinction is drawn between the limitation of real actions and the prescriptive acquisition of a right; while the latter, according to the character of the thing, is to be determined by the *lex domicilii* of the possessor or the *lex rei sitæ*, the former, as being a rule in limitation of an action, and touching merely the question of procedure, is subject to the law of the place where the process depends.⁴⁰ But we have seen already that very many material rules of law are disguised as mere rules of procedure, and this is the case with the limitation of actions. It is not by any rules of process that it is made incompetent to raise an action after a certain period. If it were so, the limitation would first come into existence with the action, and it would not be for the judge to say by his sentence, as is the case, whether it had been established before the action was begun. There is accordingly a rule recognised by the older authorities: "*Præscriptio pertinet ad decisionem litis, non ad ordinationem causæ.*"

[The law of England seems to have adopted the rule laid down by the House of Lords in the case of *Don v. Lippman*, 1837, 5, Cl. and F. 1, viz. that the *lex fori* will regulate all questions of prescription, although Mr Westlake, § 238, regards the principle as extremely questionable.

That case, being a judgment pronounced in a Scots case, is of course regulative of the Scots law, and is in accordance with the doctrine of Erskine (iii. 7, 48) and Story, § 576, who regard prescriptions as belonging to the *litis ordinatio*. The judgment is, however, looked upon by Mr Guthrie (Savigny, p. 269) as subversive of the older and sounder law of Scotland. He reviews all the authorities, and reference is made to his learned note.]

³⁹ Savigny says, "There can be no doubt that all these periods of possession (during which the thing has been in different territories) must be added together. The term of the prescription, however, and the complete acquisition of the property, must be judged of by the law of the place at which the thing is last found, because it is only at the expiration of the whole period that the change of property takes place; before it has only been in preparation." That the periods should be added together is in itself quite right, but that does not imply that the product is to be regarded exactly as the law of the last place concerned would regard it. The proper course rather is to make a calculation of the proportions of the different periods.

Stobbe seems to think that a proportional calculation of this kind may be supported in the case of a change in the period of prescription brought about by new legislation within the territory. But when a change of locality takes place, it is then that the caprice of the individual comes into play, as Stobbe points out, and therefore there is necessarily some danger in applying exclusively the law of the last place to which the thing was brought. But, if we take the analogy of the theory, which Stobbe seems to hold to be correct with regard to alterations of the law within the territory, the possessor can only appeal to the prescriptive period which is applicable by the law of the place in which the thing is subsequently found, on the footing that the period of possession which he has enjoyed under the law where the thing originally was, shall not be taken into account.

⁴⁰ Story, § 576 and § 582.

3. RIGHTS *in re aliena*.

GENERAL PRINCIPLES.

§ 238. The rules of law concerning *jura in re aliena* are partly subject to modification at the will of the parties, partly limitations imposed on the parties in the interest of the freedom of property. In the former class, as Fiore (208) and Laurent (viii. §§ 300-302) have pointed out, some other law than that of the *lex rei sitæ* may rule: it may be the law of the contract by which the right is set up, the law by which a testament is to be construed, or the law of the domicile of the parties concerned. The rules of the second class, on the other hand, must always be applied as the *lex rei sitæ* directs.^{41 42} No doubt it may be difficult, in particular cases, to distinguish the two classes. In such cases, of course, the law of the place in which the thing in question is, must rule, and, as we shall see hereafter, in contracts referring to particular items of real estate, a certain presumption obtains that the parties are subjected to the *lex rei sitæ*, even although they might have given it the go-bye. The result, therefore, is that in practice, where real rights over immoveable estate are concerned, there is a preponderance in favour of the application of the *lex rei sitæ*, so that many authorities, especially in Germany, using what is, literally taken, too broad an expression, speak of the exclusive dominion of the *lex rei sitæ*.⁴³

We do not propose to discuss the matter here in detail, for there is an infinite variety of real rights. It is rather the province of a treatise which takes up the subject of private international law from the standpoint of some particular territorial law to deal with them. We may, however, for the sake of illustration, point out that the duties of a liferenter as against the fiar may possibly, *e.g.* if the liferent is the creation of a family relationship, be determined by the personal law;⁴⁴ but, on the

⁴¹ Cf. Code Civ. § 686. "*Il est permis aux propriétaires d'établir sur leurs propriétés, ou en faveur de leurs propriétés, telles servitudes que bon leur semble, pourvu néanmoins que les services établis ne soient imposés ni à la personne, ni en faveur de la personne, mais seulement à un fonds et pour un fonds et pourvu que ces services n'aient d'ailleurs rien de contraire à l'ordre public.*"

⁴² *E.g.* if the *lex rei sitæ* does not allow an estate to be burdened with an irredeemable debt, a foreign owner cannot lay any such burden on it.

⁴³ Savigny, § 368; Guthrie, pp. 187, 188; Unger, p. 177; Stobbe, § 32, note 18; Roth, *D. Privatr.* § 51, note 95. In my former edition I took this view.

⁴⁴ Laurent, vi. § 15, vii. § 339; Fiore, § 208. The question, to whom the fruits belong with reference to a particular point of time, to the fiar or the liferenter, is ruled in this way (Fiore, § 210). So, too, the question how far a liferenter as such can cut wood (Laurent, vii. § 344, in contrast with Fiore, § 211, who proposes to apply the *lex rei sitæ*); so, too, the duty of finding caution (Laurent thinks not, § 347). This comes out particularly plainly, and it is an important illustration, in the case of a liferent given by the law over an estate as a whole. It would *e.g.* be absurd to require caution from a father, who does not require to give caution under his personal law, in respect of some heritable property lying in another country. Who should make the claim, unless a special guardianship were set up *in foro rei sitæ*?

other hand, the rule of the Code Civil, § 595, which allows contracts of lease, granted by the liferenter, to endure for nine years after the close of the liferent, but no longer, is a rule of law which must always be respected as the *lex rei sitæ*.⁴⁵ This last rule of law, which is different from the Roman rule, exists in the interests of agriculture. The farmer, whose rights should, in strict logic, come to an end with the rights of the liferenter, is to have security for a specified time, while, on the other hand, the liferenter is not to anticipate unduly the rights of the owner who comes after him.⁴⁶ The *lex rei sitæ*, too, must be taken to determine the *maximum* duration of the usufruct that can be given to a corporation (e.g. settled by the 619th article of the Code Civ. at 30 years); the question here is a question of protecting the freedom of ownership against the undue prolongation of a burden. But it is plain that any one, who proposes to give a corporation an usufruct, may limit its duration as he likes, and may reduce it below the measure which is allowed by the *lex rei sitæ*, while the law of the nationality or the domicile must rule the interpretation of the testator's will. If this law, then, prescribes a shorter duration than the *lex rei sitæ*, we must in doubt hold that the usufruct of a real estate is given for this shorter period only.⁴⁷

APPLICATION OF THE GENERAL PRINCIPLES TO MOVEABLES.

§ 239. As regards real rights over moveables, in so far as the relations of the owner and the person enjoying any such right are concerned, the law of the place in which the thing by accident happens to be will be less frequently applied, and therefore the personal law or the territorial law, which governs the contract on which the servitude rests, will more frequently be applicable.

In such cases it will generally be possible somehow to set up an obligation to grant the real right in so far as the thing is in the power of the owner, and if the owner of the thing should carry it off to a country in which the right would not be recognised as a real right, he would as a general rule have to face an action of damages, or an action based on the obligation of recompense. The owner will not, then, be easily tempted to invoke the law of the place where the thing for the moment is, against the person who claims a servitude. The rule "*mobilia personam sequuntur*"

⁴⁵ Fiore, § 210, with reference to the Italian Code, which appoints in such case a limit of five years. Laurent, § 341.

⁴⁶ So, too, Laurent, vii. § 350. There is certainly no good object in extending this rule to the liferent of moveables. In these cases, the *lex domicilii* or the national law of the person setting up the liferent must have exclusive sway, the one or the other of them, according to the particular circumstances of the case.

⁴⁷ In the case of *Emphyteusis* and *Superficies*, the contract on which they rest points at the *lex rei sitæ*. See Fiore's thorough discussion (§§ 214-217) of the provisions of the Italian Code which would be unconditionally applicable to real estate situated in Italy (see, e.g. § 1564, on the right of free sale by the *Emphyteuta*, and § 1562, on the prohibition of *sub-emphyteusis*).

has a certain justification in fact in this connection. The law of the place where the thing for the moment is at some later period of its history may, however, be of importance for the rights of third parties in accordance with the principle laid down *supra*, § 226, No. 2.

It may be that a real effect should in one country be attributed to a contract, *e.g.* of hire or lease, while in another contract that effect is denied to it.

Savigny [§ 368, Guthrie, p. 188] is of opinion that such a real right will always arise if the *lex rei sitæ* gives it, no matter what the law which rules the contract in other respects says, and, on the other side, that it will not arise if the thing at the time of the contract⁴⁸ happens to be in a country in which that rule of law is unknown.

It will, however, in the former case depend on the intention of the parties in making their contract. We can hardly look upon a provision of that kind, which gives the hirer or lessee a real right against third parties, and particularly against a purchaser, as an absolute provision, which will not yield to the wishes of the parties.⁴⁹ It may be, then, that the parties only intended to create a relation that should have a purely personal effect, and whether they had that intention or not is a *questio facti*. In most cases that will have been their intention. That does not, however, settle what the rights of a singular successor of the hirer or lessee, or of a sub-tenant, will be. It is possible that, if he is in *bona fide*, the *lex rei sitæ* will secure him a real right.

But, in the second case, the question will be whether the law of the land, in which the thing is, gives parties the power of burdening the thing to any extent they please with personal servitudes, or at least of doing so in so far as contracts of lease are concerned, and whether this power can be exercised without solemnities. If this power must be admitted in accordance with the *lex rei sitæ*, there would be no reason for denying the real character of the right of the hirer or lessee, if the parties intended that it should have that character.⁵⁰ In most cases of contracts about immoveable property that will not have been their intention (see the law of obligations). But, for instance, if two Prussians domiciled in the territory of the Prussian *Allgem. Landr.* conclude a contract for the hire of a thing that happens to be within the territory of the Roman law, there is no doubt that a real right might arise, if that were the intention of the parties; and a real right of that kind, which had arisen within the territory of the Prussian *Allgem. Landr.*, might be made effectual in the territory of the common Roman law, if the thing were subsequently brought there. The common law of Rome does, as a matter of fact, recog-

⁴⁸ By the Prussian *Allgem. Landr.* i. 2, §§ 135-137, the real right does not arise till the thing is delivered to the hirer or lessee: by the Code Civ. § 1743, the question turns upon whether that party has a "*bail authentique*," or a bargain with a certain date.

⁴⁹ So Laurent, vii. § 297.

⁵⁰ Cf. Laurent, vii. § 297, who in this matter rightly makes the intention of the parties the primary rule.

nise rights of use in particular moveables of the nature of servitudes, which can be followed out against third parties in possession of the things; the acquisition of possession in a country where that law prevails does not guarantee any protection against an action at the instance of the person having right to the servitude, and does not therefore annul the right which has arisen, and validly arisen, within the territory of the *Allgem. Preuss Landr.* It would, however, be different if the thing were afterwards possessed in a country where the rule "*possession vaut titre*" prevailed as regards moveables. In that case the real right is irreconcilable with the right of the possessor, and is therefore extinguished. Savigny (*ut cit.*) thinks that recognition should be denied in the territory of the Roman law to the real right which has arisen within the territory of the Prussian *Allgem. Landr.*, because we have here to deal with a legal institution which is not recognised at all in the former territory. We must, however, dispute the value of this argument (see *supra*, § 29). The result would be—a result which Savigny himself repudiates—that, if property could only be acquired by means of a *traditio* in this country, no one could follow out here a right of property, acquired in another country without *traditio*, by a simple contract, on the ground that a right of property without an accompanying *traditio* is not recognised at all in our territory.

THE RIGHT OF PLEDGE.

§ 240. The right of pledge is the real right in a thing which can be made good against a third party in possession, its object being to compel satisfaction of a personal obligation. A right of pledge is, therefore, dependent on—1st, the existence of a valid obligation, and that by the law to which the obligation is subject; ⁵¹ 2nd, the law of the place in which the thing happened to be at the time of the legal transaction or occurrence on which the right of pledge is founded: it is only the latter that is to be discussed here. The former subject belongs to the law of obligations,⁵² just as do all the obligations⁵³ which arise between the person who gives

⁵¹ The law of obligation recognised at the place where the thing is is only of moment in so far as it may be impossible, by reason of the theory of that law that it is illegal to satisfy the obligation in question, to constitute a right of pledge, although by the *lex loci contractus* the obligation may be quite valid: if, for instance, a security should be given over an estate in this country in satisfaction of a gambling debt. The cases are the same as those in which it would be incompetent to raise action in our courts (Burge, iii. p. 390). As the pledge serves to secure the obligation, it is only valid in so far as the personal obligation is legal according to the law regulating it; and, in the same way, it only covers such interest as is permitted by the *lex loci contractus*, although by the *lex rei sitæ* a higher rate might be allowed (Burge, iii. p. 395). See, too, the judgment of the Supreme Court of the United States, reported there.

⁵² See *supra*, § 239, as to the question whether a contract of pledge, that does not by the *lex rei sitæ* create a real right, gives a personal claim to the other party to the contract to have such a right granted. The provision of the Prussian A. L. R. i. 20, §§ 402, 403, does not negative it. It is only meant to apply to the ordinary case of a contract concluded between natives at home.

⁵³ The same thing is true, of course, as to the interpretation of any accessory agreements which the parties may have. *E.g.* the Prussian *Allgem. Landr.* i. 20, §§ 26, and 225-227,

the pledge and the person who gets it, so soon as the thing is delivered to the latter (*Actio pignoratitia directa* and *contraria*).⁵⁴ The duty of submitting all such questions to the law which governs the obligation may, however, be modified, if it should happen that the law recognised at the place where the article pledged is, adopts, in the interest of third parties acquiring in good faith, the principle of what is called the independence of the hypothec, or recognises the possibility of debts heritably secured being entirely independent.^{55 56} The discussion of these questions, however, would lead us too far into the laws of particular States. The prevailing view, then, is that the existence of the right of pledge is in general determined by the *lex rei sitæ*, although many authorities, simply on the ground of the fiction of the situation of moveables at the domicile of the owner or possessor,⁵⁷ make an exception in the case of moveables, and judge of the conditions of the origin of the right by the *lex domicilii* of the pledger.

There is no reason for departing from the general rule as to the application of the *lex rei sitæ*, since it does not require any permanent relation of possession to originate the right of pledge. In many cases, however, the view we have taken will coincide in its results with that which makes the *lex domicilii* of the debtor the rule; for moveables can be brought into the territory of that country to which the debtor personally belongs, and then, if the legal relation from which the pledge takes its rise continues, these moveables will come within the scope of the law of pledge as that is understood by the *lex domicilii*.

CREATION OF SECURITIES OVER REAL PROPERTY BY DEEDS EXECUTED IN ANOTHER COUNTRY.

§ 241. The differences which exist among different legal systems in this

construes the agreement that the pledgee is not to have the power of alienation, to the effect that the debt is to be satisfied out of the fruits and the use had of the thing pledged, or, if this cannot have been the view of the parties in the circumstances, to the effect that sale shall not take place except in the event of the pledgee's bankruptcy, a result which would not be prevented by the personal action against him. An agreement of that kind meant under the Roman law that three premonitions should be given. L. 4, 5, D. *de pignor. act.* 13, 7.

The effect of a subsidiary bargain as a real contract must, however, be determined by the *lex rei sitæ*. The so-called *lex commissoria* has e.g. no operation as a real contract, if such an agreement is invalid by the *lex rei sitæ*.

⁵⁴ Fiore, § 220, p. 307.

⁵⁵ See on this subject Beseler, § 103, note 36.

⁵⁶ What is the result if, conversely, the *lex rei sitæ* does not recognise a contract to grant security, or fasten any personal obligation on the owner who proposes to create such a right? We must hold in such a case that the person founding on the contract has subjected himself to these provisions, and of that there can be no doubt, if he is domiciled in the territory of the *lex rei sitæ*. The Court of the Empire (iii.) determined on 27th May 1886 (Bolze, *Praxis*, 3, No. 17) that in such a case no personal obligation could be created by a contract concluded in another country.

⁵⁷ So J. Voet in Dig. 20, 2, No. 34; Boullenois, i. pp. 833, 834; Matthæus, *de Auctionibus*, i. cap. 21, No. 41.

very subject of the law of pledge give rise to many difficulties and disputes, in spite of the simplicity of the principles to be applied.

(1.) Is it possible to create a security over real property by a deed executed in another country?

This question has been raised in consequence of a misunderstanding in the jurisprudence of France. However, it is a matter of interest for the whole international treatment of the law of pledge that it should be investigated. In sound legal reasoning, the answer is simply this: If the form which is required by the *lex rei sitæ* can be observed in the other country as well, then a hypothec or security may be constituted by a deed executed in that other country: if not, then it cannot be so executed. If, then, the *lex rei sitæ* requires the security to be entered in some public books or records, which can only be done at the place where the thing is, or at least only by officials of that country, then a deed executed abroad can never directly set up the security as a real right. But, on the other hand, if we are contented with a public document, *i.e.* one attested by public officials, and as regards its date beyond all doubt, such a document can be procured in another country, and is then as good a foundation for the security as any other. If, again, a declaration officially certified and emitted by the person who is entitled to create a security is sufficient warrant for the official of the country, in which the thing is, proceeding to make an entry in his register, it is not easy to see why a public document executed in another country should not give a good title to demand registration of a security, if any recognition at all is to be given to foreign public documents as conclusive pieces of evidence.

German practice and German legislation on this subject are fixed on this point, that they allow securities to be engrossed in public books only if they are authenticated as public documents: and this again is the only means by which they can acquire effect as real rights. The Belgian statute of 16th December 1851, § 77, takes the same ground; it sets, however, foreign public documents on an equal basis with Belgian public documents, and only prescribes that their genuineness shall first be tested by the President of the Civil Court.⁵⁸

On the other hand, the law of France confuses the executorial effect of public documents and judgments with their effect as evidence. By the older law of France, every personal bond in the form of a notarial instrument, and every acknowledgment before a notary of a bond privately executed, created, as a matter of common law, and without any special stipulation being required, a hypothec over the whole property of the debtor, which served as a preliminary stage of a *parata executio*. This hypothec was a result of the executorial force of the instrument. The ordinance of 15th January 1629, § 121, confused in a strange tangle

⁵⁸ See particularly Haus, *Dr. Pr.* p. 394. This Belgian statute abolished also the implied hypothec attributed to the judgment and to the notarial instrument *ipso jure*, without respect to the intention of the parties.

the executorial effect of an instrument and its effect as proof, and the legal effect of a judicial award, and went so far as to withdraw all the effect as evidence due to publicly attested documents from foreign instruments, even in matters of voluntary jurisdiction, if French subjects had any part in them. This provision has in part passed away with the abolition of the distinction between French and non-French parties in the 2128th article of the Code Civil.⁵⁹ It is not, however, easy to see why the owner, who by a legal transaction in a foreign country can divest himself of his real property, or burden it with servitudes, should not be able to constitute a security over it by a public document executed in a foreign country, although it is of course quite sound to hold that, if the hypothec implied in an obligation is looked upon as the first stage of diligence, no such effect shall be attributed to a foreign document, or to a foreign judgment.⁶⁰

RIGHTS OF PLEDGE ARISING BY OPERATION OF LAW.

§ 242. (2.) It may be that the law, without the parties having themselves had any such result in their view, makes a right of pledge arise directly from the transaction. In such cases we remark, for the purposes of international law:—

(a.) Unless the forms prescribed by the *lex rei sitæ* are observed, no right of pledge arises. But that does not supply an answer to the question, whether a legal relation, which in all other respects is ruled by a foreign law, may not found an obligation to constitute a right of pledge in the forms of the *lex rei sitæ*, may not give a title which the *lex rei sitæ* must recognise.⁶¹

(b.) If the law, to which the legal relation which is to be secured by the hypothec is subject, and the *lex rei sitæ* concur in holding that a right of pledge, or a title to demand one, arises from the contract, there is no reason for disputing the operation of that foreign legal relation on the ground that the hypothec would serve to secure a legal relation which

⁵⁹ “*Les contrats passés en pays étranger ne peuvent donner d'hypothèque sur les biens de France, s'il n'y a des dispositions contraires à ce principe dans les lois politiques ou dans les traités.*”

⁶⁰ French jurists of the most recent date are pretty much at one in thinking that § 2128 of the Code Civil rests upon an obvious misunderstanding. Cf. Duguit, *Forme*, p. 106. Laurent, vii. § 391, says very rightly that the authors of this article have confused the rights of sovereignty and the rights of the parties as independent contracting persons. See, too, Lyon-Caen, J. ix. p. 250; Weiss, p. 790; Fiore, § 222. Fiore points out that the confusion we have noticed appeared in some degree reasonable at a time when securities were not as yet registered. The Italian statute book says simply and soundly, “*Gli atti seguiti in paese estero, che si presentano per l'iscrizione, devono essere debitamente legalizzati.*” § 2128 has involved Frenchmen resident abroad in many disadvantages, a result such as often flows from provisions of this kind that take their rise in the darkness and obscurity of foolish notions of isolation and sovereignty. More modern treaties have no doubt done some good by means of consular jurisdiction. Cf. Weiss, p. 792. Fiore, too, *Effetti*, § 202.

⁶¹ See Loiseau, *Traité de tutelle*, p. 249.

belongs to another country, or would give security to a foreigner. (Fiore, *Effeti*, § 205, urges that such an *ipso jure* hypothec may be regarded as having been silently consented to, as a *hypotheca tacita*.) Any other view is at variance with the principle, now universally recognised as a rule, that foreigners and natives are to be recognised as having equal rights in matters of private international law. No recognition has been extended to any such theory except in France,⁶² and there only on the ground of the doctrine, which we have already (§ 96) pronounced to be mistaken, of the distinction between *droits civils* and *droits naturels*. The more modern theoretical French jurists are more and more in agreement that this distinction should be rejected,⁶³ although it is still recognised in practice, and in particular is maintained intact as regards the implied hypothec of the married woman, and the minor who is under curatory.⁶⁴

But in my view the principle thus adopted suffers an exception in the case of these implied rights of pledge which belong to the State, the fisk, as such [over the property of its officers]. Privileges of this kind have reference only to the State to which a person belongs, and the same must hold true of other corporations, which in truth are mere subdivisions of the organisation of the State, *e.g.* burghs and provinces. It may be otherwise in the case of ecclesiastical foundations and charitable foundations (see *supra*, § 107).

(c.) If the law, by which the legal relation is in other respects ruled—that relation to secure which by a hypothec is the matter under our consideration—gives it no implied hypothec, and no right to claim one, there is no reason for assigning one to it, should this be the effect of the *lex rei sitæ*. The implied right of pledge given by the law rests on this ground, that the legislature holds that the legal relation in question requires and deserves such protection.⁶⁵ But if that relation is ruled, not by the *lex rei sitæ*, but by some other system of law, which does not consider any such protection necessary, we cannot hold that the *lex rei sitæ* should, in spite of that, still give it.⁶⁶ If, for instance, the law which regulates the

⁶² Cf. Aubry et Rau, i. § 78, note 62, and the citations in Weiss, pp. 367, 368, note.

⁶³ Demangeat, note on Fœlix, i. p. 151; Durand, p. 432; Chavegrin, *Rev. critique*, 1883, p. 587 (see p. 586 for the cases in which the French law allows, as an exceptional indulgence, to a foreign minor an implied hypothec). Laurent, iii. § 328, criticises very severely the refusal to give this hypothec, but thinks that the law is so settled in France. In Belgium it is now expressly enacted that foreign minors and foreign wives may claim this hypothec (statute of 16th Dec. 1851; see Haus, *Dr. Pr.* p. 318).

⁶⁴ Laurent, vii. § 394, proposes to allow the foreign State to enjoy this hypothec, if it exists both by its law and that of the *lex rei sitæ*.

⁶⁵ Cf. Laurent, vii. § 395. If, for instance, the State of the domicile does not think it necessary to give the wife a right of security for her property, why should another State think that it had any concern in giving such protection?

⁶⁶ Cf. Rodenburg, ii. pars. 1, c. 5, § 16; J. Voet in Dig. 20, 2, § 34; Günther, p. 737; Merlin, *Rép. Remploi*; Troplong, *Hypothèques*, § 513. Cf., too, the judgment reported in the official journals of the judge of the Supreme Court of Baden, vol. xiii. (1852-1853). By this judgment a foreign married woman was refused the statutory right of pledge in real estate belonging to her husband in Baden, because married women who are foreigners can only make

conduct of a tutory limits the powers of the guardian, so that the fiction of a statutory right of pledge over his estate is unnecessary, it would seem strange that the law of another country should add a statutory right of the kind to the other safeguards which it provides; and it would be specially inequitable if, for example, the law of the domicile required a special bond of caution from the guardian, while at the same time his estate abroad was burdened with a general statutory pledge,⁶⁷ from which the law of his domicile released him.⁶⁸ There are, no doubt, some to be found who maintain that no law but the *lex rei sitæ* can be regarded, because what we have to deal with here is a real right over immoveables. This view, however, rather belongs to the older schools of jurisprudence.⁶⁹

Conversely, if the law of the obligatory legal relation in question grants it the security of a hypothec, while the *lex rei sitæ* does not, the real right cannot be directly created by virtue of the former law. The multiplication of implied rights of pledge imperils the security of credit, and of transmission of property.⁷⁰ Although, therefore, the *lex rei sitæ* looks upon such rights as permissible in particular cases, without requiring them to be recorded in public books, it does not by any means follow that it will be inclined to allow the same serious effect to all other possible legal relations, in which a foreign law has thought proper to allow it. It will be all the less inclined to do so, since third parties may not always be able to find out easily whether a particular legal relation is to be ruled by foreign law, or by what foreign law it is to be ruled.

The result we reach, then, so far as we have to do with rights of pledge arising immediately by force of law, and requiring no further formalities to be observed to ensure publicity, is this: this implied right of pledge will arise only if the *lex rei sitæ* as well as the law which in other respects governs the legal relation so provide.⁷¹ This is true particularly of the implied security which a ward has over the property of his guardian. The ward has such a security only in so far as it exists both by virtue of the legal system which rules the guardianship and by the *lex rei sitæ*. No

good a right of pledge under the same conditions as a native married woman can; and these conditions, among which was an antenuptial marriage contract in public form, were awaiting in the case under consideration. See Fiore, § 230.

⁶⁷ To the same effect, Loiseau, *Traité de la tutelle*, p. 250. Cf. judgment of the Rhenish Court of Cassation at Berlin, 20th February 1843 (Volkmar, p. 118): "§ 2136 of the Code Napoleon assumes that a guardian belonging to this country administers the estate in accordance with this country's laws. If in another country an implied hypothec is recognised, but is confined to its own territory, it is not to be stretched beyond these limits."

⁶⁸ Fœlix, § 67, p. 151. If the transaction in question falls under the *lex rei sitæ*—as is generally the case, for instance, if one has lent money to repair a house that has fallen into ruin—it is enough, of course, that the *lex rei sitæ* should give a statutory right of pledge. The foreign lender has the statutory right of pledge necessarily involved in such a loan by the provisions of Roman law (L. 1, D. 20, 2), if the house is in a country that recognises the common Roman law.

⁶⁹ Troplong, *Des privilèges et hypothèques*, § 429, approves of this implied security being regulated by the *lex rei sitæ*.

⁷⁰ Cf. Laurent, vii. § 397.

⁷¹ So, too, Stobbe, § 32, note 11.

exception is to be made for cases in which this implied right of pledge is referred to the conclusion of a bargain to that effect. We may admit that in many such cases this right was originally expressly stipulated, and that the usage of everyday life gradually raised this term of a contract into a condition which was universally implied, as we know very well from the 2nd title of the 20th book of the Digest was the case: "*In quibus causis pignus vel hypotheca tacite contrahitur.*" But in truth the implied right of pledge is, even in such cases, and even where it is lawful to renounce it, not a provision of the contract by a tacit expression of intention: it is dispositive law. This implied right of pledge arises even if both parties are ignorant that any such right is created by the contract, or even if they believe the contrary.⁷² This implied right of pledge, with immediate operation as a real right, will not come into being in a case where it is deduced from some contract obligation, even although the *lex rei sitæ* is familiar with tacit rights of pledge springing directly from contracts, without the necessity of any particular form, unless the particular class of contract in question is one of those in which the *lex rei sitæ* recognises it.

It is, however, a different question whether the law that governs the obligation in other respects may not give rise to a supplementary obligation which should be recognised by the courts of the country in which the thing is, to the effect of compelling the constitution of an express right of pledge in the forms recognised by the *lex rei sitæ*. Fiore, § 225, who treats the questions that arise in this connection with much detail, maintains unhesitatingly that it does. We must, however, take a distinction.

There are, of course, two very different classes of cases: on the one hand, the law may directly associate a certain obligation with a corresponding right of security, which is originated without any special form, and is not published in any particular fashion, and is again extinguished of itself without any particular difficulties; on the other hand, the law may oblige a man to submit his property to a burden to be recorded in the public registers, which as a matter of fact frequently has an influence on his credit, and can often only be got rid of with difficulty, and in a formal judicial proceeding. From this we may draw this conclusion, viz.: If a man proposes to claim such a formal security as the consequence of a contract, he must stipulate expressly for it: he shall have no such claim as a matter of course over property of his debtor situated in another country, even although any property he may have in this country would be at once affected by a right of security without any visible shape or form.

The situation may, however, be different in those cases in which the implied security right, which does not require to be constituted in any formal method, is merely a *quid pro quo*—often very inadequate—to balance the extensive right of administration and enjoyment, which, for instance, the father has over his child's estate, or the husband over that of his wife. In such cases there can be no bargaining, and it may therefore

⁷² See Chavegrin, *Rev. critique*, 1883, p. 584, and the citations there given.

be equitable to set the security right which arises directly over the estate in this country, and the security right which will require to be formally constituted over foreign property, on the same footing to a certain extent, by recognising in such cases a legal title to demand the constitution of a formal security according to the forms of the *lex rei sitæ*. Laurent (vii. § 298) is therefore plainly right in coming to the conclusion he does in the following case. The Belgian statute of 1851, in place of the direct security given *ipso jure* to wives and minors, gave these persons a legal title to require special securities which might be publicly registered. Laurent proposes to give French wives and French minors, by whose personal law the *ipso jure* security still exists, the same title as the Belgian law gives to its own subjects to require security over property belonging to their husbands or guardians in Belgium. As the law of Belgium coincides in other respects with that of France as regards the law of married persons' property and the law of guardianship, and as it holds this change of law to be equitable for Belgian wives and minors, it follows that, from the point of view of the Belgian law, it is equitable for French wives and minors also.

We must not, however, without further inquiry, assume any such substitute for the direct right of security arising *ipso jure*. Thus, for instance, the Prussian legislature (cf. *Vormundschaftsordnung* of 1875, § 58) holds that it is not politic to lay upon the guardian, constituting a special security whose property was, by the common law recognised in several Prussian territories, burdened with an implied *ipso jure* security, which was not published, in favour of the ward, an obligation to grant a special security.

The personal law will in the cases we have mentioned give the rule, but we must not assume in every case that the personal law will agree to substitute in place of the implied *ipso jure*, but unpublished, security, which is not recognised by the *lex rei sitæ*, a title, which is known only to that *lex rei sitæ*, to require a special security, and one that shall be published.⁷³

RIGHTS OF PLEDGE OVER MOVEABLES.

§ 243. (3.) With regard to moveables, special difficulties arise:—

(a.) Moveable things, too, will only be affected by a right of pledge, if the forms of the *lex rei sitæ* are observed.⁷⁴ But, if the intention to constitute a pledge, or the relation which *ipso jure* involves a pledge, continues to subsist,⁷⁵ that moveable will subsequently be affected by the right of

⁷³ Fiore, § 233, proposes to deal in this way with the French right of pledge which follows a judgment: this cannot, however, be approved, as the recognition of this hypothec goes deeply into the law of pawning and execution, which must be left entirely to the *lex rei sitæ*.

⁷⁴ Imperial Court (i.) 5th Sept. 1873 (Entsch. xi. § 7).

⁷⁵ It is not, however, to be assumed that it does subsist, and so a special pledge of a moveable article, which is invalid by reason of incomplete delivery, will frequently not come into operation without some new declaration of intention by the pledger, if the thing is subsequently brought into a territory, in which no delivery is necessary.

pledge, if it reaches a territory in which it is possible to constitute a pledge without any particular form, or which recognises and allows the form which is in accordance with the law that governs the legal relation the security of which it is desired to effect by the pledge. If, for instance, a man, in accordance with the law of his domicile, that is, the common law of Rome, pledges his whole property;⁷⁶ a moveable article belonging to him, which happens to be in some territory in which no pledge of moveables except by actual delivery is recognised, is not at once affected by this pledge. But the moment the thing reaches the territory in which the law of the pledger's domicile prevails, it falls under the impledgment.⁷⁷

(b.) A moveable thing, over which a right of pledge has been well constituted in conformity with the *lex rei sitæ* at one time, is not discharged of that burden by being brought into a territory by the law of which some different form would have had to be observed in order to constitute a pledge. But it is discharged of this burden, if a third person acquires, in accordance with the law of the place where the thing is subsequently found, a right in the thing which is incompatible with the subsistence of the pledge, or if by the law of that subsequent situation the right of pledge can only continue to subsist under a condition, which cannot be satisfied by the pledge as constituted by the law of the place where the thing originally was.⁷⁸ Thus a right of pledge, which could be constituted according to the law of country A over a moveable by a verbal treaty, will not be lost if the thing is subsequently brought into a country in which written documents are necessary to constitute a pledge. But a pledge constituted in country C, in which the Roman law of pledge obtains, without delivery of the thing, is extinguished if the thing is brought into territory D, in which the maxim "*possessio valet titrè*" prevails, or into some territory in which a right of pledge can only be constituted by possession, and can only subsist by virtue of possession.⁷⁹ In the latter case, however, if the thing is brought by the debtor to C, without any third person having acquired in D any right that is incompatible with the right of pledge, then, in accordance with what we have said, this right of pledge will at once revive.

⁷⁶ By the Roman law, as is well known, such an impledgment affects even property that may be subsequently acquired, and so, of course, property that has been acquired, but is only at some later date brought into the country or to the domicile of the pledger.

⁷⁷ The illustration from the law of the town of Hannover which I gave in my first edition is no longer applicable, as the law has been altered.

⁷⁸ See, too, Unger, p. 179. There is a complete and sound train of reasoning in a judgment of the Sup. Ct. of Appeal of Oldenburg, of 18th May 1861 (Seuffert, xvii. § 111). A judgment of the Supreme Court at Berlin, 8th April 1875 (Seuffert, xxxi. § 131), is less pointed, and recalls rather Savigny's reasoning: in its result it is quite sound: it denies effect to a general hypothec within the territory of the Prussian Allgem. Landr. because that law recognises only pledges coupled with actual delivery.

⁷⁹ This is the explanation of a remark of Thöl (§ 84, note 9): he argues thus against the regular application of the *lex rei sitæ* to real rights in moveables: "Two Prussians contracting, who, for instance, wished to constitute not a pledge (Faustpfand) but an hypothecation over a thing, a right which Prussian law does not recognise, need only take the thing for a short time over the frontier."

These rules, which are obvious to good sense,⁸⁰ rest on the principle of the importance which is due to the law of the place where the thing last was (see *supra*, § 225).

Savigny (§ 368, Guthrie, p. 191), who does not recognise this principle, but is much more taken up with the principle of vested rights, to which he refers in connection with this class of cases, can find no other foundation on which to put these results than to hold that the right of pledge created by bare contract is quite a different legal institution from that which may be created by delivery of the thing itself, that the two institutions have nothing more in common than their name and their general object, and that therefore the creditor would be appealing to a legal institution unknown to the law of Prussia.⁸¹

The fallacy of this reasoning appears from the following illustration: Suppose the legal system of a country will not recognise the validity of a pledge unless it is constituted by writing: a ship has been pledged in another country, by the law of which written documents are not necessary. According to Savigny, in such a case the impledgment of the ship would not be recognised in the former State. But, putting aside the very dangerous consequences of this doctrine, Savigny's whole reasoning rests, as we have noted (§ 29), upon that ambiguous rule, that a right which would not have come into being by the law of our country in the foregoing circumstances, should not be recognised by us. Even a right of pledge that arises by the operation of the law, once it has been well constituted by the operation of the *lex rei sitæ*, is not extinguished by the fact that the thing is brought into a territory in which the law would not hold that such a right had arisen in the circumstances, or in which there are no such rights of pledge by the operation of the law. According to Savigny's reasoning, we would reach results which would be in the highest degree dangerous for the rights of creditors who hold securities over ships.⁸² To refuse to recognise rights of security over ships simply on the ground that, in the country in which the ship last came to be, other forms of impledgment existed, or other circumstances were required to originate such a right, would destroy all the security of creditors.⁸³

⁸⁰ See Fiore, § 220c. On these cases, see Wharton (§ 323).

⁸¹ Against this argument, which is often adopted on Savigny's authority, see a judgment of the Supreme Court of Appeal at Rostock, 16th May 1859 (Seuffert, xvi. § 90), and the judgment of the court at Oldenburg cited in note 77.

⁸² On rights of pledge over seagoing ships which arise by operation of law, see Code de Commerce, §§ 191-194. *Ally. Deutsches Handelsgesetzbuch*, §§ 757, 758, and *infra* on maritime law. The view taken in the text is confirmed by the judgment of the Supreme Court of Louisiana reported by Story, § 327a. The case of vindication of goods sold ("stoppage *in transitu*," as it is termed in England) is analogous, if by the law of the country where the thing was at the time of the sale the property is not passed, and the goods are then claimed by the seller at a place by the law of which the property has passed. See the decision of an English court upon this point in conformity with the view in the text. Story, § 402, note. [*Inglis v. Usherwood*, 1, East. 515.] The creditors of the bankrupt merchant who had received the goods in England had to give them up. Cf. *Deutsche Concursordnung*, § 36.

⁸³ Story, § 402a.

PRIORITY OF RIGHTS OF PLEDGE.

§ 244. The priority of rights of pledge is determined by the *lex rei sitæ*; and as regards immovables, there can be no question of this. In moveables, the law of the place where the thing was at the moment the competition took place decides; this is a result of the rule, that in so far as one acquires a new right in a thing in one territory, the right which was previously acquired in it in another territory is limited or destroyed.⁸⁴

The special limitations of actions upon pledge, and the pleas competent to the possessor, are subject to the same laws as determine the competency of the *rei vindicatio*. This is specially true of the plea of retention on account of other claims competent to the creditor.⁸⁵

§ 245. Rights, as well as corporeal things, may be made the subjects of pledge. To pledge a right is simply to assign it conditionally, in the event, that is to say, of the debtor failing to pay, or to pay timeously. Such pledges are ruled by the law to which the right so impignorated is otherwise subject; *e.g.* when personal claims are pledged, the law which is applicable to the assignation must be respected; and when rights carrying with them a disposition in security are pledged, the *lex rei sitæ* as well, since the right of pledge, and consequently the conveyance of such a right, are subject to the *lex rei sitæ*.

REAL RIGHTS OF GERMANIC ORIGIN. RIGHTS OF LORDSHIP (*Bannrecht*).
FEUDAL RIGHTS IN PARTICULAR.

§ 246. Real rights of purely Germanic origin, such as the right of sporting, of fishing, and the like, or peasant proprietary rights, rights of entail or feu-rights, must be determined by the *lex rei sitæ*, and no doubt as to that has ever arisen except⁸⁶ on some points of detail. In the same

⁸⁴ Savigny, § 368; Guthrie, p. 191; Story, § 323; Wharton, § 324. We shall return to this subject when we come to discuss bankruptcy. Cf. judgment of ii. Civil Senate of the Supreme Court of Appeal at Celle, on 17th April 1861 (Seuffert, 14, p. 445), "The writing which forms the foundation of the pursuer's contention cannot give him the right of preference which he claims in relation to the impignorated vessel, for a claim of bottomry, according to our law, does not involve any privileged right of security, and the privileges which are accorded to it by the law of Hamburg, cannot regulate the order of preference of real rights in a competition in this country, although the contract that gave rise to the real right may have been under the regulation of the law of Hamburg."

⁸⁵ By Prussian law, A.L.R. i. 20, §§ 171, 173, the plea of retention is only competent to enforce claims by the pledge arising out of the transaction of pledge, but by Roman law it does not matter to what the claims have reference.

⁸⁶ Rights of reduction with regard to heritage are also, putting out of question the dispute as to whether the actions arising on them are real actions or actions *in rem scriptæ*, to be

way the so-called rights of compulsion [thirlage] or exclusive dealing;⁸⁷ and also questions as to liability for erection of churches, are determined by the *lex rei sitæ*.⁸⁸ But if a right of that character is bound up with some particular estate, then in that case the law of the *praedium serviens* must decide. That must in particular hold good for any compulsory abolition of such rights, for that, *e.g.* abolition of a thirlage, is done in the interest of the servient tenement, or at least in the interest of the inhabitants of the district which is under the restriction.⁸⁹ Lastly, it is possible that, in the case of a feu-right, the feudal court should have a different law from that which prevails at the place where the *fundus serviens* is situated. Is the *lex rei sitæ* or the law of the court to decide? This question is much debated, especially among French jurists.⁹⁰ The solution of the question must be to the effect that the law of the feudal court shall be held to regulate all questions that can competently be the subject of agreement, but that all questions which belong to the *jus cogens* shall be ruled by the *lex rei sitæ*. The law of the feudal court must therefore rule in questions as to the formalities to be observed in the feudal court, the duties payable to the overlord, and the right of escheat: for all these questions are among the conditions (no doubt fixed once for all) under which the overlord allowed the feu-right to be constituted.⁹¹ On the other hand, the *lex rei sitæ* must determine the right to convert the holding into an allodial holding, without the overlord's consent, and must settle how far the vassal can dispose of an estate of that character, and whether third parties can avail themselves of these powers, *e.g.* powers of burdening or alienation. The

determined by the *lex rei sitæ*. Hert, iv. 62; Boullenois, i. p. 500; Bouhier, chap. 30, note 8; Ricci, p. 599; Hommel Rhaps, vol. ii. obs. 409, No. 4; cf. Beseler, ii. § 125, ii.

⁸⁷ Judgment of Appeal Court at Lübeck, 12th June 1855 (Seuffert, xx. § 5).

⁸⁸ Judgment of Supreme Court of Bavaria, 27th March 1877 (Seuffert, xxxiv. § 82).

⁸⁹ The judgment of the Supreme Court at Lübeck of 12th June 1855, reported by Seuffert, xx. § 5, is therefore unsound. In this case, abolition of the right by the law of the country to which the *praedium dominans* belonged was allowed to rule. The true foundation of the judgment is that maxim from which so much can be extracted, viz. the principle of the seat of the legal relation. But the fact that the corn must be ground in this particular mill, does not make it the seat of the legal relation even in Savigny's sense. The seat of the legal relation is the district which is under obligation. The law of the *praedium dominans* can never have an interest to abolish the right. No doubt the *praedium dominans*, the mill, is under certain obligations, and if the law of the *praedium dominans* made it impossible to fulfil these, then for want of reciprocity all obligations upon the district belonging to the lordship would also cease. But abolition of the law that allows these exclusive privileges is not the same thing as a prohibition against fulfilling the obligations, under which the *praedium dominans* lies. It may voluntarily fulfil these, and so long as it does so, so long it is quite impossible to allow the inhabitants of the constituted territory, which is in a foreign country, to appeal to the abolition of the law regulating these privileges, which has been passed only in the country of the *praedium dominans*. The judgment of the treaty of Breslau cited by Seuffert seems to have been to this effect.

⁹⁰ Cf. Boullenois, i. pp. 880-885; Bouhier, chap. 25, No. 33, chap. 26, No. 220; Molinæus in Consuet. Paris, tit. i. *Des fiefs*, § 12, No. 37; and Burgundus, vii. 6.

⁹¹ Cf. Bouhier, chap. 29, Nos. 13, 7, 54; Rodenburg, ii. pars. i. c. 5, § 17; P. Voet, 9, 1, § 56; J. Voet, *Digressio de feudis*, in the Comm. ad Dig. Lib. 38; Savigny, § 368; Guthrie, p. 193; Stobbe, § 32; note 9, are for the *lex rei sitæ*, at least in modern times.

principle of these distinctions is that the days are gone when the feus belonging to a particular court constituted a separate territory.^{92 93}

Real burdens, too, are subject to the *lex rei sitæ*.⁹⁴

⁹² Seuffert, Comm. i. p. 258, note 17.

⁹³ The judgment of the Supreme Court of Appeal at Jena, on 11th May 1852, lays down that the form of the renunciation of a feu-right is to be determined by the *lex rei sitæ* (Seuffert, 13, p. 161). A distinction, however, would be made between the case where there was a transference of a real right in a feu by the person renouncing it in favour of another person who was under the same feudal allegiance—where the *lex rei sitæ* would rule—and the case where an *exceptio ex pacto* might be set up against the person who tendered the renunciation, where the rule "*locus regit actum*" must rule.

⁹⁴ Stobbe in particular, § 32, note 9a, although in his view real burdens are in their legal character obligations. Stobbe in this connection draws attention to the anomalous provision of the Baden Landr. § 710c. According to this, tithes may be redeemed "where a foreigner, whose own country has declared tithes to be redeemable, has right to tithes in this country."

Seventh Book.

LAW OF OBLIGATIONS.

I. OBLIGATIONS ARISING FROM CONTRACTS.

A. GENERAL PRINCIPLES.

WEIGHT TO BE GIVEN TO THE INTENTION OF PARTIES.

§ 247. Although the systematic arrangement, which we adopt in other departments of law in Germany, treats the general principles of the law of obligations as one whole, whether they refer to those obligations which arise directly *ex lege*, or to those which have their origin in contract, it is desirable in private international law to separate contract obligations and those which arise directly *ex lege*, either contrary to the intention of the obligant, or at least without his having expressed any intention in the matter. It may be that the source of the obligation will have very important effects upon the treatment of it as a part of international law. Of course, however, this does not prevent the existence of common principles, applicable to both kinds of obligations, dealing with the transference and extinction of them. When obligations are once constituted beyond all doubt, the fashion in which they were constituted is no longer a matter of any importance.

The first remark we make is that obligations resting on contract are to a very large extent dependent on the intention of the parties to them. If we have once ascertained the intention of the parties upon some point which is open to dispute, that will, as a rule, supply us with the means of determining the dispute, as is indicated by the Code Civil, § 1134: "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.*"

Accordingly, the most recent theory of the Franco-Italian jurisprudence¹ takes up quite firmly as its starting-point the intention or autonomy of the parties, and a primary guiding principle which pervades all Savigny's expositions is the "voluntary subjection of parties" to some particular local law. (Cf. *e.g.* § 369; Guthrie, p. 196; and, in the same way, the decision of the Imperial Court of Germany.)²

¹ Fiore, § 237; Laurent, i. § 225; Weiss, p. 796.

² Cf. Court of the Empire, i. 8th July 1882 (Entsch. ix. § 60, p. 227), iii. 13th Nov. 1885 (Entsch. xiv. § 58, Seuffert, xli. § 166); Sup. Ct. of Comm. 10th Dec. 1873 (Entsch. xvii. p. 55).

The judgment of 8th July 1882 lays down, that the contracting parties may agree that any

But yet that is not a sound starting-point. True it is that in the law of obligations the sphere of free action accorded to the parties is very wide: true it is that in many cases the question which practically settles the matter is: What is it reasonable to suppose the intention of the parties to have been? But for the lawyer the first question is: What does the law allow the parties to intend, to the effect of recognising that intention, and investing it with legal binding authority? Accordingly the Code Civil says, most properly, although most people pay no attention to it, "*Les conventions légalement formées,*" instead of "*Les conventions formées.*" We must, therefore, before allowing effect to the intention of the parties, know from what territorial law the limits of this intention are to be extracted. If the intention of the parties could prescribe the territorial law to be applied in the law of obligations, they might simply declare that any foreign law you please should govern a contract concluded in this country, to be implemented in this country, and belonging altogether to this country, and in this way withdraw at their pleasure such contracts from all the rules of law recognised in this country.³ No one will venture to say that that is a sound conclusion. The true meaning of the alleged autonomy of parties is this, that parties may make their arrangements so that a particular local law will regulate their contract, but not that this can be entirely dependent upon any capricious declaration of intention which they may elect to make. In other words, when a contract is made under certain circumstances and with certain aims, we say, in accordance with all considerations of reason: The law of this or that State will regulate this contract, and in so far as it allows the intention of the parties to have scope, we must respect that intention which has in fact been declared, not expressly it may be, but by implication only. Of course, the parties might have just as well made other arrangements. For instance, in place of executing their contract in A, and appointing A also as the place where it was to be carried out, they might have chosen B for both of these purposes, and then perhaps we should have had to look on B's law as regulative of the contract. The circumstances under which a contract is concluded depend on the parties and their intentions; and so, indirectly, the law that is to govern the contract, which again is dependent on these circumstances. But the governing law is never directly dependent on the will of the parties. They can choose their circumstances; they cannot choose as they please the territorial law, which does not depend on their good pleasure. The illusory idea, that they can fix this law as they please, arises from the fact that the territorial law will as a general rule again leave a good deal

other system of law they please and not necessarily that of the place of fulfilment, shall regulate the acquisition and enforcement of rights arising from a contract. On the contrary, the judgment (i.) of 1st March 1882 (Entsch. vi. § 33, p. 133) speaks very properly of the ascertainment of the local law of the contract from an equitable point of view, but has nothing to say to any such unlimited autonomy of the parties.

³ Testa (*De inhoud der overeenkomsten in het international privatrecht*, Amsterdam 1886, p. 100) starts with the theory of the intention of the parties, and upsets all general rules.

to their free choice, and the parties, desiring, as they well may, to compass some special legal results, which this or that particular law allows them to do, can roughly and roundly achieve these legal results by placing their contract under some particular territorial law. If the concrete intention of the parties were held to be really the leading consideration for the determination of the question as to which territorial law should govern, innumerable cases would either not be decided at all, or would be decided to an effect at variance with the true nature of the subject by a refusal of the pursuer's demands, based upon a "*non liquet*." For in innumerable cases the parties have not made it clear by what law their agreement is to be ruled; and when authors and judicial tribunals speak, as they so often do, of the wish and the intentions of parties with regard to the local law that is to rule, they mean, as a general rule, not the real concrete intention of parties, but that intention as it must be conceived according to objective considerations that admit of application in every case, *i.e.* they allow the nature of the subject under consideration to give the rule. The round-about road, on which the method of reasoning from the intention of parties enters, is quite unprofitable, but not always harmless. There is at bottom an error at work of the same kind, as if we were to confuse dispositive law with the implied intention of parties.⁴

QUESTIONS WHICH MUST UNDOUBTEDLY BE DETERMINED BY THE LAW OF THE *forum*, OR OF THE PLACE OF PERFORMANCE OF THE CONTRACT, AS THE CASE MAY BE.

§ 248. In the case of a relation of obligation, the following local laws may present themselves for consideration: *First*, the law of the place where action is brought; *Second*, the law of the place where the obligation had its origin, whether that consisted in a declaration of the will of the parties—a contract or legal transaction—or arose immediately by virtue of some statutory provision as to a particular state of facts, without reference to the will of the parties (*quasi ex contractu, ex delicto quasi ex delicto*); *Third*, the law of the place where the obligation is to be performed; *Fourth*, the law of the creditor's domicile; and *Fifth*, the law of the debtor's domicile.

The opinion that the law of the place in which the action is raised is to decide exclusively as to the relation of obligation between the parties, is only adopted by those who reject entirely the application of foreign law, and give the judge as his sole guide the law that prevails at the seat of his court. This opinion we have already impugned, in discussing the general principles of private international law. It is unnecessary to repeat the arguments that were then urged.

But from these general principles we may, no doubt, infer that the *lex fori* will take effect, so as to prevent a court from sanctioning a claim,

⁴ The view which I have combated in the text is laid down again, as a settled axiom, in a judgment of the German Imperial Court (iii.) of 22nd Feb. 1881, *Entsch. iv.* § 68, p. 246.

which must, by the *lex fori*, be looked upon as inadmissible, as one that is *contra bonos mores*. If any such claim were recognised, there would be a direct realisation of a claim which the judge's own system of law says should be rejected. If in country A certain transactions for differences on the Exchange are held to be illegal gambling transactions, they can never, in that country, be the ground of action, between whomsoever and wheresoever they are concluded. There is no doubt of that. In the same way, no doubt can ever arise as to the supremacy of the law of the place of performance to this extent, that if the act, which is the subject of the obligation, is impossible or illegal at the place of performance of the contract, *i.e.* the place where the act is to be done, the obligation must be of no effect, by whomsoever and wheresoever it was undertaken.⁵ Obligations directed to anything that is legally impossible, or that is forbidden, are null. The former is obvious even in international relations: if, for instance, one bound himself to give a right in an immoveable thing, which is unknown to the *lex rei sitæ*, he has simply promised an impossibility. Again, as concerns transactions which are forbidden at the place of performance, if we were to admit that any such obligation had binding force, we should be doing violence to the law of the other State, which seems entitled, by virtue of its territorial sovereignty, to refuse to allow certain transactions within its own territory.

THE VARIOUS THEORIES: (a) LAW OF THE PLACE WHERE THE CONTRACT IS MADE: (b) OF THE PLACE OF PERFORMANCE.

§ 249. These special questions, then, we can, as a preliminary, put aside. We can also show without difficulty that the personal law of the creditor must not be held to rule in such matters. If the personal law of either party is to rule, it must be that of the debtor. The person of the debtor is without doubt more closely bound up with the whole legal relation than that of the creditor. The person of the creditor may vary without destroying the obligation, but a change in the person of the debtor is equivalent to the extinction of the old and the establishment of a new obligation;⁶ and although the will of both parties may have equal weight at the origin of the obligation, the performance depends in the main upon an act of the debtor, and any active step on the part of the creditor either does not take place at all, or, at all events, is quite subordinate to the other.⁷ Neither the decisions of the courts nor the voice

⁵ Cf. Günther, p. 740; Massé, ii. p. 116; Wharton, p. 116; Wächter, ii. p. 404; Story, §§ 246 *et seq.*; Huber, i. 3, § 5; Mittermaier, i. § 31, note 9; Wharton, § 401, p. 467, note 3. Of course, all the authorities who hold that the place of performance must give the general rule, are to be counted here.

⁶ The change in the person of the debtor in the case of succession is, on the one hand, a matter of necessity, and, on the other, a compensation provided by the law, as the heir represents the person of his predecessor in matters of property.

Savigny, § 369; Guthrie, p. 195.

of the authorities has adopted the view that, as a rule, the law of the creditor's domicile should prevail.

Many authors do take the personal law of the creditor into account, but that is only in so far as they propose a modification of the principle which they generally recognise as regulative in cases in which both parties are under the same personal law. To this case we shall return again in the sequel.

We are left, then, with the following theories, as those which are chiefly represented in modern times, viz. :—

A. The theory which prevails in the Franco-Italian system of jurisprudence,⁸ takes as its foundation the law of the place in which the contract was concluded. Many weighty reasons favour this view. Both contracting parties can learn the law of their place with certainty, and this law offers at the same time to both of these parties a common ground of knowledge and information. Neither the one nor the other seems to have any advantage. For instance, how could trade possibly be carried on at fairs, markets, and exchanges, if every one who made a contract there could appeal to the unknown local law of his domicile, or of the place where it might so happen that payment was to be made, against all good faith and credit?

We cannot, however, regard the *lex loci contractus* as the only rule for matters of obligation, or even as the leading consideration in the matter. In the first place, it seems absurd that, as would be the result of this theory, if two natives of this country happen to make a contract abroad which they intend to fulfil in this country, foreign law, which may be entirely unknown to both of them, should regulate it. That would open a door of escape from every law of this country. The parties would only require to make a journey abroad in order to withdraw themselves from all prohibitive statutes, such as usury laws. And *quid juris* if the place of the completion of the contract could not be ascertained, because it took place during a journey by coach or rail? Is the transaction in such a case always to be void? Lastly, how could a contract concluded between persons who do not meet be brought to determination at all, since we are landed in this circle—that the question in what place the contract was originated could only be answered by a rule of law, and it is *ex hypothesi* undetermined what law is to be applied?⁹ However, even those who

⁸ Bartolus, in L. 1, C. de S. Trin. No. 13; Burgundus, iv. No. 7, 29; Hert, iv. 10; Holzschuher, i. p. 71; Felix, i. § 96; Norsa, Rev. viii. p. 454; Aubry et Rau, i. § 31, note 63; Fiore, § 242; Laurent, vii. § 435; Asser-Rivier, § 33; Brocher, ii. § 157; Bard, § 189 (but with important reservations); Weiss, p. 799, note 2, and citations there; Eccius and Eccius-Forster, § 11, note 31; C. de Cass. 23rd Feb. 1864 (J. i. p. 14 and p. 310). Demangeat, *ibid.*: “*au fond cette decision est excellente*,” C. de Cass. 28th Nov. 1876 (J. iii. p. 455). Spanish practice in Torres Campos, pp. 279, 280. Wächter, ii. pp. 44-46, p. 396, decides at least that this is the best theory in regard to points that are left to the autonomy of the parties. See Helleck, i. p. 155, and the practice of the Netherlands; Hingst, Rev. xiii. p. 415. The Swiss codes for the most part look to the place of execution (Huber, *Schweizer. Privatr.* i. 1886, pp. 94, 95.

⁹ Thöl, § 85, note 2.

maintain this theory do not by any means maintain that it is as a rule applicable absolutely and in all cases: they make important concessions in favour of the law of the place of performance and the personal law of the parties.

B. Next, we have the theory which regards the law of the place of performance as regulative, a theory which has found a remarkable number of adherents in Germany, in deference to Savigny's authority, and has been recognised in the judgments of German courts, particularly the Court of the Empire, as it was even earlier in the Supreme Court of Commerce in Germany.¹⁰

In support of this view, it is pleaded that performance is the end and object of the obligation to which the whole view of the parties is directed.¹¹ This does not by itself, however, justify the subjection of the obligation exclusively to the law recognised at the place of performance.¹² All that one can infer is, that in points dependent upon the agreement of parties there is foundation for inferring a voluntary subjection to the law of the place of performance, by virtue of that expectation of parties which is

¹⁰ P. Voet, 9, 2, No. 12; J. Voet, in Dig. 22, 1, § 6; Seuffert, Comm. i. pp. 254, 255; Savigny, 372; Guthrie, p. 222; Walter, § 48; Unger, p. 179; Bluntschli, *D. Privatr.* i. § 12; Böhlau, § 74, p. 456; Gerber, § 32, No. 12; Dernburg, *Pand.* i. § 48, note 4; Burge, iii. p. 757; Phillimore, iv. § 651; Sup. Ct. of App. Lubeck, 26th March 1861, 30th June 1870 (Seuffert, xv. § 183; xxiv. § 268); Sup. Ct. of App. at Wolfenbüttel, 22nd Feb. 1862 (Seuffert, xxi. § 2); App. Ct. Celle (iii.) 8th March 1879 (Seuffert, xxxv. § 88); Sup. Ct. at Stuttgart, 12th May 1881 (Seuffert, xxxvii. § 3); Sup. Ct. of Comm. 9th May 1871 (Entsch. ii. p. 270); 25th Jan. 1873 (Entsch. ix. § 3, p. 7); 25th Feb. 1874 (Entsch. xii. § 94, p. 286); 9th Dec. 1874 (Entsch. xv. § 62, "the law of the place of performance will regulate the legal relation of parties on all sides"); 1st Feb. 1875 (Entsch. xvi. § 5, p. 16). See Sachs, Rev. vi. p. 242, on the practice of the Supreme Ct. of Commerce in this matter; Ct. of the Empire (i.) 1st March 1882 (Entsch. vi. § 33, p. 131); Ct. of the Empire (i.) 8th July 1882 (Entsch. ix. p. 227, No. 60). In the former of these two decisions the regulation of all questions by the law of the place of performance is described by the court as the prevailing practice. So, too, practice of Bavaria, cf. Roth, *Bayer. Civilr.* i. § 17, note 109; Saxon Code, § 11: "Claims shall be determined according to the law of the place in which they are to be satisfied."

In the following case the Court of the Empire (i.) on 2nd Feb. 1885 found itself compelled to depart from the theory of the place of performance being regulative. A contract for the sale of a Hamburg ship then at sea, and bound for some port of the United Kingdom, or some port between Havre and Hamburg, was concluded at Hamburg between the owner, who belonged to Hamburg, and a German merchant from Shanghai, who happened to be at Hamburg. The law of Hamburg, and not the law of the place of delivery, which at the date of the contract was unknown, was held, in conformity with the view of the court below, to regulate the claims of the buyer, in respect of defects in the ship, which was shortly afterwards delivered at St Nazaire (Bolze, *Praxis, des R.G.* i. § 32, p. 8). See, too, the Ct. of the Empire (i.) 8th July 1882 (*ib.* § 35); in a contract of brokerage made by a native of Mecklenburg with

Berlin dealer, as to the sale of a real estate in Berlin, it is not to be presumed that the law of the place in which the mandatory has to discharge his duty is that which will regulate the contract: the first thing to enquire is whether the parties wished the bargain to be carried out in all its consequences according to the law of the place of performance.

¹¹ Savigny, § 370; Guthrie, p. 199.

¹² One often, however, deals too lightly with the question, in what place an obligation is to be performed: thus the place of delivery is often, but erroneously, described as the place of performance. See, on the contrary, Foote, p. 347: "The contract of a carrier is performed in the place where he carries, not in the place whence he starts, or to which he is destined." As

directed to that end; while the law of obligations consists to a large extent, although not exclusively, of rules which may be avoided at the pleasure of parties. But even with this limitation, it is impossible, without a revolt against the general logical rules for interpreting the intention of parties, to carry out the theory of the rule of the place of performance in regard to obligations. For even if we leave out of account that, as the parties often know nothing of the law of the place of performance,¹³ and as it is often very difficult to say what is the place of performance in this sense,¹⁴ we cannot assume any voluntary subjection of the parties to the law of that place,¹⁵ an alteration in the place of performance made subsequently to the conclusion of the contract must alter the contract in each and every point, if the law of the new place of performance differs from that of the old;¹⁶ and if there are several places of fulfilment, we are at a loss for any rule of interpretation.¹⁷

a matter of fact, a turn is not unfrequently given to the inferences which rest on the theory of the place of performance as regulative, which practically results in a reference to the law of the domicile or the seat of the business in question. See *e.g.* decision of the German Imperial Ct. of 19th March 1888, reported in Bolze, *Praxis*. v. § 474. In another case reported by Bolze, v. § 9 (excambion of two parcels of real estate lying within different territories), the Imperial Court (111) on 1st July 1887 had to recognise that there may be two different places of performance, and that recourse must accordingly be had to the law of the domicile of the parties, who happened to have the same domicile.

¹³ See, too, Clunet (J. xiii. p. 610), who for this very reason declares against the theory of the place of performance.

¹⁴ This difficulty is recognised in a judgment of the Supreme Court of Commerce, of 1st February 1875 (Seuffert, xxxi. § 195; *Entsch.* xvi. p. 15). If a manufacturer promises to deliver "free at the railway station of X," is X the place of performance? The court said "No," and thought there would be stronger grounds for holding it to be so, if delivery had simply been promised "at X." It may be doubted if this distinction is sound; it shows, however, that the theory of applying the law of the place of performance will often fail to furnish a satisfactory solution of the question on hand. See Schmid, p. 67; Windscheid, § 35, note 9; Laurent, ii. § 226; v. Martens, § 78, note 12; Bekker, *Couponsprocesse*, p. 49.

¹⁵ Windscheid remarks: "One man gives another in Bavaria a sum of money to enable him to continue his journey, and arranges for the repayment of the money at a bank in Naples; according to Savigny's rule, this gift must be tested by the law of Naples." V. Martens asks: "If two Russians have concluded a contract in Russia, the performance of which is to take place in England, why are we to hold that they have fixed their thoughts on the law of England, and not on that of Russia?" The instance given by me in my former edition was, as v. Martens soundly says, not well chosen, for Germans in China are not subject to the laws of China.

¹⁶ See, in this sense, Stobbe, § 33, note 3.

¹⁷ Where, for instance, are we to say that the place of performance of the obligation of the carrier is? Perhaps the answer would be, at the destination of the goods. But the carrier has to perform the obligations laid upon him at every moment of the transport, cf. note 12. It is a kind of haphazard decision, if we declare that where there are several places of performance, the law of the judge who is determining the case shall rule. (See decision of the Ct. of Comm. 9th December 1875, given with respect to the Saxon Code, §§ 11 and 6; *Entsch.* xix. p. 132.) The old Ct. of Comm. (see *Entsch.* xxiv. p. 180, of 28th June 1878) rightly laid down that if a joint stock company sets up different places for the payment of the interest on its debenture debts, it is not on that account to be held to have submitted itself to a plurality of laws as regards the substance of its obligations. But how is that decision to be reconciled with the theory which purposes to determine the law of the obligation exclusively according to the place of performance? Renaud (1886, i. p. 41) proposes to hold the place where the contract is made as decisive, if several alternative places of performance exist. That is quite capricious.

An appeal is made to the fact that by Roman law the *forum contractus* was set up in the place where the obligation was to be performed,¹⁸ and Savigny especially tries to make out that the local jurisdiction, as well as the local law of the obligation, depends upon a voluntary submission of the parties, and therefore that the rules which regulate the former are to be applied also to the latter.¹⁹ But, in the first place, the Romans, in determining the jurisdiction, had no intention of laying down what the law of the obligation was to be. Further, by Roman law the *forum contractus* was not exclusive, but concurrent with the *forum domicilii* of the debtor. This could not be the case if the Roman law had conceived the place of performance to be the seat of the obligation. In the third place, it is at variance with the general principles adopted by Savigny himself, and by far the greater number of authorities, to conclude from the competency of a court that the law recognised at its seat is uniformly applicable. By a similar deduction, we should hold that the law recognised at the seat of the court which had to decide any case must rule the case in all its bearings.²⁰ Lastly, we shall show (see our discussion of jurisdiction) that it is not by any means the case that the Roman law unconditionally set up the *forum contractus* in the place where the obligation was to be performed.

C. THEORY WHICH TAKES THE PERSONAL LAW OF THE DEBTOR FOR ITS LEADING PRINCIPLE.

§ 250. The theory which takes the personal law of the debtor for its leading principle, has been adopted by Molinaeus,²¹ Thöl,²² and more recently by Windscheid,²³ and Mommsen,²⁴ and Roth,²⁵ as well as Durand.²⁶ ²⁷ This theory, to which Stobbe (§ 33) comes very close, is in principle the correct theory, for this reason, that the general propositions of

¹⁸ L. 19, § 4, D. *de judic.* 5, 1; L. 1, 2, 3, D. *de rebus, auct. jud.* 42-45; in particular, L. 23, D. *de O. ct. A.* 44-47. "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*"

¹⁹ Savigny, §§ 369 and 370; Guthrie, pp. 196 and 198.

²⁰ Against the application of the law recognised at the place of performance, see Wächter, ii. p. 42; Thöl, § 85, note 3; Kori Erört, iii. pp. 22, 23.

While Savigny sought to refer the exclusive supremacy of the law of the place of performance to a voluntary subjection of the parties in every respect to this law, Böhlau expressly rejects this ground, and places it "upon the authority of the courts and the possibility of a real protection." As Bekker very properly points out, Savigny's reasoning rests on a fiction. Böhlau's principle, unless he means to invoke the exclusive supremacy of the *lex fori*, which he denies, is a simple *petitio principii*.

²¹ In L. 1, C. de S. Trin.

²² § 85.

²³ § 35, No. 3.

²⁴ *Archiv.* 71, p. 172.

²⁵ *D. Privatr.* § 51, note 132.

²⁶ § 201, p. 419, at least as far as rules of law, which concede nothing to the intentions of parties, are concerned. The application of the national law of the parties does in fact correspond, as a matter of logic, with the general principle established by the new Italian school.

²⁷ Muheim has recently adopted this theory (p. 153), and Brocher (*Nouv. Tr.* § 70) will at least give the preference to the law of the debtor; but by his peculiar theory as to intention and its manifestations, he puts the whole subject again in uncertainty and doubt, § 115.

law in the matter of obligations, the rules which do not give way to the pleasure of the individuals, exist generally in the interest of the debtor. We cannot hold that this protection shall cease on a subject by accident undertaking an obligation in a foreign country, or having to perform one there. In so far, however, as there is a question of the interpretation to be put on the intention of parties, we must unquestionably proceed upon the footing, that every person expresses himself in accordance with the law and the statutes which he knows, and has recourse therefore to the law to which he is personally attached. This rule of interpretation is applied in cases of unilateral obligations or transactions, especially in *mortis causa* settlements, even by those who propose to construe contract obligations by the *lex loci contractus*, or by the law which prevails at the place of performance.²⁸

Lastly, the view we have here maintained is supported by the fact that in very many cases, and in particular where no other place of performance is specially stipulated, the domicile of the debtor is the place of performance, and that in by far the greater number of cases, action to compel performance of a personal obligation, with a view to the possibility of ultimate execution, is brought at the domicile of the debtor.²⁹ The *judex domicilii* must feel himself all the more bound to apply the *lex domicilii* that, as we have already noticed, a consistent application of the *lex loci contractus*, or of the law that is recognised at the place of performance, seems irreconcilable with the maintenance of the law of the judge's own country. For instance, if one desired to evade the laws as to the maximum rate of interest, he would require merely to stipulate for a foreign place of performance, in order to be able to secure payment by an action in his own country. We must, however, keep in view that if the domicile be changed after an obligation has been undertaken, it has no influence upon the import and validity of the obligation, for this reason, that otherwise there would be a retroactive force attributed to the domicile. It applies not to obligations undertaken by subjects of the State before they became subjects, but only to such as they have undertaken while they have been subjects.³⁰ This is scarcely likely to be disputed, and is only specially mentioned in order to avoid misunderstandings.

The following difficulty has been raised in reference to the case that the contracting parties have not the same personal law. The essence of the contract, it is said, consists in a concurrent declaration of will upon either side (*duorum pluriumve in idem placitum consensus*). If we should

²⁸ Fœlix, i. § 96, p. 227.

²⁹ This is a reason for refusing to recognise that all the judgments, which, read literally, make the place of performance decisive, are really to be cited in support of that principle; they are not to be recognised to that effect, if the place of fulfilment and the domicile are in the particular case identical. See Wharton, § 410, and the decisions given there.

³⁰ But see, in our discussion of the law of bankruptcy, exceptional cases of the discharge of obligations in accordance with the law of a domicile subsequently acquired. See, too, *infra* the doctrine of prescription.

interpret the declaration of both parties according to their respective personal law, then we could never reach the notion of a *consensus*; and on the other hand, there is, it is said, no ground at all for conceding an absolute authority to the laws of either of the parties. If the parties to a contract have in contemplation a law that will give effect to their contract, they will generally proceed on the footing that one and the same law should regulate the whole of it, so that it should receive its full effect, just because the contract is meant effectively to reconcile their opposing relations. Apparently, then, it is said, there is no course left but to assume the law of the place of the contract as regulative.³¹

Against this argument we have, in the first place, to remark that in the law of obligation there are considerations other than the will of the parties. Besides that, however, this train of reasoning not being able to discover a law common to both parties, and desired by both, substitutes therefor a law which neither desires, since every person declares his will in conformity with the laws which are known to him—that is, the laws of his own country. For the real contract of the parties, then, it substitutes an imaginary contract.

On the other hand, the difficulty can be simply solved by the following considerations. Every bilateral transaction may be resolved into two unilateral obligations—sale, for example, into the obligation of the seller to deliver the thing, and the obligation of the buyer to pay the price; and indeed it was customary among the Romans to conclude bilateral obligations in the form of two unilateral stipulations.³² Both seller and buyer give each other such performance as may be prescribed by the personal law of the one and of the other respectively.^{33 34} That is what each has promised, and this promise the other party can only have understood in the sense of the law of the domicile of him who promised, because the assumption that every man declares himself in the sense of the law which he knows, is founded on considerations of general applicability and of good sense. But if the different personal laws give a discrepant result—if, for instance, in the case put, the law of the buyer's domicile throws upon him the risk of the subject sold, while the law of the seller

³¹ Merlin, *Rép. Vo. loi*; Fœlix, i. p. 227; Wächter, ii. p. 44.

³² Cf. Savigny, § 369; Guthrie, p. 195; and Wächter, ii. p. 45. Judgment of the Sup Ct. of App. Rostock, 3rd Nov. 1862 (Seuffert, xix. § 5).

³³ The inadmissibility of allowing a common place of performance to both parties is admitted more and more readily. See, *e.g.* the grounds of decision of the Sup. Ct. at Jena, 11th April 1885 (Seuffert, xlii. § 25): "It scarcely needed to be shown, that this rule, which is founded on the presumed intention of parties, is not to be understood, as if the place of performance for the one party were in every case to be regarded as the place of performance for the other also." This involves the collapse of Savigny's theory.

³⁴ But if the one party has performed in accordance with the law which his country recognises, the result is, that no further demand can be made on him, but not necessarily that the other party must on his side recognise this performance as sufficient, so as to bind him to perform his part. The distinction does not seem to have been clearly taken in the judgment of the Imperial Court of Germany (vi.) of 27th June 1887, reported by Bolze, *Praxis*, iv. § 27, p. 7. The law of the place in which the manufactory of the seller stood was held to regulate the conditions of the sale, because the seller had to perform his part at this place.

throws it upon him, a contradiction seems to arise. We have, however, precisely the same difficulty if two express provisions at variance with each other find their way into a contract, and no interpretation sought from other circumstances avails to give exclusive validity to the one or to the other. The decision must be in favour of the defender, since the pursuer has certainly not made out his case.³⁵ In the case of an agreement by letters, or if the place of the conclusion of the contract cannot be ascertained, those who regard the place of the contract as regulative have no resource left except to fall back upon the personal laws of both parties.³⁶ An objection to the application of the laws of the different domiciles seems to lie in this, that one party might often be entitled to demand performance, while he himself was not bound at all. But in every contract the undertaking of the one party depends upon that of the other: the one has only validly bound himself in so far as the other is bound to carry out his undertaking. He can, therefore, if he is called upon to do his part, demand that the other party shall either do his first (if this is sufficient, as it often is, to bar any subsequent challenge of the transaction), or bind himself in some way that is recognised by the law of his domicile.³⁷ If, however, the party who is truly bound has already performed his part, and if, by the law of the domicile of the other party, it is not enough to set up the contract that performance so made has been accepted, then all that is left is an action to recover what has passed.³⁸ (*Condictio indebiti sine causa* in Roman law.) Most cases, however, will not turn upon this question, but upon whether the party who has already done, or alleges that he has done, his part, shall be satisfied with the *minus*, which is all that the law of the other party allows him.

THE PERSONAL LAW OF THE DEBTOR IS ONLY AS A GENERAL RULE DECISIVE.
MANIFOLD RESTRICTIONS UPON THIS RULE. THE THEORY WHICH
REJECTS ALL PRINCIPLE FOR THE DETERMINATION OF LOCAL LAW IN
THE MATTER OF OBLIGATION.

§ 251. The application of the *lex domicilii* of the debtor cannot, however, be set up as a rule without exceptions,³⁹ and those who maintain

³⁵ So, too, Windscheid: "As, however, the creditor is the person to make the demand, he must, in order that he may make a demand, accept the law of the debtor's domicile, if he, the debtor, takes his stand on this law, but conversely the law of his, the creditor's, own domicile may have to be taken, if it suits the debtor to appeal to it."

³⁶ Cf. Story, § 284. Judgment of the Court of Appeal from the Rhine Provinces at Berlin, 21st September 1831 (Volkmar, p. 141).

³⁷ See *infra*, § 252, on the point that the personal law in such matters is the law of the domicile.

³⁸ There is an analogous case in Roman law, where a person contracts with a pupil without the sanction of his guardian. The guardian can take up or reject the contract, but cannot enforce the undertaking in his ward's favour without recognising the obligation undertaken by him (Savigny, iii. p. 40).

³⁹ Muheim, p. 155, sets up other exceptions in place of those in the text, which he attacks. I believe, however, that his view really differs from mine but slightly.

broadly that no general rules at all can be recognised in connection with the law of obligations are to a certain extent, and indeed one might say in many respects, in the right.

In the first place, the provisions of the law of obligation often rest upon the consideration of circumstances that are purely local. If it were proposed to apply these provisions uniformly to the contracts of subjects into which they had entered in a foreign country, and which were to be performed abroad, the purpose of the legislature in making these provisions would be far overstepped, and natives living for a time abroad would find it very difficult, and often impossible, to carry on trade and commerce. No one, for instance, would hold that a tax imposed upon the sale of particular articles of subsistence in one country should be leviable in the case of these goods being sold in a foreign market by a native of the former country. The like, too, must in reason hold good of limitations on the rate of interest. If in some foreign country, where a subject of this country has an estate or a trading house, a higher rate of interest than ours is allowed and is in use, by reason that capital is more scarce, or the security is not so good, then the foreign lender with whose money the estate has been improved, or the trading concern extended, is entitled, even in our courts, to demand his higher rate of interest as was arranged. The restrictions on the rate of interest are local taxes upon the price of money. The opposite theory, instead of benefiting our citizens, would destroy their credit, since the foreign judge would certainly pay no attention to our law upon this head.⁴⁰ It is of much more consequence whether the money lent has been expended here or abroad. In the first case, the local limitations upon interest receive effect, but not in the second, for the interest is the price paid for the leave to apply the money. Thus, too, it is the law of the foreign country as to interest, and not ours, that decides a question where one native of this country lends another a sum for the improvement of an estate in a foreign country. On the other hand, our law on the subject must be applied if a foreigner lends one of our subjects money for the improvement of an estate in this country, or for the exten-

⁴⁰ Cf. Stephen, ii. p. 82. He says, in reference to the limitation of the rate of interest: "The statutory prohibitions, it will be observed, have always been confined to English transactions, for *if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made. Thus Irish, American, Turkish, and Indian interest have been allowed in our courts to the amount of even 12 per cent. (though by Statute 13 Geo. III. cap. 63, § 30, British subjects in the East Indies are prohibited from taking more than 12 per cent.), for the moderation or exorbitance of interest depends on local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade.* And by Statute 12 Geo. III. cap. 79; and Geo. IV. cap. 47, all mortgages or securities for money lent on lands, tenements, or hereditaments in Ireland or the West India Colonies, bearing interest above 5 per cent., but not above what is allowed by the law of the place, shall be valid although executed in Great Britain, and whether the interest be made payable in Great Britain or in the country where the property is situate." The words in italics are quoted from Blackstone. In this we have the express testimony of a system of law much concerned with the interests of commerce, to the effect that native rules of law are not to be applied even to the subjects of that country themselves.

sion of a business carried on here. It is plain what an advantage this theory has over that which rests upon purely external characteristics, by which the law of the place of performance or of the execution of the contract is applied in every case. The application of our laws is fully ensured, while they are not allowed to hamper foreign trade by their interference. Our task will partly consist in testing the different rules of law, with a view to determining whether they rest upon local considerations such as we have mentioned.

In the second place—and here we shall find the second part of the task furnished for us by the law of obligation—it is among all civilised peoples of the present day a rule of the law of obligations, that all such relations are to be determined in the ultimate resort by *bona fides*.⁴¹ Even in such a case as the law of bills, where apparently considerations of strict law decide, this very strictness, which protects the person who has acquired his rights *bona fide* by means of the *littera scripta*, rests upon the principle that every one may rely upon this *littera scripta*, without having to fear the many objections that may be taken by the debtor. In cases, then, where the application of the law recognised at the domicile of the debtor would do violence to *bona fides*, while other local laws would indubitably support it, then the latter and not the former is the law which, by the unanimous voice of all systems of legislation, must decide. We have already seen that no trade could go on at fairs, markets, or on exchanges, if both parties could appeal to the law of their domiciles to regulate the ordinary contracts of these markets, etc. The difference in the laws which prevail at the domicile of this or that seller would make it impossible for a buyer to determine which offer was the more favourable, taking into account the possible loss or deterioration of the goods, as well as the time allowed for payment and delivery. Commerce demands that there shall be one law that shall necessarily determine the import of all contracts for all buyers and sellers alike, and the only possible one in such cases is the law of the place where the contract was concluded.⁴² If appeal is made to another law, violence is done to the principle of *bona fides*. The following cases may serve as illustrations: A person owns a trading

⁴¹ See Phillimore, § 705: "Surely the first principle of private international law, namely, the duty as well as the expediency of upholding, wherever it is possible, *bona fide* transactions with the subjects of other States. See, too, Hartmann, *Internationale Geldschalden*, p. 51.

⁴² Cf. a judgment of the Supreme Court at Berlin of the 26th September 1849: "Contracts made by our subjects abroad, which are to be put in force in this country, will, in ordinary circumstances, lead us to the conclusion that the parties meant to subject themselves to the law of this country. But this conclusion cannot be drawn in the case of contracts as to moveables, which are at once performed by both parties, as, for instance, a bargain concluded and carried out as to the sale of cattle in a foreign cattle market" (*Entscheidungen*, vol. 18, p. 150). A bargain made at the market, which does not rank among those ordinarily made there, is to be otherwise judged of, e.g. a contract for the sale of an estate, which is accidentally made at the market. It is of no moment that the parties who make the contract during the fair or market, and within the territory to which it belongs, are subjects of the same foreign State. Judgment of the Supreme Court at Berlin, 3rd April 1856 (*Striethorst*, 20, p. 303).

establishment abroad; he cannot suppose that the law of his domicile can be applied to contracts concluded abroad in connection with that establishment. Another contracts debts for his subsistence abroad, or opens an hotel; he cannot avoid liability by an appeal to the law of his domicile. Another delivers goods abroad to a railway company for carriage; the law that is recognised in the country where the railway is situated determines the meaning of the contract of freight.⁴³ The managers of a railway cannot be supposed to make different contracts with each individual, according to his caprice or his probable intention. A person who uses the railway in the ordinary manner must be subject to the law that is recognised at the place where it is situated. On the other hand, the very requirements of *bona fides* may place one of the parties under a law, which, in the particular case, is the most unfavourable to him of all the laws that could be applied. *E.g.* A foreign railway or shipping company keeps an office in A, where contracts are made. Any one who contracts with the company in A, may appeal as he pleases to the law that is recognised there, or to the law which regulates the company generally. It is the company's business to meet any possible conflicts of the two systems by conditions of which special notice must be given. This consideration may perhaps supply the solution of the case of *Cohen v. The South-Eastern Railway Company*, which was decided in England, and has been so much criticised.

[1877, L.R. 2, Ex. Div. 253. The pursuer brought an action against an English Railway Company, which was subject to the English Railway Statutes, and was authorised to run steamers between Boulogne and Folkestone, for damage done to her luggage at Folkestone. She was an English subject, and had taken out her ticket at Folkestone. The Court held that as the Company were admittedly responsible by French law, and, assuming the contract to be regulated by English law, were responsible by that law also, it was not necessary to determine which law ruled. Their inclination was, however, to hold that English law ruled. Lord Justice Brett threw out the opinion that different laws might rule at different stages of a journey which has to be performed through different countries. That would seem to be contrary to any reasonable assumption as to the intention of parties and the *bona fides* of the contract. See Foote, p. 425.]

In this connection the place of performance, too, is of importance. In the first place, it has to be ascertained whether the whole transaction, from its nature, must be developed and carried out where it was entered upon.⁴⁴ If, even without a special agreement, performance must take place where

⁴³ Judgment of the Supreme Court at Berlin on 12th October 1852 (*Entscheidungen*, vol. 24, pp. 21, 22): "The contract relations of a railway which is exclusively Prussian, and has received goods to be forwarded, these goods having been handed on to a foreign railway, and carried farther by them, are, in questions with the sender, determined by Prussian law." See, however, the law of carriage.

⁴⁴ Cf. Dudley Field, § 601: "A contract made and agreed expressly or tacitly to be performed within the jurisdiction of the same nation, is governed by the law of that nation." *E.g.* debts which are to be looked upon as the daily expenditure of a person on a journey, or spending some time at a watering-place, or as a student at an university, must undoubtedly

the contract was concluded, then, as a general rule, the whole transaction belongs to the law of that country, whereas the local law of the contract is not to be displaced by selecting some other place of performance purely at random.⁴⁵ In the same way, the choice of a particular place of performance will regulate the obligation, if a prohibitive law of the place in which the contract is made⁴⁶ stands in its way, or in so far as the will of the parties pronounces indirectly in favour of attaching to the performance modifications provided by the law of the place of performance. The latter⁴⁷ is the case where a certain sum of money is promised, to which a different value is attached at the place where the contract is concluded from that obtaining at the place of payment; or if a contract bears to be for delivery of a certain quantity, expressed according to a measure of weight, to which different meanings are given at different places. Payment can only be made, or the goods measured or weighed out, as a rule, at the place of performance, according to the currency or the measures or weights in use there; and this justifies the understanding that parties, when they concluded their contract, had no other currency, measure, or weight in view. If, for instance, a bill is drawn in Constantinople upon London for £100, the holder of the bill is entitled to demand £100 in English, and not in Turkish currency.⁴⁸

be dealt with according to the law of the place in question, where the person spent his time. (Cf. Savigny, § 370; Guthrie, p. 207; and Wharton, §§ 414, 415.) The contract, by which a traveller bound himself after leaving the service of the pursuer not to sell or manufacture her articles, is to be regulated by the law of the place where the contract was made, where the pursuer was domiciled. Ct. of the Empire (ii.) 11th February 1887 (Bolze, *Praxis*, iv. § 21, p. 6).

The judgment of the Appeal Court of Genoa of 30th April 1886, reported in *Journal* xv. p. 290, contains a decision which agrees no doubt with the literal text of the Italian Code, but in my opinion does not correspond with the circumstances of the case, by which the law of the country of the parties was applied to transactions upon a foreign exchange.

⁴⁵ On this point no general rules can be given—it depends on circumstances. Cf. Judgment of the Supreme Court at Berlin, 17th January 1856 (Striethorst, 19, p. 284); Judgment of the Supreme Court of Appeal at Jena, 1832 (Seuffert, 2, p. 162); Story, § 293a.

⁴⁶ See on this point the following paragraph.

⁴⁷ German Commercial Code, art. 327: "If the time of performance is said to be spring or autumn, or the like, then the usage of trade at the place of performance rules." Art. 336: "Measure, weight, standard of coinage, coinage, measure of time and distance, recognised at the place of performance are, in doubt, to be held as regulating the contract. Cf., too, art. 352. Art. 353: "If, in making the bargain, the market price or the price of the exchange is fixed as the price, then, in doubt, the current price at the time and at the place of performance, or the trade centre that determines prices for that place, is to be thereby understood." Cf. art. 569 as to the time for loading vessels. (The regulations of the port, or, failing them, the usage of the place, is to rule.)

⁴⁸ Burge, iii. p. 772; Wheaton, i. § 145, p. 194; P. Voet, 9, 2, No. 12; Story, § 272a; Burgundus, iv. 27, 29; J. Voet in Dig. 12, 1, § 25; Christianæus, i. decis. 285, Nos. 5-11; Boullenois, ii. pp. 500, 501; Gand, No. 295; Fœlix, i. p. 232; Pardessus, No. 1495; Massé, ii. Nos. 119-126; Judgment of the Sup. Ct. of Appeal at Lübeck in the year 1853 (Seuffert, 8, p. 5; Austrian General Code, art. 905 *ad fin.*—"In considering weights, measures, and currency, the place of delivery must be regarded." [In the case of *Ainslie v. Murrays*, 1881, Ct. of Sess. Reps. 4th ser. viii. 636, two litigants in the courts of Scotland, both of whom were resident in Scotland, agreed to settle the action on condition that the defenders should grant the pursuer's firm a power of attorney to sell certain property in Rangoon, and to pay them-

But this rule is not to be applied if, from the circumstances, we may infer that parties had in the particular case some other end in view. For instance, if a loan is made in Constantinople in currency, and London is fixed upon as the place of repayment, the debtor has only to refund £100 Turkish currency, since the essence of such a contract is that the debtor has, putting interest out of the question, only a duty to repay what he got. If, to take another illustration, in a contract of sale, the currency of the place of payment would give either an unreasonably high or a disproportionately low price for the goods, while the currency of the place where the contract was concluded would give an ordinary price, it cannot be assumed that parties have had the former in view.

In contracts affecting immoveables, performance can only take place on the part of the person giving a permanent or temporary right over such property, at the place where the thing is. Setting aside the consideration that performance is in this way always subject to the prohibitive laws in force at the place where the thing is, and that real rights in immoveables can only be given in the forms of the *lex rei sitæ*, and, therefore, that there is from the first the probability of a reference to that law, the person who acquires a right of use, or a personal claim to the use of a parcel of property, generally contemplates taking up a permanent residence in the place where the thing is, and at the same time we may assume that both the disponent and the possessor are acquainted with the *lex rei sitæ*.

In doubt, then, contracts as to landed property must be interpreted in accordance with the *lex rei sitæ*,⁴⁹ although the circumstances of a particular case may lead to a different result,^{50 51} which accounts for the opinions which some authors have adopted at variance with that which we have maintained.

selves a sum of £4250 out of the proceeds; if the proceeds fell short of that sum, the defenders were to pay the difference. The properties being sold, and the price being paid in rupees, which are worth in Rangoon 2s., but in Scotland only 1s. 8d., the total sum realised being in any view less than £4250, the question arose whether the price was to be credited on the basis of the Rangoon value or the Scots value. The latter was adopted, two of the judges holding that it must be so, because Scotland was the *locus solutionis*—Lord Shand agreeing in the result, because the contract was for the sum of £4250, *i.e.* a sum of English currency; that the parties intended to make up that sum, and that the debtor could not escape for less. Like the author, his lordship examines what was the true intention of parties.]

⁴⁹ Fœlix, i. p. 232; Massé, No. 97; Boullenois, i. p. 554; ii. pp. 453, 497; Burge, ii. pp. 858, 859, 871; Choppin, *Opera de feud. Andegav.* ii. lib. 2, tit. 3, No. 10; J. Voet in Dig. 46, 3, No. 8; Harum in Haimel's *Magazin für Oesterreichische Rechtswissenschaft*, ii. p. 396; Story, § 271 *ad fin.* Judgment of the German Imperial Court (v.) of 1st June 1887 (Bolze, *Praxis*, iv. § 24, p. 7): in the case of the sale of a concession of the profits of open mineral workings.

⁵⁰ Molinæus in L. 1, C. de S. Trin. “*Unde stantibus mensuris diversis si fundus venditur ad mensuram vel affirmatur vel mensuratur, non continuo debet inspicere mensura quæ regit in loco contractus, sed in dubio debet attendi mensura loci in quo fundus debet metiri et tradi et executio fieri. Et ita tenendum, nisi ex aliis circumstantiis constet, de qua mensura senserint.*” Molinæus has a different theory as to warrantice.

⁵¹ Cf. Judgment of the Supreme Court of Appeal at Wiesbaden of 5th February 1825 (Nahmer Coll. 2, p. 219), where it was held that a contract of lease concluded by a subject of Nassau, in Mainz, was to be determined by French law, which rules in Mainz.

It is, therefore, by no means my intention to raise the personal law of the parties to the position of an exclusive rule, and that is my answer to the objections which v. Martens (§ 77) has urged against the principle I have maintained. We come pretty near the theory, which,

D. is set up by several authorities of repute in the most modern treatises,⁵² the theory that no universal principle at all can be set up for contract law. But the theory is somewhat too indefinite. It may no doubt happen that, testing the case by its concrete circumstances, which this theory says are to be decisive, the result is a complete "*non liquet*," and then it may be that the personal law of the parties is all that is left. But at all events we must not, like v. Martens, confuse the concrete circumstances of the case with the concrete or express intentions of the parties as to the law that is to be applied (see *supra*, § 247 *ad fin.*). Again, we must not fancy that no general rules at all can be set up in the law of obligations, but that each particular case must be decided according to some undefined instinct. It is no reason for not discussing the question on general and scientific principles, that it is not possible to determine all conceivable cases on the lines of a single principle, or that there are cases on the boundary line between one principle and another, which can only be resolved with an admission that there is doubt about the matter.

LAW OF DOMICILE OR OF NATIONALITY?

§ 252. The next question that has to be answered, if or in so far as the personal law of the parties is to be taken as our guide, is, Is it the law of the domicile, or the law of the nationality or citizenship of the parties, that is to be understood? The answer is plain, from what has already been said. As matter of principle, it is the law of the nationality that must rule; but it is excluded in so far as the nature of the subject persuades us that the relation of obligation in question will be completely developed in another country, *i.e.* the country of the domicile. But this exception will invariably occur in the case of obligations which take their rise in the free contract will and intention of the parties. As a rule, we cannot suppose that a

⁵² Stobbe, § 33; v. Martens, § 79. This seems to be the result of Wharton's discussion, §§ 393 *et seq.*

The practice of England and of the United States sometimes applies the law of the place of execution, sometimes that of the place of performance. Cf. Westlake Holtzendorff. [The Lord-President of the Court of Session in Scotland lays down very much the doctrine of the text. "By the term *locus contractus* is sometimes understood the place of making the contract, . . . but in general what is meant is the locality as ascertained from the nature of the contract itself, and what is to be done under it." *Valery v. Scott*, 1876, Ct. of Sess. Reps. 4th ser. iii. 965. Storey, § 280, takes the law of the place of performance to be the general rule, but remarks, § 282, that it is "often a matter of serious question whether that law or that of the place where it is made should prevail." The rule in England is to be fixed by substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such.] The influence of Savigny's teaching has, as Rivier (p. 72) truly remarks, made itself much felt in modern times. We must not, however, forget that very frequently the place of performance is the domicile of one or other of the parties.

party to a contract should propose, that his contract relation should for the first time come into full play and development, when he shall have given up his present residence or domicile. Besides, an appeal to the law of nationality will in fact result in violation of *bona fides*. It may very well be that to ascertain the capacity of a person to contract, one may have to refer to a certain extent to his national law: but we cannot, in view of the despatch with which ordinary commercial contracts are often, or must often be made, measure each and every stipulation of a contract by the national law of the other party. Just as the place of the making of the contract is, in this sphere, generally strong enough to drive the personal law of the parties into the background, so a similar force must be attributed to the law of the domicile as against that of the nationality. It is therefore unsound to give, as the Italian Code, § 9, Alin 2 *disposizione sulla pubblicazione*, and § 7 of the new Belgian proposed code give, most weight to the national law of the two contracting parties, and not so much to that of their domicile.⁵³

IMPORT OF THE PRINCIPLE OF THE LAW OF THE DEBTOR'S DOMICILE.

§ 253. Our opinion, however, is that the decision of the points that arise in this subject by the law of the debtor's domicile is in principle and theoretically the only unassailable starting-point. We do not mean to say by any means that, as a matter of fact, this law must be applied to the majority of cases, and that it is the rule in that sense. Just as little does the theory we maintain go the length of asserting that, in each and every relation, the contract obligation is always subject to one and the same territorial law. An obligation, which in certain respects is subject to the law of the place where the intention of the parties was declared, may, as we noticed, be subject to the law of the place of performance as regards certain conditions of performance, while in some other respects the law of the place where action is brought may have a bearing upon it. And, on the other hand, there are rules as to the discharge of existing obligations, which, once established by the *lex domicilii* of the debtor, demand universal recognition: such as, for example, are the total or partial discharge of the obligation by the operation of a negative prescription, and the discharge of the debtor, which, according to some systems, is in certain circumstances operated by bankruptcy. If the object of some particular rule of law can only be attained by leaving the *lex loci contractus*, or the law of the place of performance, entirely out of account, the *judex domicilii* is bound to apply that rule thoroughly.

If effect be given to these modifications, the view which we have adopted is no longer open to the criticism that, while it may no doubt be suitable for the cases in which the *judex domicilii* of the debtor is competent, it is not adapted to give rules for decision to another judge, e.g. the *judex loci contractus* or the *judex domicilii creditoris*, who have nothing to do with the protection of the person of the debtor. If we have excluded the purely

⁵³ Stobbe, on the other hand, expresses himself correctly.

local provisions of statutes recognised only at the place of his domicile, and, from consideration for *bona fides* and what may be presumed to be the intention of parties, have allowed the law of the place where the contract is concluded or is to be performed to have its operation, we have done enough to secure the intercourse of our subjects with foreigners; for no one can be disappointed in any well-founded expectation (*bona fides*) that his own law will be applied to relations of obligation entered into with foreigners: this our limitations have ensured; and if they are not applicable in any particular case, the foreign judge is all the more under obligation to recognise the *lex domicilii* of the debtor, since, if he were in every case to apply the *lex loci contractus* or the law of the place of performance, then, as we have seen, he could never succeed in having the law of his own country observed abroad. We undertake to show in the sequel that, where practice and the most approved authorities take the law of the place where the contract is made or is to be performed as their principle, our view, too, leads as certainly to that result, without carrying with it the inevitable consequences, prejudicial to all sense of justice and equity, which accompany the unbending application either of the law of the place of the performance, or of the place where the contract is made.

If objection shall be taken to the principles laid down by us, because they are capable of various meanings, and so leave scope for capricious interpretations, we may answer by pointing to the impossibility of expressing fully in any code, or for one particular positive law, the principles of *bona fides* which govern the law of obligations. The cases, for instance, which the rich casuistry of Justinian's Pandects exhibits are mere illustrations which, by analogy, the lawyer may apply to the endless multiplicity of relations of obligation. We have less right to require of a system of international law what cannot be attained even for a particular system of positive law. If the cases which have hitherto supplied the most important material for questions of international obligation are discussed by us in such a way that those other questions, on which we shall not bestow particular attention, may be determined from the analogy of those that are fully dealt with, then we may fairly consider that our task is complete, because the rest may be left to judicial determination in each case as it arises.

FORMULATION BY LEGISLATIVE ENACTMENT.

§ 254. It is, however, an affair of the utmost difficulty to formulate in legislation the principle of private international law which shall regulate the law of obligations. That is at once demonstrated by a reference to the attempts in the Italian Code and the new Belgian Draft Code to do so.

The Italian Code, in § 9 of its preliminary rules, provides: "The import and the effects of obligations are held to be regulated by the law of the place in which the documents were executed, and if the contracting parties are foreigners belonging to the same nation, by the law of their

nationality. In every case an exception is made if some intention to another effect can be shown to exist."

The application of the law of the place of execution is thus held to be the rule. But that is not quite suitable for the performance of the obligation, which to some extent necessarily, and to some extent reasonably and presumably, is subject to the law of the place of performance. The leading exception, however, in accordance with which, if both parties belong to the same nationality, their contract is to be regulated by the law of that nationality, is, in very many cases, in palpable contradiction of what the nature of the subject and the ideas of the parties demand. If the parties do not know each other to be fellow-countrymen, they will often as a matter of necessity believe—and especially if they consult the Italian Code—that their bargain will be ruled by the *lex loci contractus*; and even if they recognise each other as countrymen, it is quite out of place to call in their national law in the case of bargains which are concluded at fairs and markets, or on public exchanges, as we have already noticed. Again, the reasonable consideration to take into account would seem to be, not whether the parties belong to the same State, but whether the personal law of the one in the case of the particular contract is identical with that of the other in its provisions, especially as we know that in different provinces of the same State different rules of law are recognised. Accordingly, the Belgian Draft Code, after providing in the same way at the outset, § 7:⁵⁴—

"Les obligations conventionnelles et les leurs effets sont réglés par la loi du lieu du contrat,"

has this subsection:—

"Toute fois, préférence est donnée aux lois nationales des contractants, si ces lois disposent d'une manière identique."

But if the parties are not aware of this agreement of their laws—and such knowledge is often a much more difficult thing to achieve than a knowledge of nationality—they will in the end be dealt with by a law, the application of which they could not foresee. Again, the same considerations may be urged against this theory as may be put against the Italian formula. Against both we have this further objection to make, in accordance with the exposition we have given, that the law of the domicile will better suit what may be presumed to be the intention of the parties, than will their national law. If a German *e.g.* has been for twenty years—it may be said his early youth—domiciled abroad, and has carried on business there, are we to believe that he had in his mind, not the law of his domicile, but the law of his nationality?

But, it is said, both the Italian Code and the Belgian Draft say in the end, that the intention of parties to some other effect shall be allowed to prevail. This intention, however, must by some special circumstance be shown to exist, and if any force at all is to be attributed to the foregoing rules,

⁵⁴ Rev. xviii. p. 472.

they must at least have the force of presumptions. Thus either the difficulty of proof will involve the application of the foregoing rules to cases to which they are quite inappropriate, or these rules will sink almost to the point of being meaningless. And, lastly, what are we to understand by the "will" or the "intention," as the Belgian Draft calls it, of the parties?

If the will of the parties be expressly declared, it must, of course, be allowed to determine the meaning of the legal transaction, in so far as that will does not come into conflict with coercitive laws. If parties in Berlin *e.g.* expressly declare that they are entering upon some mercantile contract according to the usance of Bremen, no one will doubt that the Bremen usance is applicable to the case. But where there is no such express declaration—and that is the general case—the question will be one, not so much of the intention of parties, as of the nature of the subject, although, no doubt, we are not altogether without real indications of intention which are implied, not expressed, as, for instance, where the parties use the technical legal language of some particular country.⁵⁵ It may, perhaps, have been in truth a confusion of the nature of the subject with the implied intention of the parties, which led the framers of the new Belgian Draft to the following singular limitation on the intentions of parties:—

"Ces règles ne sont pas applicables si, de l'intention des parties expressément ou manifestée par les circonstances, il résulte qu'elles ont entendu soumettre leur convention à une loi déterminée. La faculté accordée, à cet égard, aux parties contractantes, ne peut avoir pour objet que la loi nationale de l'une d'entre elles au moins, la loi du lieu du contrat ou la loi du lieu où celui-ci doit être exécuté."

If, for instance, some custom of trade, which prevails at a particular place, has proved itself of great practical value, why should parties not be at liberty to adopt it as the basis of their contract, supposing that no coercitive law intervenes, even although their contract should have nothing whatever to do with the place where the usage prevails.⁵⁶ This restriction may, perhaps, turn out in the future to be a serious drawback upon Belgian trade.

Perhaps we might draw up a statutory enactment in some such form as this:—

"In so far as contract obligations are to be determined by a foreign law, the determination must be in accordance with the nature of the subject, and must respect the mode of satisfying the contract which has been expressly or by implication provided by the parties. In so far as in this way neither the law of the place where the contract was made nor the law of the place of performance falls to be applied, each of the parties will

⁵⁵ [As to the importance of the form of the deed and its language in the case of a testament, see the case of *Mitchell and Baxter v. Davies*, 1875, Ct. of Sess. Reps. 4th ser. iii. 208.]

⁵⁶ Laurent's sketch of a bill (cf. § 14, p. 84) had no such limitation.

be ruled by the law of his domicile, and in so far as the law which regulates the matter does not contain coercitive provisions to the contrary, the parties are at liberty, either expressly or by implication, to subject themselves to another law."

In view of the indefinite character which must necessarily attach to all provisions, dealing with the law of obligations in its international aspects, that are not distorted, it may perhaps be asked whether it would not be better to refrain from any provision on the subject by way of statutory enactment.

B. PARTICULAR QUESTIONS.

1. SUBJECT OF THE OBLIGATION. LEGALITY OF THE TRANSACTION. (EVASION OF FOREIGN FISCAL REGULATIONS.)¹

§ 255. We have already noticed (cf. § 248) that an obligation is invalid everywhere, if the transaction which constitutes the subject of the obligation, is an act which is forbidden at the place that is selected, as, or is necessarily presumed to be, the place of performance.² *E.g.* a man binds himself to deliver some particular materials for the manufacture of drink at a place in which such manufacture is forbidden. Conversely, however, the obligation is valid, although the transaction is illegal at the place where the contract is made, if it is to be carried out altogether at a place where it is legal.³

It has, however, been proposed to make an exception to this rule in the case of prohibitions which rest on purely fiscal grounds. The most important example of this is where it is forbidden to import certain wares where the customs laws of foreign countries are to be evaded. It is often maintained that, in such cases, the judge should look upon a transaction that has that end in view as a legal transaction. Pardessus⁴ says that, in so far as customs duties go, States live in a kind of war with one another, and older authors, such as Emérigon⁵ and Straccha,⁶ express themselves in

¹ The purely logical requirements of an obligation, *e.g.* that the transaction shall be possible, and the subject of the obligation shall not be altogether indefinite (cf. Arndt. *Pand.* § 202), are not to be considered here, because they are found in all systems.

² Cf. Günther, p. 740; Massé, ii. p. 116; Wheaton, p. 116; Wächter, ii. p. 404; Story, § 246; Huber, i. 3, § 5; Mittermaier, i. § 31, note 9; Wharton, § 486; Fiore, §§ 280, 281; Stobbe, § 33, note 5a; Field, § 604; Foote, pp. 288, 297. It will be understood that all authors who make the place of performance the rule in every case are to be reckoned here. But the impossibility of performance as a matter of fact or a matter of law is to be tested by the state of circumstances and of the law at the place of performance. Sup. Ct. of App. Lübeck 31st October 1859 (Seuffert, xiv. § 195).

³ Wharton, *ut cit.*

⁴ § 1492.

⁵ I. chap. 8, § 58.

⁶ *De assicurat.* gl. 5, No. 5; Massé, ii. p. 116; and Wheaton, § 91, p. 122, take the same view. The older practice in France, according to Emérigon, as well as in England and America, is to the same effect. Cf. Story, § 245; Westlake, § 213.

a similar fashion. This ground, however, may justify retaliation, but can never justify the principle itself of refusing recognition to the revenue laws of other States; for, as Vattel remarks,⁷ every sovereign has the right of limiting the import or export of particular goods, without thereby giving other States, who claim the same right for themselves, any ground to complain. It comes to this, that it can hardly ever be possible to transgress foreign revenue laws without deceiving the officers of that Government—a proceeding which can never be regarded as creditable. An obligation which requires such a deception needs no more to show it to be necessarily regarded as invalid. But, as a matter of fact, this view gains more and more support daily.⁸

Of course, contracts which aim at an invasion of recognised principles of public law are also invalid. Such as are loans for the support of

⁷ I. ch. 8, § 90.

⁸ Pothier, *des assurances*, § 58; Story, §§ 245-257. According to Story's and Massé's notes, the English authors Marshall and Chitty, and the French jurist Delangle, adopt the same theory. Pfeiffer, *Prakt. Ausführ.* iii. p. 85. Mohl (*Staatsrecht, Völkerrecht*, i. pp. 724, 725) refutes at the same time the view that the State which favours contraventions of foreign revenue laws has any permanent advantages to expect from it: "Revenue laws are an essential means of compelling all classes of subjects to contribute to the burdens of the State; and, therefore, the maintenance of manifold rights and privileges, which every State is bound most completely to ensure to its subjects, is dependent upon their observance." At the least, as Mohl remarks, the opposite view must be rested upon the belief that advantage may somehow be drawn from this system of smuggling. By the same reasoning, theft, robbery, murder, and swindling in a foreign country will be supported. See the judgment of the Supreme Court of Cassel, of 13th December 1828, reported by Pfeiffer, pp. 85, 86, which pronounced for the nullity of a contract directed to the evasion of foreign revenue laws, as being intended to withdraw from the State in question a right founded on law; and the fact that the courts of Hesse had no jurisdiction to impose punishment in such cases could not be decisive. In the same sense Heffter, § 32, note 8; Fiore, § 287; Laurent, viii. § 114; Brocher, ii. § 159, p. 92; Weiss, p. 802, and Westlake, § 213, all express themselves to the same effect. C. de Bruxelles, 17th February 1886 (J. xiv. p. 214), the court holding that a contract, the object of which was to smuggle in France, was null. In France the question is unsettled, although the tendency is towards the view taken in the text (cf. C. de Pau, 2nd July 1886, and Clunet, J. xiv. p. 57). The case of a contract directed not merely to smuggling, but also to the corruption of the foreign officials, is beyond all question. Massé, ii. No. 83, "*La corruption quelque soit le but qu'elle se propose étant contraire aux principes de morale universelle. . . . C'est ce qui a été jugé par un decret de la Cour royale de Pau du 11 Juillet 1834.*" The grounds of a judgment of the Supreme Court at Lübeck, of 14th June 1886 (Seuffert, xxi. § 32), are to the opposite effect. It is said that the view, that the transgression of foreign revenue laws is to be considered inadmissible, has not yet spread among commercial nations. So long as this is so, competition must tempt nations to set themselves above the revenue laws of their neighbours. In the result we may concur in this judgment; for the question related to an entirely arbitrary prohibition of through carriage, of which the pursuer knew nothing, and was not bound to know anything, whereas the carrier, who was sued for damages, ought to have known of it. On the part of the pursuer, therefore, there was no intention of evading the foreign law. The question whether a transaction has for its object the evasion of revenue laws does not belong to international law; it is to be determined by the actual circumstances of the particular case, and this is a solution of the variety of the judgments reported by Story, § 251. In one case the transaction was not declared void, although the person who sold the goods knew that they were to be smuggled, because it was necessary, in order to produce that legal result, that the smuggling of the goods should form part of the contract, or that the seller should himself contribute in some way to the smuggling, e.g. by packing the goods in some special way. In the other case the contrary was found.

rebellions in a foreign country, or contracts for supplies to a belligerent State, in so far as the principles of neutrality are thereby infringed. The principles of public law are a part of the legal system of every civilised State.⁹

Undoubtedly, however, a distinction may be taken between the legality of the act, which constitutes the subject of the obligation, and the legality of the [antecedent] engagement. [For an instance of this distinction, see the case of Santos, 1860, 8, C. B. N. S. p. 861, where it was held that a Brazilian might sue a British subject for delivery of slaves sold in Brazil, where slavery is legal, although a British subject might be held to have committed felony under a British statute if he had bought or sold or held slaves even in Brazil.]

As a general rule, no regard need be paid to the law of the domicile or residence of parties, in so far as police prohibitions are concerned: for police prohibitions do not bind subjects in a foreign country. It might, of course, be that the State, by an order in that form, should bind all its subjects, even though they should happen to be abroad; but that must be distinctly enacted, and third States would have to refuse absolutely to uphold such prohibitions, by giving them extra-territorial execution.

The law of the place where action is brought rules, however, to this extent, that the judge cannot by his sentence compel any act which, by the law of his country, must be regarded as immoral, even although it was intended to do the act in some other country; and, in the same way, the judge may not work out any contract which encroaches on the law of his own country. It is, however, to be remembered, that a legal relation which in its nature belongs to another country, for that very reason does no violence to the law of this country, and for that reason, as we have already noticed (§ 36), may often have to be recognised by the judge of this country as a fact.

NOTE Q ON § 255. SMUGGLING, ETC.

[The doctrine recognised in England and the United States may be learned from the statements of Westlake and Wharton, to which the author refers. With regard to smuggling, the doctrine of the English law is stated by Addison (on Contracts, p. 99) to be that a foreigner who sells goods abroad, which are intended to be smuggled into this country, cannot sue on the contract of sale, if he shares in the illegal transaction, or packs the goods in a particular way to facilitate their being smuggled. But he may sue for the price of the goods in an English court, even although he knew that they were intended to be smuggled, if he does not actually aid the act of smuggling.

The law of Scotland is to the same effect, and is there stated in a judgment of the Court of Session in 1793 (*Cullen & Co. v. Philp, Morison's*

⁹ Cf. Wharton, §§ 495, 496, and the decisions there cited.

Dict. p. 9554): "When a merchant settled abroad, whether a foreigner or native of this country, simply sells goods to a smuggler, *tanquam quilibet*, and makes delivery on the spot, he can maintain action for them in our courts, though he suspected, or even knew, that they were meant to be smuggled into Britain; but if he is accessory to the smuggling, and thereby to an infringement of the laws of the land (which he is bound to know as far as concerns his trade), he cannot demand the aid of the British courts for recovery of his debt." The same doctrine is stated by Prof. Bell, Comm. i. pp. 326, 327. Foreigners and natives who are directly accessory to the smuggling, or are participant in it, are denied all right of action in respect of the goods. But the law of the country in which the contract is made, is to be applied in favour of natives of this country and foreigners alike, where there is a sale independent of the smuggling, even although the vendor knew to what purpose the purchase was to be turned.

But the courts of Scotland will not refuse to enforce a contract for smuggling into a foreign country, or for any other end which is pronounced, by the law of the country where the contract was made, or that of the country in which it is to be carried out, to be null as being forbidden by the laws of these countries, if it is not condemned by the law of Scotland as in itself immoral (per Ld. Justice Clerk Moncreiff in *Gelot v. Stewart*, 1871, Ct. of Sess. Reps. 3rd ser. ix. 1057). A common instance of the application of this rule is in connection with the stamp laws of a foreign country, see *supra*, p. 289 *et seq.* Again, the court seem to have held that they would allow one American to sue another for implément of a contract entered into in the Confederate States during the civil war, with reference to a mercantile adventure to be carried out by running the blockade of the southern ports, which had been established by the Federal fleet, on the footing that the Confederate and Federal parties were true belligerents; but that, if it should be ascertained that the Confederates were mere rebels, *i.e.* citizens of the United States engaged in illegal acts, then the court would perforce hold that the whole transaction was illegal, and could not receive any effect, since no contract between American citizens to furnish munitions of war to be used against their own country could be legal (*Clements v. Macaulay*, 1866, Ct. of Sess. Reps. 3rd ser. iv. p. 583). The legality of two natives of England, however, arranging for the supply of munitions of war to belligerents is not doubtful, unless it is prohibited by statutory authority. See cases cited in Wharton, § 496, especially *ex parte Chavasse* 1865. De. G. J. and S. 655.]

2. INTERPRETATION OF CONTRACTS.

§ 256. The interpretation of contracts¹ is assumed by some authors to include the whole subject matter of contracts, in so far as that is capable of modification at the pleasure of the parties. But it is better, with

¹ See Savigny, § 374; Guthrie, pp. 243, 244; Fiore, § 271; Wharton, §§ 431-439; Laurent, vii. §§ 479-482.

Savigny, to confine the subject of the interpretation of legal transactions to the doubts which may spring from the wording of them. No definite and adequate general rule for the interpretation of legal transactions in this sense can be laid down for international law, any more than any one general rule can be laid down to control such interpretation within the domain of any one local law, the latter problem being, strictly speaking, identical with that which is presented to us. In the one case, as in the other, the whole matter consists in ascertaining the true intention of the parties from their words, their acts, and the circumstances.

Indirectly, however, the question, what local law rules the transaction, is of importance, in so far as, supposing that *bona fides* demands the application of the law of the place where the contract was made, the same consideration will induce us to interpret it according to the phraseology in use there: for the intention of one of the parties only cannot be decisive; we must also enquire whether that intention was made intelligible to the other party. Savigny does not bethink himself of this circumstance, and he comes therefore to the contradictory result, that while the local law which is to be applied is a matter to be determined according to the presumed intention of the parties, and in consequence the law of the place of performance is to be the universal rule, the interpretation of contracts, a matter depending just as much on the presumed intention of the parties, is to be tested, in so far as phraseology and the construction of terms are concerned, by the law of some place other than that of the performance of the contract.²

Of special importance is the language which the parties have used, and the place where the transaction was concluded:³ in cases in which the parties do not meet, the place from which the relative writings are dated is of weight,⁴ and in the case of offers, proceeding from the one party, and

² Most authors recognise this close connection of the interpretation with the local law regulative of the contract in other respects. Story, §§ 272, 280. But yet, it is going too far to say that they never diverge. See Boullenois, ii. pp. 494-498. Especially may this fact be of importance, that one has passed a long time in a foreign country; in such cases, in certain circumstances, one might have to use the fashion of speech in use at that place, instead of that of one's own domicile.

³ But this place may be quite immaterial, if, for instance, the presence of the parties there is purely accidental, both of them being domiciled somewhere else, and, it may be, at the same place. In such cases, too, it will not be altogether a matter of indifference, whether or not the parties knew each other to be countrymen. To this effect, Imperial Court of Germany (11), 13th December 1887 (Bolze, *Praxis*, v. No. 20). [“Take the case of two Scotsmen, meeting in Paris, who contract regarding the disposal of a moveable in Scotland. It is of no consequence that they happen both to be in Paris.” Lord President Inglis, in *Valery v. Scott*, 1876, Ct. of Sess. Reps. 4th ser. iii. 965.]

⁴ Judgment of the Supreme Court at Lübeck, reported in Goldschmidt, *Zeitschrift für das gesammte Handelsrecht*, ii. pp. 140-142. A trading house in Bremen contracted with an English shipowner at Southfield in the English language, and employing the ordinary forms in use in England. The court interpreted the penalty clause attached to the contract, which was the ordinary English clause, as it is understood in England, and not as it is understood in Germany, because the contract was not only made in England, but the parties, one of whom was an Englishman, had taken as the basis of their contract the customary English forms. (By the law of England this clause confers no substantial rights, and the party, in spite of it,

simply accepted by the other, the terminology of the offerer must be taken as the rule.⁵ One who makes a demand for the services of a tradesman, must, unless he stipulates to a different effect, pay him at the rate which is recognised at the place where he carries on his business;⁶ and in support of that result it may be said, that the tradesman has in a way, by carrying on a trade there, offered his services once for all at the seat of his place of business.⁷

The rules of interpretation furnished by the law of Rome, according to which, in case of doubt, the interpretation was to be against the *stipulator*, the seller, and the lessor,⁸ are not against us. They are dealing with interpretation within one and the same language and terminology, they do not touch the question which of several terminologies or languages is applicable.⁹

Accepting, however, the view which I have maintained as to the treatment of the law of obligations in general, we shall as a rule, so soon as we know what local law is to rule the particular case, determine at that moment what terminology is to be adopted for its interpretation. It will almost require the use of a foreign language, or of some special technical expression, to give any other result.

We have avoided setting up too abstract rules for the determination of international law on this point, and, on the other hand, we are not, as we have said, of opinion, that the bare intention of one of the parties, which presents no point to attract the notice of the other, has a claim for our consideration. That is the shortest way of putting the matter.

3. CONDITIONS OF THE VALIDITY OF CONTRACTS AND OF THE ENFORCEMENT OF THEM BY ACTION. (PROHIBITION OF LOTTERIES.) CHALLENGE OF CONTRACTS.

§ 257. The validity of contracts and their force in judgment may depend upon the observance of a particular form. We have already

cannot demand more than what he has suffered.) Trib. Comm. de Caen, 7th September 1883 (J. xi. p. 282); to the same effect in a similar case, see Clunet, *ibid.* p. 284. Wächter (*Archiv. f. d. civil. Praxis*, vol. xix. p. 121) gives the following case: An insurance company at Leipzig had in its printed conditions excepted the case of destruction by riot (*Aufbruch*). In a conflagration which occurred in a foreign country, the question arose, whether the legal idea of riot was applicable, since the laws of different countries define this idea in different ways. Wächter decides that regard must be had to the language of the law of Saxony. See Savigny, § 374; Guthrie, p. 244 note (d.)

⁵ Fiore, 274.

⁶ Supreme Ct. of App. Lübeck, 26th November 1867 (Seuffert, xxii. § 2).

⁷ That is not the rule, however, for determining the question whether one is or is not bound to the tradesman, but merely for settling the amount of his remuneration. See the judgment cited in the immediately preceding note, and Ct. of App. Berlin, 22nd October 1874 (Seuffert, xxxiii. § 124): the grounds of decision there seem to settle the rate of remuneration independently of contract.

⁸ L. 26, D. *de reb. dub.* 34, 5, L. 38, § 18, L. 99, *pr. de V. O.* 45, 1.

⁹ Savigny, § 374; Guthrie, p. 246.

remarked, in discussing the rule "*locus regit actum*," that the transaction in such a case must be recognised generally as valid and good as a ground of action, if it is in accordance with the forms recognised at the place where it was entered into.¹ If, then, informal contracts are generally recognised in any country, then an informal contract concluded there may be pleaded in judgment in any other country, although according to the law of that second country such a contract would only create an obligation on which no action could be raised. Whether, again, it will be enough that the transaction, as regards its form, is in accordance with the law of some other country, will depend upon what laws govern it as regards its substance. For it may be laid down that the same laws to which the essence and import of the transaction are subject, will and should regulate the form of the same, since its form is simply the outward token of its essence and import. Besides that, however, the purpose of the parties to bind themselves by a valid contract must be evident. This consideration will show that there can seldom be a binding contract, if in the form of the contract the *lex loci contractus* is not observed.

If the transaction is forbidden by the law of the place where it is entered into, then there can be no form recognised by the *lex loci contractus* by which it may be validly concluded.² Thus, all such contracts must, as a rule, be pronounced null, unless for this exceptional case it is sufficient to observe the form imposed by the law of some other territory. For instance, according to the penal code of France,³ a sale for delivery of public funds is invalid if at the time of concluding the contract the scrip is not in the possession of the seller. A contract of this kind, therefore, concluded on the Exchange at Paris in contravention of this provision, is, as a rule, to be held null everywhere. But if two persons domiciled in another country conclude a bargain of this kind in a railway carriage while they are in some territory where French law prevails, then either party

¹ Mevius in *Jus. Lub. proleg.* 4, No. 116, "*Cave autem in hac materia confundas actuum et contractuum sollennitates, nec non effectus.*"

² Asser (cf. Asser-Rivier, § 36, p. 78) refuses to accept this result. He is of opinion, taking the very instance which I have taken in the text, that, "if such a transaction is concluded on the Exchange in Paris, can it be said that the law has not prescribed the form of it?" Asser makes a confusion between the civil and the criminal law; within the meaning of the criminal law the parties have concluded a transaction, although it is an illegal transaction. But a transaction which is null within the meaning of the civil law can have no form in the eye of the law at all, not even an informal form, for a nullity has no form. This reasoning of Asser rests on a circle, and is at the same time misleading. He says that the accidental circumstance, that the suit comes up for decision in another country, can never give a subsequent validity to a transaction which is invalid by the *lex loci actus*. But in this he assumes—what he ought to have proved—that the declaration of invalidity has an extra-territorial operation, and it is not always a matter of accident that the suit comes up for decision before a judge, other than the judge of the place where the contract was made; e.g. if two subjects of country A are making a short journey through country B, and there make a contract with each other, which is to be performed in A, completely valid by A's law, and invalid only by the law of B. The validity of this contract in country B cannot well be doubted; e.g. X sells Y in country B a ticket for a public lottery in country A. According to Asser's reasoning, the contract is invalid.

³ §§ 421-1. Cf. Gand, § 688.

may bring an action for compelling performance before the *judex domicilii*, if the law of the domicile of these parties knows no such restriction,⁴ and if their intention clearly was directed to the execution of a binding contract.⁵ The same rules will decide if, for instance, one makes some stipulation in Vienna contrary to the provisions of the 879th section of the general code of Austria.⁶ The question whether an obligation will give rise to action, whether the undertaking, that is, in itself, apart from the act to which it is directed,⁷ is valid or permitted or not, is undoubtedly a question as to the substance of the contract, and must therefore be determined by the law to which the obligation is itself subject, and must therefore be independent of the law recognised at the seat of the court.⁸ But if an action arising out of the particular legal relation is held in our country to be immoral, or indecent, it must be thrown out, without respect to the law of the place where the contract was made or where it is to be performed, or to that of the domicile of the parties.⁹ These cases, and such

⁴ Boullenois, ii. pp. 456, 489, 490. Story, § 273, remarks, "Without undertaking to say that the exception may not be well founded in particular cases, as to persons merely *in transitu*, it may unhesitatingly be said that nothing but the clearest intention on the part of foreigners to act upon their own domestic law, in exclusion of the law of the place of contract, ought to change the application of the general rule." See also § 278 *ad fin.*

⁵ Such exceptional cases are generally overlooked, if one argues with Huber, in *confl.* § 3: "*E contra negotia et acta certo loco contra leges ejus loci celebrata quum sint ab initio invalida, nusquam valere possunt.*" The reason "*quum sint ab initio invalida*" contains a *petitio principii*: it assumes, what is not proved and cannot be proved, that every transaction is to be determined by the *lex loci contractus*. Story, § 243, says of contracts, "If void or illegal by the law of the place, they are generally held void and illegal everywhere." He maintains it is a principle of the law of nature; Foote, pp. 292, 297, seems to come to the result stated in the text, although he gives no special demonstration of it.

⁶ § 879, "In particular, the following contracts are invalid—viz. 1st, If any condition shall be laid upon the undertaking of a contract of marriage."

⁷ Foote very properly calls attention to this distinction, pp. 373, 374.

⁸ Seuffert, *Comm.* i. p. 160, note 78; Fœlix, i. § 110, p. 255; Wächter, i. p. 270; ii. p. 26, and 400.

⁹ If, for instance, at the place of action gambling debts cannot constitute a ground of action. Savigny, § 374; Guthrie, p. 252. The law of England and that of the United States seems up to this time less disposed to throw out the action on the ground of the *lex fori*, and to be disposed, unless in specially pressing cases, to hold by the *lex loci contractus*. See, e.g. as to the recovery of gambling debts, Wharton, § 492. Phillimore, § 676, remarks: "The general rule, however, is never—i.e. unless express exceptions are made—to extend the prohibitions to contracts made abroad." The jurisprudence of the continent is more inclined to place the moral character of the law of the judge who is dealing with the case above the *bona fides* of the international law of contracts, which would let the *lex loci contractus* have its effect. Cf. e.g. a judgment of the Supreme Court of Appeal at Rostock, of 17th December 1857 (Seuffert, xix. § 107): "It is immaterial to consider whether the *lex commissoria* is recognised in England, for the judge of this country is absolutely bound to see that the prohibition of so sternly compulsory a nature, which was enacted as a protection against the pressure of usury, shall receive effect unconditionally." But see a judgment of the German Imperial Court, of 10th May 1884, S. T. and H. (J. xiii. p. 609), in which the court applying the law to which the contract belonged, i.e. that of the place of performance, declared a stock exchange transaction in France null, because null by French law, and refused action. The question of suing on a foreign gaming contract has never occurred in Scotland, but it is thought no such suit would be entertained, the ground on which suits upon native gaming contracts are thrown out of account being that courts of justice will not concern themselves with such transactions—

cases as those in which some legal relation cannot be sued upon for want of a prescribed form—*e.g.* where action cannot be maintained for more than a certain sum except upon a written document—have been so mixed up¹⁰ as to have led to the very general adoption of the view that where a transaction or contract cannot be sued upon in some particular country, no action at all arising out of a transaction of that class can be maintained there, although it was concluded and is to be performed in another country, and both parties are foreigners.¹¹ If the law restricts the judicial operation of particular obligations, that provision no doubt implies that the judge is bound to throw out any action of the kind, in spite of the desire of the parties that the transaction should be upheld. If, then, for instance, an action is brought upon a guarantee by a wife for her husband, a forbidden transaction, the judge must necessarily dismiss it. But that does not settle the question whether the law meant to deal merely with bonds undertaken by married women belonging to its own country, or bonds which were to receive effect there, and not to touch those undertaken by foreigners in a foreign country.¹² The theory which holds that the *lex fori* must always determine whether action can lie or not, leads necessarily to this, that more favour is shown to a transaction which is entirely void, than to one which is valid in itself, but on which no action can be brought.¹³

In this connection, too, the question of prohibited gambling by means of lotteries falls to be discussed. If a State will not tolerate at all public lotteries with money prizes, or at least money prizes of considerable value, or only sanctions lotteries for charitable and suchlike purposes,¹⁴ the courts of that country cannot be asked either to compel the payment of a prize, or to recover the price of a ticket; the State in such a case regards

sponsiones ludicrae—a reason which would apply as much in a suit between foreigners for a bet made abroad. The same considerations are held to apply in the case of lotteries; see case of Christison, cited in note 14 *infra*.

¹⁰ *E.g.* “*La recherche de la paternité est interdite*, Code civ. art. 340; or the provision of the Austrian Code cited in note 4; or the contracts cited by Story, § 258, in encouragement of prostitution, or for the circulation of indecent books or pictures, if these contracts are concluded in a foreign country.

¹¹ So, for instance, Weber on natural obligations, § 62; and Linde, Handbook of German Civil Process, § 41, note 3.

¹² Judgment of the Faculty of Kiel, reported by Brinckmann, i. p. 16. See, too, the interesting English decision, *Branley v. S. E. Ry. Co.* [1862, 12, C. B. N. S. 63] (Foote, p. 374), where it was held that the company could make conditions of carriage in Boulogne, which would have been illegal by Act of Parliament for conveyance on English soil exclusively (a special rate for goods packed in a particular way).

¹³ Wächter, ii. p. 402; Demangeat on Fœlix, i. p. 255, note a.

¹⁴ *E.g.* the French statute of 21st May 1836, which in its first article forbids lotteries generally, and in § 5 makes only one exception in favour of lotteries of moveable articles, “*destinées à des actes de bien faisance, ou à l’encouragement des arts, lorsqu’elles sont autorisées dans les formes qui seront déterminées par les règlements de l’administration publique.*” [In England and Scotland foreign lotteries cannot be advertised, under penalties, 6 and 7 Will. IV. c. 66, and 8 and 9 Vict. c. 74. All lotteries within the kingdom are forbidden except for the distribution of prizes of works of art. The court must therefore refuse to give decree to a person who claims it as the winner of a lottery. See *Christison v. M’Bride*, 1881, Ct. of Sess. Reps. 4th ser. ix. p. 34.]

gambling by lottery as something immoral, and mischievous to the public. But if, as is frequently the case, the State in the interest merely of its own fisc forbids trafficking in foreign lottery tickets and gambling in foreign lotteries, all talk of the State assisting a legal relation, which from its own point of view is immoral and not actionable, by entertaining in its courts a suit founded on a foreign lottery, is out of the question. The thing, then, to be investigated is whether the case on hand, which has given occasion to the suit, is one that ought and can, from its own nature, be touched by the prohibition of the State. The widest scope which can be given to the prohibition is that it should affect all persons who are in the territory, and all natives who buy tickets abroad with a view to evade the law. Foreigners, who are in a foreign country, cannot, it is plain, be bound by any such prohibitions. Again, it is unworthy of any State, which desires to recognise its neighbour's law, to refuse judicial aid to a legal relation which has arisen in a foreign country in a perfectly legal fashion, from some idea of stretching its fiscal regulations to their largest extent. If, then, for instance, a foreigner has gambled in a foreign country in a lottery which is legal there, or as a collector has become debtor to pay a prize in one, and then travels into another State, which forbids gambling in that foreign lottery, he will be liable there also to action for the price of his ticket, or for payment of the prize.

We must, however, go further. Even a subject of this country who is domiciled abroad, or resides there for a considerable time, must in the nature of the case be free from the pressure of fiscal prohibitions of the kind. And it is at variance with that *bona fides*, which is so necessary in international law, to refuse action to a foreign contracting party—who in a foreign country is under no duty of turning to the prohibitions of our State, and does not need to inform himself as to their import—for not knowing that the person who took a ticket in the lottery belonged to a country which forbids gambling in foreign lotteries. The courts of the United States seem to take this view,¹⁵ as it is their endeavour generally to protect the *bona fides* of commerce in conformity with the *lex loci actus*. The jurisprudence of the Continent of Europe, on the other hand, seems for the most part to exhibit the spirit of a mere tax-collector. The opinion which prevails is that, as it is a revenue law of the one country or the other that is in question, or as the legislature is in pursuit of some moral object,¹⁶ it is permissible to set the statute on this subject above all the rules of international competency which are recognised on all other matters. The decisions themselves, however, are not unfrequently more

¹⁵ See Wharton, § 487.

¹⁶ See Weiss, p. 802, and the judgments of the French courts cited there: also Laurent, viii. § 112. It is, however, to be noticed that the French authors on this subject, who have principally in view the law of France (see note 14), have, in that respect, another and a better foundation for their opinion than German authors and German courts have, who, in the rules of law enacted by the statutes of their country, have before their eyes a case in which the legislator maintains the lotteries of his own country, and only forbids those of foreign countries.

sound than the reasoning on which they are based. Thus a judgment of the Supreme Court of Berlin, of 16th October 1855, proceeded on the ground, that the question whether or not the transaction was permissible must in a Prussian court be determined by Prussian law; and the pleas of the defenders—who were domiciled in Prussia; and had sold to the pursuer, who was domiciled in Bohemia, tickets in a marine lottery for Prussia—that they were free from liability, because in Austria the sale and purchase of Prussian lottery tickets was forbidden, were repelled. Again, in a judgment of the Appeal Court of Lübeck of 11th September 1849,¹⁷ it was said: “Foreign laws forbidding gaming in lotteries in other countries are not to be applied by the courts of Frankfort, as the Frankfort lottery is a financial institution of the State; and it cannot, therefore, be held that the legislators of Frankfort intended to give to courts of that place power to apply such laws. If a collector has invited a foreigner to game in the lottery, knowing that that was forbidden by the laws of his (*i.e.* the collector’s) country, he cannot appeal to these foreign laws, so as to escape payment, if the foreigner wins; this plea will be repelled by the *Replica doli*. The same result, *viz.* decree against the collector by the tribunals of the State to which the lottery itself belongs, may more correctly be referred to this consideration, that the obligation of the defender was to be tested by the law of his own domicile, and that the foreign law by which the obligation of the other party was to be tested, could not on general principles (see *supra*, § 250) be taken into account at all, after that party had already performed his side of the contract. A judgment of the German Imperial Court (iii.), of 12th July 1881,¹⁸ held it to be sound that an action by a foreign lottery collector directed against a person domiciled in Prussia, presumably a Prussian, on account of a claim founded on the purchase of lottery tickets, should be thrown out without taking any account of an averment that in certain cases the tickets had been procured, not in Prussia, but at Bremen, at the domicile of the collector himself, on this ground, because the question whether an act is to be regarded as illegal, is to be decided by the law of the court to which appeal is made.¹⁹ The obligation of the defender in this case was ruled by the law of Prussia, and was obviously null. Nor was this nullity affected by the fact that in this or that instance, when the defender happened to be in the immediately adjoining territory of Bremen, he took tickets there. All the less could any weight be put upon that fact, as the collector, the pursuer, presumably knew of the prohibition which existed in the law of Prussia, as the defender was well known to him: thus the application of the Prussian prohibitive law could not for a moment be represented as an invasion of *bona fides*.²⁰ The exact ground upon which the decisions in such cases have been put is, however,

¹⁷ Römer’s Collection, ii. pp. 158-160.

¹⁸ Entsch. v. § 33 (cf. especially p. 129).

¹⁹ Then follows the usual reasoning as to the coercitive laws on Savigny’s model.

²⁰ If, in such cases, the prohibitory law were not to be regarded, a door would be opened for evasion of it.

of special importance, because in more modern times even the public loans of foreign States may often be touched by prohibitions of this nature,²¹ and because modern legislation generally experiments in all possible and conceivable prohibitions, frequently without any great success. It is worth while, then, to protect at least in some measure the possibility of international commerce and intercourse in lines that will harmonise with *bona fides*.

The challenge of contracts is subject to the same law as that by which their validity is to be tested. Their liability to challenge is simply an incomplete or conditional invalidity.²² In the challenge or reduction of a sale because of lesion to the extent of more than one-half of the whole,²³ or because of defects in the thing sold, the law as to *locus premitentie*,²⁴ the right to resile upon rejection of arles or *arrha* that has been given, the right of re-purchase, and the right of restitution against a contract, we find applications of this rule.²⁵

4. IMPORT OF OBLIGATORY CONTRACTS.

§ 258. Within certain limits, the import of an obligation depends on the declaration of the intention of the parties. But yet it would not be correct to say that the import of an obligatory contract is merely that which may be presumed to be their intention. The so-called dispositive rules of law which belong to this subject may, no doubt, be excluded by the will of the parties; but it is by no means the case that they are to be applied only where they correspond with what was probably the intention of the parties.¹ If this were true, these rules would be excluded in every case where one could not point to some declaration of intention, perhaps a tacit declaration, by the parties that they should be applied. It is upon a confusion between the presumed intention of the parties and these so-

²¹ Cf. e.g. C. de Douai, 6th August 1883 (J. xi. p. 190).

²² Rules as to the challenge of legal transactions are part of substantive law. Judgment of the Supreme Court at Berlin, 11th February 1858 (Striethorst, *Neue Folge*, 2nd year, vol. i. p. 51). Cf. Massé, p. 158.

²³ Fœlix, i. p. 249 (§ 109); Hert, vi. 4; Massé, p. 220 (in the sale of real property, as a rule, the *lex rei sitæ*. See Massé, p. 223); Fiore, §§ 293, 294; Brocher, ii. § 82. Laurent, viii. § 145, proposes that the personal law of the parties shall be the absolute rule, because there is a close connection between a failure of *consensus* and incapacity of the person. But although the law protects a party against his own thoughtlessness by allowing him to challenge a transaction on account of *lesio enormis*, this is not effected by declaring him to be incapable of acting.

²⁴ Boullenois, ii. p. 454; Fœlix, i. p. 230.

²⁵ See generally J. Voet in Dig. 4, 1, § 29; Story, § 331; Wächter, ii. p. 404. Wächter recognises this in so far only as rights are concerned which parties may renounce. According to the general principles which we have assumed (§ 247), we cannot approve of this restriction. See, too, Savigny, § 374; Guthrie, p. 249; Renaud, *D. Privatr.* i. § 42, note 26, and the judgment of the Sup. Ct. of App. at Lübeck, of 30th January 1850, reported by Römer, ii. p. 228. As to restitution, see *supra*, § 154.

¹ Thöl, § 44, ii.

called dispositive rules of law that the theory of those authors rests,² who say that the immediate effects of a contract are to be determined by the *lex loci contractus*, while its indirect or accidental consequences must be ruled by the laws of the country where these consequences may have taken place. For instance, it is said that among the immediate consequences of a contract of sale are the delivery of the subject sold to the buyer, the payment of the price, the right to renounce the contract on the ground of enorm lesion, and the passing of the risk to the buyer; while among the accidental consequences are unwarrantable delay on the part of any of the contracting parties, or the renunciation of the contract by reason of the occurrence of some subsequent event.³ The former are results that can be foreseen, the latter cannot. But the whole theory must be rejected, for the very reason that it is only the particular capacity and prudence of individuals that can determine what is unforeseen. It is difficult to understand, as a matter of fact, why there should be any greater difficulty in foreseeing a delay in performance, than in foreseeing the accidental destruction of the subject, and indeed it may very well be that, if the buyer had a reputation for dilatoriness, punctual payment should belong to the category of things unforeseen.

Further, it is an error to determine objections which may be taken to the validity of a contract by the law that is recognised at the seat of the court, instead of by the law under which the contract itself falls.⁴ No doubt there may be objections which are rested on considerations of the forms of process, and there the *lex fori* will decide; but it is different with objections depending on substantive grounds—they determine up to what point the validity of an obligation may be carried, and can therefore be decided by no other law than the local law, which for other purposes determines the validity of the obligation.⁵

5. CONTRACTS, THE OBJECT OF WHICH IS A MONEY PAYMENT.

§ 259. We have already noted, in discussing the general principles of the law of obligations, that in cases of doubt the coinage recognised at the place of payment must be taken to be the proper medium of payment.¹ We need only mention one point in this connection which is much controverted, especially in the judgments of English and American courts.

Suppose that a debtor, who is bound to pay a certain sum at a

² *E.g.* Fœlix, i. p. 247, and note i.; also Fiore, § 257.

³ Fœlix, i. p. 249 *et seq.* § 109. See, on the other hand, with much emphasis, Asser-Rivier, § 36, p. 81.

⁴ *Cf. e.g.* Fœlix, i. p. 237, § 100. See, on the other hand, in particular, Asser-Rivier, § 38, p. 82.

⁵ Savigny, § 374; Guthrie, p. 247; Demangeat, in note to Fœlix, *sup. cit.*; Story, §§ 330, 331.

¹ In contracts as to landed property, circumstances will frequently compel recourse to be had to the currency of the law of the place where the subject is. See *supra*, § 251, note 47.

particular place, is asked for payment at some other place, is the sum to be determined by the nominal or statutory relation which the currency of the place in which the demand is made bears to the currency of the place where payment was to be made, or is it to be determined by the rate of exchange current between these two places? For instance, action is brought in the United States for a debt of £100, nominally payable in England—by statute in the United States the pound is equal to 4 dollars 48 cents,² but the course of exchange with England gives it a higher value by 1 per cent.—is then the pursuer of the action entitled to 448 dollars, or to that sum and 1 per cent. besides? Upon this question there have been conflicting decisions in the courts. The following seems the true answer. In strictness, the creditor is not entitled to require payment to be made at any other place than that originally appointed, nor is the debtor entitled to discharge himself by tendering payment anywhere else; and, therefore, the sentence of the court must condemn the debtor to pay the sum fixed at the original place of payment according to the statutory equivalent. It might be impossible to work out such a decree at the original place of payment if the debtor had no sufficient estate there, or if the court of that country should refuse to give legal redress. If, then, the reason for not raising the action at the appointed place of payment be that the debtor has no estate there, the judgment of the court must be in such terms as will make it possible to carry it out at the place where action is brought, and, therefore, since the debtor has failed timeously to make payment at the appointed place, and must bear the consequences of that failure, the creditor will receive, in addition to the original sum, enough to pay the act of transmitting that original sum to the place where payment should have been made. If, then, the debtor wishes to pay in bills, or if there is no other way of remitting the money safely (*e.g.* if it should be impossible to ensure the money that has to be remitted), he must make good to the creditor the difference of the exchanges in case the rate at the place of payment as compared with that of the place of action is above par, while in the converse case he may take credit for the difference. It may, however, be equally convenient for the creditor to receive payment at the place of action; if in such a case he should, nevertheless, demand payment at the place originally fixed, the debtor by establishing the fact may plead the *exceptio doli*, and the creditor, who has no interest to receive payment there, would be satisfied with receiving so much as might be equal to the sum originally contained in the obligation according to the value set upon it by the law of the place of action. Lastly, it may absolutely be for the creditor's advantage to receive payment at the place of action; in such a case the debtor would be entitled to deduct, upon similar grounds, the difference between the rates of exchange in the two places.³ In the case of settlements between traders, it is generally in the

² There is, however, an exception to this, viz. in the estimation of duties on goods where duty is payable *ad valorem*. Story, § 309, note 6.

³ L. 2, pr. D. *de eo quod certo loco*, 13, 4.

interest of the creditor that payment should be made at the place arranged, and that the rate of exchange, if the payment is made by bills, should determine the amount. In such cases, however, unless there should be some statutory prohibition,⁴ the judgment of the court can only give the pursuer the sum sued for, along with the expense of transmitting it safely to the place of payment; for the mode of payment, which may, for instance, be made by post-office order or by the remittance of specie under insurance, is left to the choice of parties until steps are taken to compel it.⁵

FORCED CURRENCY.

§ 260. The question, whether a creditor must accept a statutory forced currency of depreciated foreign paper, is answered in the negative by Massé;⁶ and in the same way by Pardessus, § 1495*a*, and Wharton, § 518; at least the creditor, they think, can only be required to accept such a paper currency at its real value. Although the creditor has no means of forcing his debtor to make any further payment in the country whose law ordains that payment may be made in this paper currency, he may in such a case sue his debtor in the courts of any other country where that debtor possesses property, and obtain and put in execution a decree for the full amount of the debt. To this view I cannot, however, assent.⁷ The creditor might, with as much justice, dispute the binding force of any

⁴ Cf. *Allgem. Deutsche Wechsel Ordnung*, § 57, rule 2.

⁵ Cf. Story, § 368 *et seq.*; Wharton, §§ 514, 515. Lord Eldon says [in *Cash v. Kennion*, 1805, 11 Ves. 314], "If he fails in that contract," *i.e.* his contract to pay at a certain place on a certain day, "wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." "From this," says Westlake, § 226, "the conclusion has been drawn that, where the time and place of payment are fixed by contract, the rate of exchange ought to be taken as at the time so fixed." [Bertram *v.* Duhamel, 1838, 2 Mo. P.C. 212, and in accordance with this doctrine the rule is stated thus in *Mayne on Damages*, p. 209: "Where an action is brought in England to recover the value of a given sum in a foreign currency, upon a judgment obtained abroad, the value is that sum in sterling money which the currency would have produced, according to the rate of exchange between the foreign country and England at the date of the foreign judgment." See, too, the Scots case of *Ainslie v. Murrays* cited *supra*, p. 550. In *Campbell v. Hannay*, February 15, 1809, F. C., the Court of Session held that a person sued for payment of a sum which he should have paid in India, was not entitled, as the suit in Scotland had been rendered necessary by his own default in not paying in India, to claim discount at the Indian rate of exchange. This case can hardly be defended on sound principle: reason would support a decision that the creditor should not suffer by the debtor's obstinacy, but the Court were not entitled to impose a fine. The ordinary principle of allowing the current rate of exchange on payment *e.g.* of an Indian debt in England, is applied in *Kibble v. Graham's Trs.* by the House of Lords (1830, 4 W. and S. p. 166). The Supreme Court of Comm. of the German Empire on 28th June 1875 decided (*Treschow v. Bockelman*, J. iv. p. 161) that, in all that concerns payment or performance, the law of the place of payment or performance will rule.]

⁶ p. 170.

⁷ Fiore, too, § 300, holds the view that the law of the place of payment must prevail even against foreign creditors. Pardessus and Massé, however, concede that the courts of the State, which sets up the forced currency, would enforce it absolutely.

other law which in whole or in part destroyed his right of action under the contract—*e.g.* the law of prescription, if it did not exist in the legal system to which he was personally subject. If the obligation in dispute is generally subject to the law of the country in which there is such a forced currency, the discharge of the obligation must be ruled by the law applicable to this currency. But the fact that payment happens accidentally to be made somewhere in that country is not decisive of the point.⁸

This view too is, as a practical matter, not of any great danger. A forced currency is only ordained by the government of a country in the extremity of necessity, for the institution of such a depreciated currency must have the worst effect in the future upon the credit of the State and of its subjects. To apply the view first stated would only ensure a very small measure of assistance, because it is purely accidental whether the debtor has property abroad or not; and since he could not in future venture to send any articles of property, or even money to creditors, for fear of an attachment being laid upon it, the result would be that commerce would be completely crippled, and the public would suffer. The case would no doubt stand differently if it was proposed to apply this forced currency, according to its nominal value, to all claims which in truth belonged to a foreign country, but which accidentally came to be paid or to be sued upon in the country where this currency was in force.⁹

ADOPTION OF A NEW STANDARD. THE ACTIONS BROUGHT AGAINST AUSTRIAN RAILWAY COMPANIES AFTER THE INTRODUCTION OF A GOLD STANDARD IN GERMANY.

§ 261. The question, in what currency a debtor must pay, received a peculiar illustration shortly after the German Empire, by the laws of 4th December 1871 and 9th July 1873, adopted a gold standard in place of a

⁸ Two countrymen make a contract at their domicile, and for convenience agree that payment shall be made in some country where a forced currency is subsequently introduced. In this case, the creditor must accept the paper, for the enactment extends to all payments made within the territory of the State, but only at its real value.

⁹ Cf. too, Massé, *ut cit*: "*Il arrive souvent que les lois d'un pays, dont le valeur monétaire est dépréciée, établissent dans l'intérêt du commerce des règles particulières pour les paiements à faire aux étrangers.*" Cf. *e.g.* § 3 of the Italian Statute of 1st May 1866, which is no longer of any practical force, and the judgment on it of the App. Ct. of Florence of 21st March 1870 (Jour. viii. p. 446), with Clunet's note, *ibid.* It is plain, from the exposition we have given in the text, that an enactment like that of the 1895th § of the Code Civil is to be applied to foreign creditors, even although the obligation falls under the law of France: that article provides: "*L'obligation qui résulte d'un prêt en argent n'est toujours que de la somme numérique énoncée au contrat. S'il y a eu augmentation ou diminution d'espèces avant l'époque du paiement, le débiteur doit rendre la somme numérique prêtée, et ne doit rendre que cette somme dans les espèces ayant cours au moment du paiement.*" Massé, p. 171. Gust. Hartmann, in his paper cited in the next note, § 57, says very soundly: "The only civil tribunal that can decide the case is, in respect its powers are restricted, neither an adequate nor an appropriate instrument to afford the necessary protection to the citizens of its own country, who are touched by a foreign financial law, which may happen to be unjust.

silver standard.¹⁰ The German statute of 1871 took as its basis the actual relation of gold to silver that then existed, according to which 15½ lbs. of silver were worth 1 lb. of gold. Soon afterwards an enormous fall in the value of silver took place, so that France *e.g.* found herself forced to suspend free coinage of silver, and in that way practically to adopt also a gold standard. Austria adhered to her paper currency; but the value of silver sank so low, that the value of the Austrian silver florin was no longer any higher than that of the paper florin, and at times even sank below it. Now a number of Austrian railway companies had put upon the international market debentures, in which the amount of the bond and of the interest coupons to be paid were first stated in Austrian silver currency, but at the same time also, at the option of the holder, in German thaler currency, in francs, and partly also in pounds sterling, in English currency, and in Dutch.¹¹ At the same time, besides the place or places of payment in Austria, there were other places of payment appointed, at the option of the holder, in the German Empire, in Paris, in London, etc. The railway companies then, or by far the greater number of them,¹² paid at the appointed places, but only at the subsequent value of the Austrian silver florin, *i.e.* according to the exchange of the Austrian silver florin; and in consequence foreign creditors suffered a loss, according to the value of silver, of from 15 per cent. to 20 per cent., which latterly was as a rule the amount of the depreciation. A number of actions were fought, with much excitement among the public and the press, against the companies in Germany, jurisdiction being given to the German courts by the establishment of the places of payment within the Empire. By an unbroken series of decisions, what was at one time the Supreme Court of Commerce for the Empire, afterwards the Imperial Court (Reichsgericht),¹³ gave decree against the companies:¹⁴ whereas the Austrian Courts (see Bekker, p. 12) gave judgment of absolutor. The grounds of the German decisions may be shortly summed up to this effect, that the obligations in question, as they had a place of performance in Germany, were, in the option of the creditors, to be ruled by the substantive laws of that place of performance, at least in so far as the business of payment was concerned, and that they were

¹⁰ On this subject, see particularly a paper by Bekker, "*Über die Couponsprocesse*," and Gus. Hartmann's "*Internationale Geldschulden*," 1882.

¹¹ As to some distinctions in detail among these bonds, see *infra*, note 19.

¹² The Aussig Teplitz Company, the Staatseisenbahn Company, and the Süd Bahn, satisfied their creditors without any deductions. See Bekker, p. 7.

¹³ Cf. judgment of the Sup. Ct. of Comm. 19th February 1878 (*Kaiserin Elisabeth Bahn*), and 8th April 1879 (*Süd-NordDeutsche Verbindungs Bahn*). (Dec. vol. xxiii. § 72, p. 205, and vol. xxv. § 11, p. 41.) Judgment of the Imp. Ct. of 12th December 1879 (*Elisabeth Bahn*) (Entsch. d. R.G.I. § 12); also R.G.I. against the *Lemberg-Czernowitz-Jassy Co.* of 4th October 1882 (Entsch. ix. § 2).

¹⁴ Of all the German courts, that of Cassel was the only one that gave judgment in favour of the defending companies, see Bekker, p. 19. This judgment mistakenly lays down that a debtor, as regards the payment due by him, can subject himself to any other law than that to which his obligation is in other respects subject, can thus for this purpose subject himself even to several systems of law, so that the creditor may have his choice.

thus brought under the provisions of the law of the German Empire, *i.e.* in the present case its laws as to currency.

§ 262. The assailable point, as Bekker and Hartmann agree in thinking, is the theory borrowed from Savigny of the determination of everything connected with the obligation according to the law of the place of performance, and also the theory of the implied intention of parties. But, at the same time, we may fully concur in the judgments of the German courts as against those of Austria in so far as the result is concerned. The statements of the different currencies for payment upon the bonds were not, as was averred on behalf of the companies, made for the convenience of the public. As every one knows the difference between the currencies of different countries, statements made for that purpose would have been idle. The object rather was to lull the foreign public into the belief that any depreciation in Austrian currency should have no effect at all upon the sum of principal and interest due under the bond. So familiar was the history of Austrian currency and of Austrian public debts, that it seemed worth while to refer to a number of foreign currencies, which, in the event of any depreciation in that of Austria, should afford the creditors a guarantee if they chose to take it. But then something quite unexpected happens. It was not the Austrian legislature that altered the currency, but, on the contrary, the Germans did so, and, in consequence it may be of this change—we may at once concede this point, although in the main other factors determined this—the value of silver sank. It is therefore incorrect, and here again Bekker and Hartmann are agreed, to speak of any real intention of parties, even although by implication merely. The only question to be asked is, What in these circumstances accords with the nature of the case, with the reason of the thing, or, as Hartmann expresses it, with the necessary *bona fides* of international commerce and intercourse?

Now, what the Austrian obligants, in their endeavour to give security to the creditors by a reference to the currencies of other countries, said was truly this: "If this Austrian currency of ours seems to you to some extent to be an untrustworthy customer, at least you will rely on these foreign currencies we lay before you, and, as the currency of all States depends upon their laws, you will trust the laws of these States. These States, whose credit is above suspicion, will not make any changes in their laws to your prejudice." But in this vote of confidence, which the Austrian debtors in this way passed in favour of foreign currency laws, was involved a further vote of confidence, *viz.* that these foreign currency laws would not change for the advantage of the creditors, or rather that, if they did change,¹⁵ the change would correspond with some change in the nature of

¹⁵ If *e.g.* silver is suddenly depreciated by an enormous and rapid increase in its production, even the promptest adoption of a purely gold currency would be a measure of absolute necessity to protect from the most serious loss creditors in long outstanding claims, all persons who depend on fixed incomes, and wage-earners. In such a case non-alteration by enactment would in truth be an alteration in the purchasing power of outstanding obligations, *i.e.* an alteration in their real value.

the thing itself, and what was called a change would in truth rather be the maintenance of the *status quo*. We reach this result simply in this way, that wherever one precious metal is adopted as a medium of currency in place of another the same assertions may be made, viz. that it is done in obedience to necessary laws, and, on the contrary, that these laws do not require any such change. It may be that in every case, after all practical interest in the matter is over, science can tell us with certainty which of these assertions was well founded. But, so long as the matter is one of practical consequence, a government can do no more than give a positive answer in view of the relations of credit over which it itself has control.¹⁶ The debtor, then, who asks for credit in a foreign country, and calls in foreign legal systems as his sureties, trusts their discretion in this matter: at least, if his creditor desires it, he, the debtor, must recognise them as worthy of credit. A debtor, who does not desire to give any such vote of confidence in a foreign legislative system, must simply contract upon the currency of his own country. But then, of course, if this currency is not sound—and it is unsound, if it fails to follow the requirements of the time, where that is necessary—he must in issuing his scrip put up with more unfavourable conditions in other respects, *e.g.* in the rate of interest he will have to pay.

The same considerations dispose of the following argument also on the Austrian side, which is the most formidable that can be urged in that behalf.¹⁷ If, so the objection is put, any given financial reform was to affect other countries, the State, to which the creditors belong, would have it in its power with one stroke to double the money obligations due to its subjects by foreign countries. All it would require to do would simply be, in passing from a silver to a gold standard, to double the relative value of gold as compared with silver. But such a system of robbery is, as Hartmann (p. 55) remarks, inconceivable among civilised States. If for no other reason, at least for this, that as all its subjects could not be creditors, it would hit one section of its own subjects very hard, and would produce the greatest confusion in all relations of property within its own bounds. The more natural supposition is that every civilised State would strive to strike the true proportion in such a change in its money laws. We may then go further, and say that if a person chooses another as his repository of trust, as an oversman or umpire, he may of course, if the person so chosen practises deceits, challenge the validity of the decree, but cannot do so, if there is no *dolus* or even *culpa lata* proved against him, but he is rather shown to have done his best in his own interest to reach a sound decision.

Bekker, who on the main question¹⁸ holds the Austrian companies to

¹⁶ On the necessity of such legislative steps in money matters, see Soetbeer, *Deutsche Münz- und Bankverfassung*, 1881, p. 25, Goldschmidt, *Handelsr.* i. ii. p. 1176; judgment of the Sup. Ct. of Comm. 19th Feb. 1878 (Entsch. xxiii. § 72, p. 207).

¹⁷ Cf. Hertzka in Faucher's *Vierteljahrsschr. für Volkswirtschaft*, vol. i. 1876, pp. 221, 229.

¹⁸ See specially p. 135. Bekker thinks that those companies which, besides their promise to pay in Austrian money, promised also to pay in the thalers and florins which before the

have done right,¹⁹ thinks that in truth the claims of the creditors were for a certain quantity of pure silver, and he therefore proposes that in future, to avoid disputes, scrip intended for an international market should not be for a specified sum in any local currency or coin, but directly for a specified weight of the precious metal, *e.g.* a certain number of grammes of gold. He proposes to abolish in the future all that justifies the existence of the bearer bonds in different currencies that are at present so extensively used.

In this proposal, however, Bekker overlooks, as Hartmann, who again supports the judicial determination arrived at by the German courts, very rightly notices, that the creditor's concern is that he shall on the day of settlement get, not a particular quantity of precious metal, but money's worth; or, to speak more accurately, a power of purchase or exchange to a certain extent of the great mass of commercial commodities. To be still more exact, he desires to get the same power of purchase or exchange, which the sum of money written upon his bond represents at the moment at which it is issued, and conversely the debtor, too, desires to give on the day of settlement to his creditors this same power of purchase or exchange, but no more. But, since the value of gold is exposed to serious fluctuations, scrip, issued for certain quantities of gold, will not succeed in attaining what in all reason the parties must have desired. In theory it is quite sound to point, as Hartmann does—and this furnishes him with a bridge by which to pass to another proposal—to the possibility of a vast additional burden being laid upon the debtor, if the value of gold and its purchasing power should rise uninterruptedly, especially if a fall in silver took place concurrently, and the debtor belonged to a country with a silver currency. But in the case of bonds, which are not to be paid up for some time, things may go the other way. The purchasing power of money generally may sink, and, although at the same time the value of gold as against silver may rise, it is still possible that the creditor, who takes payment in gold, may suffer very real prejudice, although he will have no cause in law for complaint. The international bimetallic currency, which is recommended by many well-known persons and by Hartmann himself,

change of standard had currency in North and South Germany respectively, would pay all they could be asked to pay, if they made their payments in Austrian silver currency exclusively, and defrayed besides the trifling percentage, which would be the result of their undertaking to maintain a constant exchange upon the German places of payment as compared with the exchange of the day, which of course would vary. They required only to pay something more than the exchange on a bill payable at sight.

¹⁹ But then all the scrip of the different companies' defenders was by no means in all respects alike, as the decisions of the Supreme Court in Germany showed, and as Bekker himself, p. 135, sets out. Even in Bekker's view those alternative bonds, which were first issued after the German change of standard, would, in the option of the creditor, about which there would be no doubt, require to be paid in gold, since no one could for a moment maintain that in these cases the debtor was not subject to the changes which had taken place in the German legislation as to currency. Again, the scrip which was expressed in pounds sterling must suffer the same fate, because in England no change had taken place at all, and, in any case, in England the same number of gold pieces would have to be paid as had been due at the outset.

will not protect the creditor from loss in this case, or prevent damage in the opposite case of a rise in the value of money, an event which, it may be, is not so likely to take place. But it is quite beyond the sphere of law to attempt any discussion of bimetallism, since it does not yet exist, and, to all appearance, has not come any nearer for years. There is no other means readily available for protecting both debtor and creditor from excessive loss than the old expedient which lies in full information as to the obligations on both sides.²⁰ If, for reasons which can be easily understood, the great debtors despise this remedy, there is no help for them, in so far as the derangement of values is concerned: apparently, however, they can easily console themselves with advantages of another kind.

§ 263. The practical business world, however, by issuing its bonds as against different currencies, leaving the choice of them to the debtor, has instinctively grasped at what is the best remedy for the time, and, perhaps, in spite of theoretical objections, such as Bekker's, for all time. The remedy, which shall protect the creditor against any depreciation of currency that may occur in any State, particularly in that of the debtor, is that he shall have an option of demanding payment in the currency of some other State, or of several other States. It may be that the creditor will gain, if one of these States makes a miscalculation in some currency law.²¹ But, on the whole, the probability of this is much less than that of its opposite, just because States as such are for the most part severely burdened with debt, and are therefore much more inclined to do something for debtors than for creditors. This course of action, which the business world had with sound instinct adopted, had a consequence which very few people dreamt of, owing to the change of currency made by the German Government, and the depreciation in the value of gold as compared with silver, which followed on that; but this consequence was none the less on that account in accordance with the bargain which had been made.

The future will show whether it was an advantage for the great undertakings that must have recourse to the international money market, and in particular an advantage for Austria, that the largest part of the Austrian railway undertakings should try, under cover of erroneous judgments of the Austrian Court, although pronounced *in optima fide*, to throw discredit on these international forms for transaction of business. A great part of the Austrian State debt, and the debts of railway and other establishments

²⁰ The publication of information by one side which is now becoming the fashion, *i.e.* if the debtor desires it, will probably prejudice the creditor.

²¹ The Austrian companies may be supposed to have made a considerable profit at the expense of their creditors, by paying in silver florins; because the premium on silver as against Austrian paper money was gone, and accordingly these Austrian debtors paid no more than if they had been paying in paper, whereas their obligation was to pay in silver, which was then of a much higher value. Arendt and Hartmann (p. 61) have pointed this out.

requiring credit, has had to make special provision for payment in gold and in foreign currency, *e.g.* in German marks. Without doubt that must have contributed to depreciate still further silver and Austrian securities.²²

6. PAYMENT OF INTEREST. LEADING POINTS OF VIEW.

§ 264. The obligation to pay interest is always an accessory of some other leading or principal obligation. Hence the question whether interest—be it pactional or by operation of law—is due, and from what point of time and up to what point of time it is due, must be dependent on that territorial law to which the leading obligation is itself subject. But, since the payment or performance of an obligation may to a certain extent be subject to some law other than that on which the validity of the obligation and questions therewith connected depend, the point, as to the height to which the rate of interest may be raised, and what, among several, is to be the recognised *maximum*, needs special consideration. Of course, unless there is some coercitive enactment in the way, the real intention of parties, be it express or implied, may make a difference in this respect. But the most difficult question in this connection, and that which is of most practical importance, is that of the rate of interest.¹

The payment of interest may either be put as an indemnity to the creditor for the gains which he might have made by using or laying out his money in some other way, or as a crop which grows where the principal is used: "*Usuræ vicem fructuum obtinent*" (L. 34, D. 22, 1). If we take the former point of view, we shall adopt the law of the creditor's domicile as our rule;² if we take the second, we shall adopt that of the debtor's domicile; for it is the labour and the other property of the debtor out of which the lent money produces fruit. This cannot, however, be asserted without making exceptions. Circumstances may show that the creditor, if he had had the money, would not have spent it at his domicile, but elsewhere, and in the same way that the debtor will make the money productive at some other place than his domicile. The law of these other places will then decide: the former we may describe as the place where

²² The grounds of judgment in a most interesting decision by the German Imperial Court (i.) of 9th February 1887 (Entsch. xviii. § 12, p. 47, *præes*, p. 53), in substance amount to the argument stated in the text. In that case, the Austrian Company had not appointed any place of payment within the German Empire. On that account the grounds of the previous decisions could not be applied. I first had my attention attracted to this judgment a year after I had written the text.

¹ The question whether interest is due, a question which is, in substance, identical with that, from what time and to what time is it due, must be carefully distinguished from the question as to the rate of interest. Generally both questions are treated together indiscriminately: hence come the obscurities and contradictions, which are to be found in such quantity in this chapter of the law, both among authorities and in judicial decisions.

² The law of nationality has no meaning here: for it must be presumed that one denies oneself, or takes the use of money not in one's own country, which has been abandoned, but at what is actually the centre of one's business life.

the money would have been spent, the latter as the place where it was spent.

But when does the consideration of the creditor's abstention from spending give us the rule, and when is our rule to be taken from a consideration of the investment or application of the money made by the debtor?

In any case we must take the creditor's position as decisive, when we have to make good a wrong to him: and in such cases it will plainly be sufficient, if an actual wrong has been done to him, be the debtor as innocent of it as you please. The practical justification of such a rule is that, in cases of failure to perform civil obligations, the subjective fault in the party failing is often impossible to substantiate. It will be conceded that in many other cases connected with contract relations we must frequently be contented with objective wrong, and that an exact enquiry into the subjective responsibility for it would frequently be entirely unpractical.

Putting these cases aside, the point of view of where the creditor would have spent the money, the law of his domicile, must prevail, if the creditor has given the money for what is, comparatively speaking, but a short time. The application of the money to a particular purpose for a short time seems to be a subtraction of it from the ordinary rules of enjoyment or use of it at the creditor's domicile, a denial of that enjoyment to the creditor. But, on the other hand, we must put ourselves at the point of view of the application of the money by the debtor and for his behoof, and take that point of view as our guide,³ when the money is given to be used for a considerable period: if in a sense an investment has been made of it on or over the property of the debtor.

In such cases the creditor in truth is drawing a harvest from the work and from the property of the debtor, both of which are, by the capital invested in them, either made to bring forth fruit for the first time or to bring forth more abundantly.

The place where the money would have been spent by the creditor is, however, frequently the place for the performance of the obligation to pay interest, especially where the place of performance is fixed by special agreement of parties in commercial transactions. For the man of business will naturally direct all payments due to him to the place where, but for them, he would have to deny himself money.

The distinction, in matters of interest, between cases in which the ruling consideration is where the creditor would have used the money, and those in which it is where the debtor has employed it, will no doubt in many cases give rise to doubts. But we are not entitled on that account to say that this basis of treatment of the subject is unsound. No doubt it

³ In my former edition I took this as the guide in the case of all pactional interests. See in this sense, Stobbe, § 33. Thöl, § 85, note 4, makes the *lex domicilii* of the debtor the rule as a matter of principle. This view comes very near the one I had adopted in my former edition, since in most cases the money will find the application at the domicile of the debtor.

is new, and, in the former edition of this work, the solution of such questions was made dependent on the distinction of obligations to pay interest into pactional and *ex lege*.⁴ But this distinction will not give us a principle for the determination of the territorial law, for this reason, that if parties know that in particular circumstances interest will be paid on outlays and advances, *e.g.* even although there has been no special stipulation to that effect, the undertaking of an obligatory relation of that kind is not so essentially different from an express stipulation for interest that in the one case one territorial law should be applied, and in the other case an entirely different law.

Wharton (§ 501) distinguishes between, 1st, Interest secured by contract, either directly or by implication; 2nd, Interest which must be paid on account of a wrong, particularly breach of contract; and, 3rd, Interest on account of delay. This division is not very far from what I have adopted; but delay in performance is, accurately speaking, also a kind of breach of contract, and Wharton himself abandons his division again, in order to be able to apply Savigny's theory of the seat of the obligation, and the supremacy of the law of any fixed place of performance.

MAXIMUM RATE OF INTEREST.

§ 265. The local law may in the first place be important for determining what is the highest legal rate of interest,⁵ and on this point one theory, which is very strongly represented among German lawyers,⁶ forbids the judge ever to allow a higher rate than is sanctioned by the legal system which prevails at the seat of the court: because the meaning of any law which limits the rate of interest is that no judge of the land shall use his authority to further any undertaking so immoral and so contrary to the public interest as an usurious contract. That by foreign law, to which the transaction is subject, the creditor could have recovered the stipulated interest from any other debtor belonging to that country, and the debtor could have been forced to pay it to any other creditor, is not sufficient to disprove the correctness of this last rule, although it may raise a doubt as to whether the transaction can properly be held to be usurious. Laws against usury are intended to protect the debtor from oppression; but this can only come within the cognisance of the law of the place where the court is situated, in cases where the borrowed money is to be laid out at that

⁴ See, too, on the same side, Fiore, § 261.

⁵ This question has, it must be admitted, in modern times lost much of its importance, and does not come up so often for consideration, as many States no longer have a limit to the legal rate of interest. But still analogous questions may arise even in these States, in so far as they do not allow absolute freedom of contract in the matter; this is the case by the law in 1867 of the North German Bund, now that of the German Empire.

⁶ Savigny, § 374; Guthrie, p. 257; Stobbe, § 31, note 8; judgment of the Sup. Ct. of App. at Celle, of 16th Sept. 1852 (*Magazin für Hannover. Recht*, ii. p. 445; Seuffert, viii. § 1). Ratio of judgment by the German Imp. Ct. (ii.) (*Entsch. i.* § 30, p. 61), but see Laurent, viii. § 201; Demangeat on Félix, i. p. 232.

place, and the maximum allowed by the law of that place is exceeded. Another reason for rejecting the theory which proposes that the *lex fori* should rule, is the fact that by the provisions of the laws of some countries a higher rate of interest is allowed in dangerous transactions and in trade loans; while the higher rate of interest prevailing in other States is often justified by the insecurity of the law of the land, or the wider prevalence of speculation there.

Industrial progress would be very seriously hampered in countries which are for the first time being opened to civilisation, if the subjects of other countries could not make loans to them at higher rates of interest.⁷

Besides all the older authors, who take the law of the place where the contract is made, or where it is to be performed, without any further limitation, as the rule in this matter, Savigny's theory⁸ is directly and expressly resisted by the modern French school,⁹ by the law of England and that of the United States, by that of Austria;¹⁰ further, *e.g.* by Fiore (§ 264), Wharton, Brocher (*Nouv. Tr.* § 145, in a comprehensive discussion),¹¹ and Asser-Rivier (§ 91).

Many lay down as an universal rule for interests that they are regulated by the law of the place where the contract is made;¹² others take that of the place of payment, when the place of payment is fixed.¹³ These theories rest upon the assumption that the law which is to rule the

⁷ Wharton, § 508.

⁸ Laurent, viii. § 203, decides in favour of the theory which I have disputed in the text, on the ground that the French law of 1807 made a transgression of the legal rate of interest a delict. But are there not delicts of a purely local character? See, on the other hand, Laurent; Brocher, ii. p. 248.

⁹ Aubry et Rau, iv. p. 606; Massé, p. 176; judgment of the Court of Bourdeaux, of 26th January 1831 (Sirey, xxi. 2, p. 178). The grounds of judgment in this last case sanction in France interest which is allowed by the law of the domicile, and of the place in which the contract was made, but which is by French law illegal, even for a period during which the parties have been resident in France. C. Cass. 24th December 1874, *aff.* a judgment of the Ct. at Grenoble (J. ii. p. 354); C. de Chambéry, 19th February 1875 (J. iii. p. 181); Trib. Seine, 12th May 1885 (J. xii. 305). Cf. too, Cass. 9th June 1880 (J. vii. p. 394).

¹⁰ In Austria the decree of court, of 12th January 1787, provides that interests which have been validly bargained for by the law of the place in which the debt was contracted, may be validly ranked by a judge in bankruptcy, although they are higher than are usual in Austria (Unger, p. 188).

¹¹ Brocher in the end takes the law of the debtor's domicile as the ruling law (*loi du principal établissement du débiteur*). In its practical result that will be very much the same as the rule of the text. If the debtor changes his domicile, it may be that a new law will rule the prolongation of interest payments for a new period.

¹² Cocceji, vii. 11; Rodenburg, iii. p. 2, c. 2, § 6; J. Voet, Comm. 22, 1, § 6; Massé, p. 176 (No. 131).

¹³ P. Voet, c. 2, § 9, No. 12; Everhardus, Cons. 78, No. 24; Christianæus, i. decis. 283, Nos. 12, 13. Burgundus also (iv. No. 10, cf. with No. 29) belongs to this class; and Story, § 298; Burge, iii. p. 774, § 304e; Fœlix, i. pp. 250-253; Trib. Civ. Melun, 18th June 1874; C. Cass. 21st December 1874 (J. ii. pp. 374, 375); and Clunet, *ibid.* In the cases reported the decisions were sound. Boullenois's view is not distinct, ii. p. 472 (cf. with ii. p. 446); but he, too, seems to take, in cases where a place of payment has been fixed, the law that is there recognised. Bouhier, chap. xxi. Nos. 194, 195, takes a peculiar view. The law of the domicile of the creditor is to prevail, except in so far as he may have subjected himself to another.

obligation is simply determined by a voluntary submission of the parties. But if parties have not the power to take a foreign law at their pleasure as a rule of determination (as, for instance, two Prussians cannot at their pleasure adopt American law as the rule for a contract which they are concluding as to a subject situated in their own country),¹⁴ they are just as much incapacitated from doing this indirectly by capriciously choosing some other country for the place of performance, or for the conclusion of the contract. And even the adherents of this theory maintain the impossibility of choosing a foreign place for the performance, or the conclusion of the contract, in order to escape from the law of the country to which the parties belong.¹⁵

The place of performance is, however, like the place of the contract, so far of importance that from it may be inferred in what place the loan is really to be spent.¹⁶ *E.g.* a native of this country contracts a loan abroad to meet the expenses of his stay there, and this loan is to be repaid during his stay abroad. The legality of the interest stipulated in this case must be determined according to the law of the foreign country. Conversely, if one lends money abroad to one who is to keep it for a considerable time, and to continue to pay interest upon it after he has returned home, it may then be taken that the loan is to find its real application at the domicile of the debtor.¹⁷ Any agreement that may be made that the creditor is to

¹⁴ Unger, p. 180.

¹⁵ J. Voet, *ad loc. cit.*: "*Modo etiam bona fide omnia gesta fuerint nec consulto talis ad mutuum contrahendum locus electus sit, in quo graviore essent, quam in loco in quo alias contrahendum fuisset, probatæ inveniuntur.*" Story, § 304; Westlake, § 225. Wharton, § 505, note, says rightly that Westlake's rule, by which the law of the place where the principal ought to be repaid will rule, does not hold good, when the place of such payment is not the place where the money is invested, but merely a central business point, selected as a matter of mutual convenience, as *e.g.* are New York banks by New England or other capitalists making loans in the West.

¹⁶ C. Lyon, 3rd August 1876 (J. iv. p. 356). [The general doctrine is thus expressed in that case, viz.: "In truth money is a commodity; its price varies according to the place where the contract of loan is realised and put into operation. Thus the rate of interest must perforce depend on the economic conditions among which the parties contract, the contract is performed, the lender remits his money, and the borrower who receives it ought to pay it. Further, the contract of loan made and carried out abroad, even by a French subject, should be ruled by the law of that foreign country." More recently the Court of App. at Rouen has decided (12th July 1889, J. xvii. p. 123) that a loan made to a foreign company whose place of business is abroad, is, as regards the rate of interest, stipulated to be ruled by the foreign law, even when the lender is a French subject. But where no interest is stipulated, and an action is brought to recover both principal and interest in France, then the rate allowed will be the French rate (*Benaïad v. Samama*, 1885, J. xiii. 459). These decisions are all to some extent rendered obsolete, by the abolition of limitation on the rate of interest in commercial matters, by the statute of 12th January 1886. In France now any rate in commercial matters is legal.]

¹⁷ Cf. Circuit Ct. of Nebraska, January 1881, J. x. p. 416 [*Kellog v. Miller*, Alb. L. J. xxvi. 499. In this case there was a heritable security given for the loan. The law of its situs was held to rule] as regards a limit of interest. The place in which the money was advanced, and the place of repayment, are both declared to be immaterial. Lyon-Caen et L. Renault, Dr. c. 1, § 1387, declare expressly for the law of the place where the money is laid out: "*C'est en effet, de l'emploi et du lieu où il est fait que proviennent surtout les risques.*" Testa, p. 136.

receive repayment of capital and interest at his domicile, can certainly never determine¹⁸ the legality of the rate of interest.

VARIOUS GROUNDS FOR OBLIGATION TO PAY INTEREST.

§ 266. In proceeding to consider particular cases, we find:—

First, That as a rule the obligation to pay interest upon money advanced on real security will be ruled by the *lex rei sitæ*, the law of the place where the security subject is.¹⁹ That is because, where we are concerned with capital outlays that have a tract of future time in view, the law of the place of their application must rule, and that is the place where the real estate lies. The only exception to this rule, as Wharton points out, will be if the loan is made primarily on the personal credit of the borrower.²⁰

Second, Interest upon advances against goods to be delivered, will be dealt with by the law of the domicile, or trading establishment, of the person who made the advance.²¹ In particular, a commission agent calculates the interest on his outlays according to the custom of his domicile.²²

Third, In open accounts current, each of the two traders reckons interest according to the rules of his own country.²³

Fourth, Interests upon capital sums given for the support of a manufacturing or trading house are subject to the law that prevails at the seat of that business.

Fifth, Interests on sums, which are payable on scrip at some particular place, will be calculated by the law of this place of payment; in any case this holds in favour of a *bona fide* holder, even as regards the limitations on the rate.²⁴

Sixth, As regards interest due *ex lege*,²⁵ for instance—

(a.) The rate of interest which the buyer has, under certain circumstances, to pay upon the purchase price depends on the law of the seller's domicile, or on that of his trading establishment, as the case may be; for

¹⁸ The domicile of the creditor may also be of importance. If two natives of this country enter upon a contract of loan in a foreign country, it is more easily inferred that the transaction is *in fraudem legis*, or that the money is to be spent at their domicile, than it would be if the creditor were a foreigner. The term *in fraudem legis* may be fitly applied to cases in which parties, to escape from the usury laws of their own country, choose some foreign country as the place in which the contract shall be made, or shall eventually be performed. In reality, the parties, in such a case, hold their own country to be the territory to which the whole transaction belongs, and they disguise this fact. A mark of this would be that the creditor cannot show any interest in having the contract performed abroad (Thöl, § 65, 2).

¹⁹ Phillimore, § 728; Wharton, § 510; see Kellog v. Miller, *supra*, note 17.

²⁰ J. Voet, *Pand.* 22, i. § 6, and Fiore, § 265, who seem to regard the personal obligation as in general the important thing.

²¹ Wharton, 407 *ad fin.*; Fiore, § 262, says the law of the place where the advance is given, but means perhaps what is stated in the text.

²² App. Ct. of Lübeck, 31st October 1859 (Seuffert, xv. § 222).

²³ Fiore, § 263.

²⁴ Wharton, § 505a.

²⁵ It is generally said, and that was what I said in my former edition, that interest *ex lege* is subject to the law of the place to which the legal relation, whose operation is to produce the interest, belongs. (Cf. e.g. Fiore, § 261: "Because interest *ex lege* is one of the immediate

the matter here is reimbursement to the seller, for having parted with the thing sold. But if traders have specially arranged for payment of the purchase price at some other place, as a general rule we must hold that it is at that place that the seller needs the money. He must have interest then according to the law and the rate that is recognised there. In sales of real property we must, as a rule, have regard to the rate that is due according to the law of the place where the property is.²⁶

(b.) The obligation of a guardian to pay interest for moneys not timeously invested by him for his ward, or not timeously handed over by him on the expiration of the guardianship,²⁷ must be ruled by the law of the guardianship, and by the rate which prevails where the moneys might, in due course, have been employed to profit. In such a case we are plainly dealing with neglect, *i.e.* with a wrong.

(c.) This is still more appropriate when one, *e.g.* a mandatary, has illegally applied moneys to his own profit. But, as one who acts illegally cannot be permitted, as a matter of fact, to make any profit out of that illegality, he must refund at that rate of interest which is the highest of those that can be considered in the matter. The opposite party, who has right to the money, may therefore, as he pleases, claim either interest according to the custom of his own domicile, or according to the law of the domicile or trading establishment of the mandatary. Again, too, if the mandatary ought to pay at a particular place, which has been fixed, if that be the place where the money that is due was to have been laid out, the rate of interest of this third place may be appealed to.

(d.) In the same way, in the case of moratory interest,²⁸ the domicile or the trade establishment of the creditor must rule. But if some place of payment distinct from the domicile of the creditor has been stipulated for, then, as a general rule, the rate of interest of this place will prevail, and the authorities, as well as the judicial utterances on the point, almost all express themselves as in favour of the law of interest as it prevails

effects of the obligation." Laurent, viii. § 220.) But this rule is not fair altogether in different cases; it is inadequate for this reason, that the payment may, as we noticed above, fall under a different law from that which rules the question whether the obligation is good.

²⁶ The obligation which, by the law of Italy (Code, § 507), falls *ex lege* on the liferenter to pay interest on the burdens over the estate, is in itself to be ruled by the law to which the liferenter is on the whole and in other respects subject. For the burdens and privileges of the fiar, as against the liferenter, must be determined by one and the same law. The rate of interest may, however, fall to be regulated by the custom of the place where the thing is situated, *e.g.* if the fiar, to meet the burden, has incurred a loan upon security of the subject at that place.

²⁷ Fiore, § 261 (Cod. Ital. § 308).

²⁸ The question whether there has been delay is not to be discussed in this connection. The German Imp. Ct. (ii.) on 20th Feb. 1880 (*Entsch.* i. § 30, p. 61), following the Imp. Ct. of Comm. (*Entsch.* xxiv. § 102, p. 388), holds that the law of moratory interest is in itself dependent on the law of the place of performance of the obligation: and from that it infers that the other question, how far compound interest from the day of citation can be exacted, is also to be ruled by the law of the place of performance. This last inference is sound, in so far as the question of rate of interest dealt with in the text is excluded.

at the place of performance.²⁹ This rule will almost always be a sound rule in the case of payments between traders, and obligations by bill must, as is well known, except in the case of what are known as "domiciled bills," be performed [*i.e.* paid] at the domicile or at the trading establishment of the individuals who are bound by them. We must, however, remember that in truth moratory interest is a measure of damages of a rough and ready kind. If, then, at the domicile of the creditor a rate of interest prevails, the exorbitancy of which can only be explained by the fact that money claims are less well secured, and less easily recovered there than elsewhere, we cannot, as a matter of course, allow the creditor that high rate. If, too, the creditor was accustomed to invest his money in the debtor's country, and if the claim was only brought into court because the debtor was in arrears in the payment of a rate of interest which had been stipulated, we may hold that the creditor's loss is no greater than the interest which prevails at the debtor's domicile. Here, as in many other cases in international law, we can only hit upon what is right by a sort of *aequitas*.

Process interest, *i.e.* interest which a defender, without any of the other circumstances of actual *mora*, has to pay in respect of the duration of the process [if he shall lose his suit], just because a process had to be instituted against him, is in truth simply a special kind of moratory interest. The institution of the action supplies the *mora*. The question, then, whether it is due must depend on the law to which the obligation is itself subject, while its rate must be determined on a consideration of the matter already discussed. A judgment of the Imperial Court³⁰ seems to test this kind of interest by the *lex fori*. But it cannot be a decisive element that this kind of interest is no doubt in a sense a product of the process. It may be better described as a product of the original obligation. This latter is modified by *mora*, and also by the institution of a process. The German *Civil processordnung* does not speak of this kind of interest, and holds it therefore not to belong to the law of process, but to substantive law.

NOTE R ON §§ 264-266. INTEREST.

It is abundantly settled by Scottish authority that the rate of interest on contract obligations will not be determined by the *lex fori*, but by the law of

²⁹ Fœlix, i. pp. 251-253; Massé, p. 184; Savigny, § 374; Guthrie, p. 257; Fiore, § 267; Wharton, § 513; Weiss, p. 804, note 4, and the French decisions cited there; Sup. Ct. Stuttgart, 1st July 1852 (Seuffert, vi. § 1); Sup. Ct. of Comm, 6th Dec. 1878 (Seuffert, xxxv. § i.). Older writers say that the law of the place must rule, "*ubi mora contracta, facta est.*" Bartolus in 1, 1, C. Trin. No. 18; Curtius Rochus, *de statutis*, sect. 9, § 49. Boullenois, ii. p. 252, "*Où la demeure est encourue*," cf. pp. 478, 479.

³⁰ I. on 9th Feb. 1883 (*Entsch.* viii. § 45, p. 175). But see, on the other hand, the decision of the same court (ii.) cited *supra*, note 28. [See, too, *Benaïad v. Samama*, 1885, C. de Cass. J. xiii. p. 459, where the rate of interest to be allowed upon the sum brought out in a count and reckoning in the French courts, for the period during which the process had depended, was held to be the French rate.]

the contract. Thus, in the case of *Graham v. Kibble* (1820, 2 Bligh 126), the House of Lords had to adjudicate in a case where a person had deposited bonds with a trading house in India, these bonds bearing interest at eight per cent. The depositor then died, having named one of the partners of the Indian house to be his executor; he realised the bonds, and employed the proceeds in the business of his firm in India. Some time afterwards, the representatives of the depositor brought an action in Scotland against the executor, who was then domiciled in Scotland, and finally established his liability to account for the bonds. In a subsequent action for the interest on the bonds, the House of Lords gave eight per cent. on the bonds up to the date they were realised, twelve per cent. (being the current Indian rate) from that date till the date when decree was pronounced against the executor, and five per cent., the British legal rate, from that date till payment, the debt having become, after the previous decree, a British debt. Again, in the case of *Ferguson v. Fyffe* (1841, 2 Rob. 267), which was a case wherein the representatives of a person deceased sought to recover a sum of Indian interest from a mercantile firm in whose hands the deceased's funds had been left for many years for use in their business, the Lord Chancellor (Lyndhurst) remarks: "The Court of Session appears to have taken a very correct view of the international law upon this subject, in considering the law of the country where the debt is contracted as furnishing the rule by which the nature and extent of the obligation were to be tried." His lordship refers approvingly to a previous case, *Palmer and Co. v. Glas* (1835, Ct. of Sess. Reps. 1st ser. xiii. p. 308), where the Court of Session applied the law of India as to the rate of interest in the case of a claim for moneys invested in an Indian business. In both cases Indian interest was given. It will be observed that his lordship speaks of the place where the debt was contracted. From the context it will be evident that this expression is not used merely in the narrow sense of the place in which the instrument of obligation was drawn up, or the money originally paid over, but as meaning the place in which the loan was employed. The same rule was followed in the more recent case of *Price and Logan v. Wise* (1862, Ct. of Sess. Reps. 2nd ser. xxiv. p. 491), where Indian interest was allowed to the executors of a clerk, who claimed moneys due to him by an Indian commercial firm.

Again, in *Gillow and Co. v. Burgess* (1824, Ct. of Sess. Reps. 1st ser. iii. p. 45), interest on an open account, for furnishings by an English tradesman to a person resident in England, was refused by the Scottish Court on account of the provisions of the law of England that in such circumstances no interest is due. On the other hand, an Irish Insurance Company, which establishes agents in Scotland and undertakes to pay its policies in cash in Scotland, must submit to the law of Scotland as regards interest (*St Patrick Assurance Company v. Brebner*, 1829, Ct. of Sess. Reps. 1st ser. viii. p. 51).

In this latter case, however, the court were of opinion that interest would be due (but for special circumstances) on the amount sued for

after the date of citation in the action, that is, that process interest would be regulated by the *lex fori*. But, as has been seen in the case of Kibble already quoted, Indian interest was allowed on an Indian debt at twelve per cent. up to the date of final judgment, a decision which was repeated in *Wilkinson v. Monies* (1821, Ct. of Sess. Reps. 1st ser. i. p. 89), interest on an American debt being allowed there at seven per cent. up to the date of judgment. In *Palmer and Co's. case*, cited *supra*, Indian interest was allowed up to final decree, and the *lex fori* was thus set aside in favour of the *lex contractus*.

7. PARTIES TO OBLIGATIONS. AGENCY.

§ 267. The local law, to which an obligation is, as regards its import and effect, generally subject, will also rule the question whether each of several persons, who have jointly stipulated for something or jointly contracted a debt, has a right to claim, or a duty to satisfy the whole obligation.¹

If the obligation does not rest upon *bona fides*, or if the special character of the contract (*e.g. ex delicto*) does not require the application of the *lex loci actus*, and if there is no room to infer from the intention of parties that the duty undertaken by them is to be read according to the law of the place of performance, then the *lex domicilii* will settle for each debtor whether or not he is bound to satisfy the whole or what part of the debt, or whether he is entitled to refer the creditor to some other debtor (*beneficium divisionis, excussionis*).²

Story (§ 327*b*) takes the following illustration: By the law of England a double policy of insurance upon a ship for the same voyage is quite competent; in case the ship is lost, the insured may require the whole sum insured from either of the underwriters he pleases, and then the underwriter who pays has *pro rata* a right of recourse against the other. By the law of France the first policy, which covers the full value of the subject, is the only valid policy, and the first underwriter, if he should have to pay, has no recourse at all against the second.³ Now, in this case, the insurer who has had, according to English law, to make good the obligation, has no action against a French insurer, and neither has the first insurer, who has by French law become answerable, any recourse against the second insurer in England. There is no recourse against the French insurer, because, in binding himself, he did not mean to make himself liable to any such claim, and the Frenchman has no right of recourse against the other, because the French law, which supplements and prescribes his contract intentions for him, knows of no such right.⁴

¹ So, too, Fiore, § 254.

² These pleas are matters of substantive law, and do not, therefore, depend upon the *lex fori*; Burge, iii. p. 765; Fœlix, i. p. 254; Story, § 322*b*.

³ Code de Commerce, art. 359.

⁴ So, too, Story, for this reason: "If a different view were adopted, there might be an entire want of reciprocity."

It is a very important and very common question whether a contract concluded by any one as representative of another, is in a legal sense made at the place where the principal is, or where his agent is. Fœlix, i. p. 244, Fiore (§ 248), and several of the judgments to which Story (§ 286*b et seq.*)⁵ refers, take the latter view, for the reason that the mandatary fully represents the mandant, and therefore the case must be treated as if the mandant had come to the place where the contract is concluded.

As Hert⁶ has noticed, however, according to this view the case must be distinguished, in which the contract which has been concluded by the mandatary is not to become binding until it has been confirmed by the mandant. In such a case the mandatary has in truth only prepared the contract, it is the mandant who concludes it. This is to be remembered in connection with the method in which many insurance companies⁷ at the present day are in use to make their contracts of insurance, and in connection, too, with those not uncommon cases in which commercial travellers do not make a definite contract for the house which they represent, but merely collect orders and then hand them over to their principals for definite acceptance. But again, on the other hand, we must distinguish the case in which the mandatary has given himself out to the third party not as a mandatary, but has concluded the contract in his own name, as commissioner in the technical sense.⁸ In such a case the mandant has simply given the mandatary an order to do a piece of business in accordance with his own (the mandatary's) law, or in accordance with the law of the place where the business is to be done, and the mandant has subsequently to relieve the mandatary of the transaction. These distinct cases are frequently improperly confused.

§ 268. Two views of the case may be taken; first, we may hold the contract to have been made by the agent or mandatary, and to affect the principal or mandant only by virtue of the contract or the legal relation that exists between him and his agent.⁹ This view will give a result contrary to that expressed above, for, as the agent's contract only takes effect as

⁵ Wharton, § 406, is of this view; so, too, Foote, p. 366. "*Qui facit per alium, facit per se.*"

This theory of English law and of the law of the United States hangs together with the prevalence of the view, in England and the United States, that the law of the place where the contract is made is, generally speaking, regulative of it. The results are in England evaded by holding that in doubt the contracting party has contracted only with the mandatary, and not with the mandant. See Foote, p. 368.

⁶ *De coll.* § 4, note 55. Accordingly a decision of the Appeal Court at Lucca holds (J. viii. p. 449) that in such cases the contract concluded by the agent is not liable to the stamp-duties imposed by the law of his (the agent's) country. See Clunet, *ibid.*

⁷ See the grounds of decision given by Lord Lyndhurst [in *Pattison v. Mills*, 1828, 3 W. and S. p. 218, and 1 Dow and Cl. 342: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."]

⁸ So, too, Fœlix, *ut cit.*; Fiore, § 249; Pardessus, § 1354.

⁹ So Thöl, *Handelsrecht*, ii. § 25.

regards the principal by force of the contract between these persons, and only so far as that contract permits, the obligation of the principal must be determined by the law to which the contract of mandate itself is subject,¹⁰ and that, as a rule, will be the *lex domicilii* of the principal. By the second view, which regards the contract as concluded with the principal himself, and looks upon his mandatary as a messenger, it is still more difficult to reach the result stated above. If we consider the matter as if the intention to contract did not originate with the agent, but with the principal, that intention of course originated where the principal happened to be, and the case we are considering cannot be distinguished from that of a contract concluded by letter or telegram. The theory which regards the contract as if it were concluded by a principal who is personally present on the spot, rests upon a contradiction; it looks upon the principal as the party to the contract, but makes the law of the agent the test by which the contract is tried.

It is, however, correct to say that, within the limits of the authority given to the agent, his representations, and the law to which these are subject,¹¹ must rule, but beyond these limits no responsibility attaches to the principal.

In support of the opposite view, it is urged that if the other party to the contract, in reliance upon the law of the place of contract, has *bona fide* held the powers of the agent to be larger than they were, it is necessary for the sake of protecting commerce to apply the *lex loci contractus*. This is, however, a mistake. If any person contracts with one who describes himself as the agent of the subject of another country, he has a plain intimation that he should inform himself as to the laws of the place where that authority was conferred.¹² If he neglects this, he no more deserves protection than if he had contracted without inquiring whether there was any authority at all; in both cases he may have recourse upon the agent to whose express or tacit representations he trusted.

When we consider the point more closely, it will be seen that to determine the authority of the agent by the *lex loci contractus* would be quite inconsistent with the security of commerce. Statutory representatives of legal persons and those who represent others by virtue of family relationship as well as ordinary business agents, could, by contracts made abroad, where the law of the land gave them wider powers, bind the persons represented by them in a way entirely unforeseen. What use would there

¹⁰ Unusual limitations of agency can only be regarded if proper notice is given. Thöl, *Handelsr.* § 31, c.; Savigny, *Obligationenrecht*, ii. pp. 60, 61.

¹¹ The interpretation of contracts concluded by the agent must depend upon the *lex loci actus*. See judgment of Imperial Court of Germany (i.) of 5th January 1887 (*Entsch.* No. 9, p. 33). A charter party made by two English brokers as representatives of the defenders, one of whom was domiciled in Quedlinburg, while the other had his business establishment in Braila, fell to be interpreted as regarded the penalty clause by English law. See the discussion on the interpretation of contracts, *supra*, § 256.

¹² See in this sense Asser-Rivier, § 97 *ad fin.* We shall come back to this subject in discussing commercial law, Laurent, vii. § 453.

be, for instance, in a joint stock company restricting the powers of its manager by requiring the concurrent authority of a board of management, or of a general meeting of shareholders, when he would not be bound by that restriction in any contract concluded abroad? The owner or part owner of a ship who can, according to the law of the place where the shipping company exists, free himself from liability by abandoning the ship, might, by a contract of the master's concluded abroad, be bound to pay something more.¹³ But although, in conformity with the general principles which govern the interpretation of contracts, the law that is in force at the place where the authority originates, must be applied to ascertain the extent of the authority conferred, there may indirectly be established an obligation upon the principal to answer to the other party as the *lex loci contractus* may direct; e.g. a joint stock company appoints some one in a foreign State to be its permanent agent, and advertises the appointment in the public newspapers of that country without noticing the limitations imposed on such an appointment by the law of the domicile of the company. The public are in such a case entitled to hold that the authority of the agent is that which such a person has by the law and the usage of their own country.

§ 269. We must distinguish between the liability incurred by the principal by his contract and the constitution of a real right in things that are in the custody of his agent. If the law, which is recognised at the place where the subject is situated, allows real rights to be constituted by contracts made between the agent and third parties, without considering the nature of the agent's authority,¹⁴ then the principal must lose his rights, without regard to the law which determines the character of the agency in other respects. This is the result of the universal validity of the *lex rei sitæ* in the law of things, and is less hazardous for the principal who has actually put his whole property into the hands of an agent, and can incur no obligations beyond the value of the property so committed to his charge.

Story (286*d*) calls attention to this difficult case, but gives no decision on it himself: By the law which prevails at the place of execution of a power of attorney, the domicile of the mandant, that power of attorney

¹³ See the case given by Story, § 286*c*. "The question whether a third party, as partner of the debtor in the contract, can be made answerable for the prestations of a contract, is not to be ruled by the law of the place where the contract was made, but by the law of the place where the partnership was constituted." Judgment of Supreme Court of Appeal at Lübeck, 31st March 1846 (Seuffert, ii. p. 324); Judgments of the Supreme Court of Commerce, 4th Dec. 1872 (Seuffert, xxviii. § 48); 17th Feb. 1871 (Seuffert, xxvi. § 101). Fiore, who proposes generally to apply the law of the place where the contract is made, provided the agent has power to make it, says very truly (§ 254) that in spite of that the responsibilities of the partners of a trading firm cannot be determined by the law of the place in which they have concluded a contract by means of an agent. The one view is contradictory of the other; for it is in truth the contracting will or intention of the firm that limits their liability. Fiore falls back upon the idea of capacity to act, and attempts to set up the authority of the law of the place to which the firm belongs.

¹⁴ E.g. by the law of England (5 and 6 Vict. c. 36) an agent provided with certain papers, and actually in possession of goods, may effectually deal with these as if he were the owner, in so far as the party with whom he deals is in good faith (cf. Stephen, ii. pp. 76, 77).

falls with the mandant's death, whereas, by the law of the place where it is to be carried out, the domicile of the mandatary, it would still subsist. Phillimore (§ 705) in such a case holds that a transaction concluded in name of the mandant in favour of a *bona fide* third party must be upheld, just because *bona fides* is one of the most essential principles of private international law. Fiore (§ 335) goes still further, and thinks that the power of attorney is to be regarded as still subsisting even as regards the relation of mandant and mandatary, because the law of that place in which the power of attorney is to have its operation must rule. The result of this latter position would be that a power of attorney, the operation of which was not confined to any particular place, but which was intended to have effect, wherever the person holding it thought fit to use it, would have to be ruled by an infinite variety of local laws as different circumstances might occur. It is by no means uncommon in practice to find such powers of attorney, and indeed they are matters of necessity. But if such a decision were given, any protection on which the person giving the power might rely by reason of limitations of the power would prove illusory. Besides, there is no ground on which a theory of testing contracts exclusively by the law of the place where they are to have their effect can be set up. Fiore himself does not adopt any such theory. But no more can I support Phillimore's view. If a man contracts as the agent of a foreigner on the ground of a power of attorney given in a foreign country, the third party contracting with him cannot reasonably be held excused, if he makes no enquiry at all as to the foreign law by which that power of attorney is ruled. The principle of protecting a third party who contracts in good faith must have some limitation, if it is not to be turned into a source of legal uncertainty. As then, in the case we have put, the third party is much better able to protect himself than the person who gave the power of attorney—supposing that this power of attorney is, as the solution given by Phillimore suggests, to subject him to a law of which he knows nothing—then in the interest of legal security we must decide in favour of the person who gave the power of attorney.

NOTE S ON §§ 267-269. AGENCY.

[To the statement of foreign law on the subject of agency it is unnecessary to add anything beyond a reference to the case of *Christianse v. David and Javitz* (16th Dec. 1885, R.G. vi. J. xiv. p. 84), in which it was held by the court that a commission agent for a German house, who was resident in London, was entitled to appeal to the law of England to determine questions as to the method of his remuneration, *e.g.* whether he was entitled to pay himself out of the proceeds of goods in his hands.

As regards the law of England and Scotland on the matter of agency, the questions which arise seem to fall under two heads, the first of which comprises questions as to the rights and obligations of the principal and agent *inter se*, while the second deals with the rights and obligations which principal and agent have against and to third parties.

On the former class of questions there is little or no authority in England or Scotland, a fact which may perhaps be accounted for by supposing that in such cases the relations of parties are always expressed in writing. The form of a mandate will be tested by the *lex loci actus* (Gt. Northern Railway Co. v. Laing, 1848, Ct. of Sess. Reps. 2nd ser. x. p. 1408). It was held in the case of Kerslake v. Clark (1820, More's Notes to Stair, vi.) that the extent and character of a power of attorney, upon which action was brought in Scotland, must be determined by the law of England, the country in which it had been granted, which was also, so far as it appears, the domicile of both parties. This case, however, would only go to exclude the application of the *lex fori*. Again, in the case of Cunningham & Co. Ltd. (1887, L.R. 36 Ch. D. 522), it seems to have been assumed that questions as to the extent of the powers of an agent acting for a company must be determined by English law, the law of the seat of the company, and not that of the seat of the transaction, Buenos Ayres, although the document embodying the transaction, as to which it was debated whether the agent had power to grant it, was expressed in Spanish.

But as regards the other class of questions, viz. what are the rights and obligations of principals, and, again, what those of agents against and to third parties, there is more authority in the laws of both countries. In the first place, Lord Lyndhurst has laid it down (Albion Insurance Co. v. Mills, 1828, 3 W. and S. 233) that "If my agent executes" a contract "in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland." The result of this dictum would seem to be that the rights and obligations of the principal, in questions with third parties, will be the same as if he had himself concluded the contract, *i.e.* that he will be answerable to claims made by the other party, and will himself have right to sue on the contract, to the exclusion of his agent, in the one case as in the other. Lord Kyllachy in a recent case (Delaurier v. Wyllie, 1889, Ct. of Sess. Reps. 4th ser. xvii. at p. 191) states the law of Scotland in the same way: he says the general rule is not "on this matter doubtful. It is that whether the principal is disclosed or undisclosed, contracts made by an agent on behalf of his principal are the contracts of the principal, who may sue and be sued upon them, and to whom, in the case of sale, the property passes by delivery to the agent. Such is certainly the general rule, and I have not been able to discover that any exception has been established in the case of foreign principals." This opinion is no doubt entitled to great weight, but it would rather seem as if the safer way of stating the law were that the question whether an agent dealing *factorio nomine* binds a foreign principal or not is a question of fact, and the presumption will vary in each case, this much no doubt being certain, that the mere fact of the principal being a foreigner will not raise the presumption that the agent intends to bind himself (Millar v. Mitchell, etc. 1860, Ct. of Sess. Reps. 2nd ser. xxii. p. 833). That presumption may be stronger where the agent is buying for a foreign principal, and where the prestation on his side, viz. payment, can be made by agent just as well as by

principal: it will be weaker where he is selling for a foreign principal, since delivery of the object sold may obviously not be within his power, and cannot have been believed by the other party to be so. This is the view of the law taken in the recent case of *Bennett v. Inveresk Paper Co.* 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 975, where it was held that, although by the usage of trade there might be a presumption that a British commission merchant deals as a principal and not as an agent, that presumption will give way to evidence that he is acting as agent, and if that be proved he may then sue in his own name. The law so established in Scotland is different from that of England, and it had at one time in Scotland been thought that the English rule was the proper one, and that the fact of the principal being a foreigner raised a presumption that the agent was himself bound (*Cochrane*, January 16, 1818, F. C. Bell's Comm. i. p. 536).

The law of England is stated in Addison on Contracts (p. 65) to the effect that when an English agent contracts on behalf of a foreign principal, it will, in general, be presumed that the agent was intended to be responsible for the fulfilment of the contract. The agent does not pledge the credit of his foreign constituent, and that constituent cannot be sued on the contract. The reasons for this doctrine are thus explained by Mr Justice Blackburn (*Armstrong v. Stokes*, 1872, L. R. 7, Q. B. 598): "The great inconvenience that would result, if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods, has led to a course of business in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order or on his account. It was true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of his order to a London commission merchant, is so obvious and well known that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." The foreign principal will thus not be liable to action under the contract, nor will he, conversely, be entitled to sue on the contract (*Elbinger Actien Gesellschaft v. Claye*, 1873, L. R. 8, Q. B. 313), but that will not prevent him from following his own goods or their proceeds, if he can identify them (*Kaltenbach v. Lewis*, 1885, L. R. 10, App. Ca. p. 617). Reference may be made to the criticism of these views of Lord Blackburn used by Lord Maclaren in the Court of Session, in the case of *Bennett*, quoted *supra*. His lordship treats Lord Blackburn's statement as a statement of what is known to be a general usage in the foreign trade, giving rise to a presumption of fact, and not as a statement of a rule of law.

But the same law will not be applied in cases in which principal and agent are both foreigners, and an English third party has dealt with the agent *factorio nomine*. There the foreign law will be taken into consideration as a circumstance in determining the nature and effect of the authority given by the principal to the agent. It is said, however, that the question whether that principal, who is undisclosed, can sue upon the contract made by the agent with an Englishman and prestable in England, is a question to be determined by English law, the law of the contract between the agent and the third party, and not by the law of the mandate or agency. In determining that question, however, a different rule will prevail from that stated above for the case of a foreign principal and an English agent: the question then would seem as in Scotland to be a question of fact, and a highly important element is the law of the agency. (*Maspons Y. Hermano v. Mildred*, 1882, 9 Q. B. D. 530).

It is somewhat remarkable that in cases where the agent is English and the principal foreign, the question does not seem ever to have been put, What is the law regulating the mandate? It would appear to have been assumed that the law of the contract—of sale or whatever it might be—would determine the question, and that the law of the mandate was not worth consideration even where, as in Scotland, the question was held to be one to be determined upon the circumstances of each particular case. This is the more remarkable, as in Scotland (*Edin. and Glasgow Bank v. Ewan*, Ct. of Sess. Reps. 2nd ser. xiv. p. 557) the question as to the right of a company to sue or their liability to be sued as a company—an analogous question—was held to depend on the law which regulated the constitution of the company, since it was through the contract of co-partnery alone that they could come or be brought into the field.

The recent Factors' Act (1889, 52 and 53 Vict. c. 45, subsequently extended to Scotland) which deals with the power of a mercantile agent to give a good title to third parties by sale, pledge, or other disposition of the goods of which he is in possession by consent of the true owner, is expressed in terms so general as to cover all such transactions concluded by agents in this country with reference to goods situated here, no matter what the powers of the owner, if we suppose him to be a foreigner, may be in questions with that agent. The questions naturally arising here, however, are the questions dealt with in the last paragraph of the text, and committed by the author to the determination of the *lex rei sitæ*.

One highly important branch of the doctrine of agency is that as to the authority of a shipmaster to bind his owners in a foreign port. Story states the law of England to be that the law of the domicile of the owner would rule (§ 286*b*), and the court of Bremen (*Harvey v. Engelbert*, 1877, J. v. p. 627) came to the same result, on the ground of the rule "*locus regit actum*," the mandate of the master being given at the domicile of the owner and of himself, and the extent of the mandate being, therefore, a matter to be determined by that law. Story indicates a doubt whether this is just,

whether it would not be right to prefer the law of the place of contract. Brodie, in his notes on Stair, p. 956, thus sums up the matter: "The clear result, then, is that the transactions must be held to have reference to the master's implied mandate" (the commentator is dealing with contracts by a shipmaster) "according to the law of his own country—a mandate which it is the duty of those who deal with him as an agent to ascertain the extent of; and that, while they never can justly complain of having their right limited by such a principle, the shipmaster cannot be supposed to intend an abuse of his powers; whence the very gist of all contracts, the understanding of parties, would be wanting to infer a right, *ex lege loci contractus*, which the scope of his authority did not import."

Mr MacLachlan, in his work on Merchant Shipping, criticises the views advanced by Mr Story and Mr Brodie, and adopts as the rule in such contracts the law of the flag which the ship carries, a law which must be known to those with whom the master contracts (p. 180). This conclusion is rested mainly on a decision of the Court of Queen's Bench, *Lloyd v. Guibert*, 1865, L. R. 1, Q. B. 115, in which Blackburn, J., says in language which is applicable generally to the law of mandate: "We think that the power of the master to bind his owners personally is but a branch of the general law of agency. And it seems clear that if a principle gives a mandate to an agent containing a condition that all contracts which the agent makes on behalf of his principal shall be subject to a defeasance, those who contract through that agent, with notice of that mandate containing such a limit on his authority, cannot hold the principal bound absolutely. And, we think, as far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of that flag—that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril."

In this decision, regard is paid to the question, What is the mandate? It is required of those contracting that they shall enquire what that mandate is, but, as we have seen, that doctrine does not seem to be carried into the general law of agency, where the obligations of parties *hinc inde* are determined without any such reference.]

8. CONTRACTS CONCLUDED BY LETTER, TELEGRAM, OR TELEPHONE.

§ 270. The discussion of contracts concluded by agents leads naturally to the question, by what local law contracts concluded by letter between persons who never meet¹ are to be determined. We have already (p. 280) discussed the question in so far as the form of the contracts is concerned, and the result of the principles we have established is that the general rule

¹ Hugo Grotius (*de J. B.* ii. c. 11, § 5, note 3) proposes to decide such contracts by *jus naturale*, like contracts concluded on the open sea, or on a desert island.

whereby the laws of the domiciles of the two parties decide, must be applied. No reason at all can be given why either the offerer or the acceptor should be entitled to appeal exclusively to the law of his own domicile. Each party can only hold the other to be bound in the sense in which the law of that other's domicile permits.²

The great majority of authorities,³ however, propose to regard the law of the place, in which the transaction was concluded, as authoritative. In this theory there is in the first place, as we have already pointed out, a vicious circle of reasoning, since it is impossible that the question as to what local law shall rule should be dependent on the question as to where in law the contract was executed, but rather the former question must be answered before the latter can be put. Further, the determination of what local law is to rule is made to depend in a way that is not desirable upon the issue of a very doubtful controversy, on which widely different views are entertained.⁴

Wächter,⁵ Savigny,⁶ and Stobbe (§ 33, note 11) are of the opinion which I hold; but Roth, too, must be counted as an adherent of this theory, since his general view is that the domicile of the contracting parties must decide. Savigny, no doubt, makes this distinction, that where there is a definite place of performance fixed the law of that place is alone to be applied. It is not necessary again to discuss this point, resulting as it does from the principles adopted by him.⁷

Very often, and particularly where there is a final and complete offer made on the one side, which is simply accepted on the other, the contract must be interpreted according to the law of the offerer.⁸ In this way, the view which I have taken frequently yields the same result as that which

² We must premise that the domicile, and the place from which the letter is dated, coincide.

³ Thus Burge, iii. p. 743; Story, § 285; Bornemann, i. p. 65; and Foelix, i. p. 225, § 105, are for the domicile of the acceptor; a judgment of the Supreme Court of Appeal at Dresden (reported by Kritz, ii. p. 120); Massé, p. 130 (No. 94); Günther, p. 750; Seuffert, i. p. 252; Fiore, § 247; Laurent, vii. § 447, on the other hand pronounce for the domicile of the offerer. See, too, a judgment of the Appeal Court of the Rhine at Berlin, 21st September 1831 (Volkmar, p. 141). [Trib. Comm. Gand, 1876; *Velghe v. Van Oye*, J. ix. 564, takes the former view.]

⁴ On the different views, see Windscheid, *Pand.* ii. § 306; Lomonaco, p. 160. Different codes are likely to differ on this point. See *Allgem. Deutsch. Handelsgesetz.* §§ 319-321, and Brocher on the law of Switzerland, ii. p. 80.

⁵ II. p. 45.

⁶ § 371; Guthrie, p. 216.

⁷ Savigny's principle is a result of his theory, whereby the *forum contractus* and the local law of the obligation must go *pari passu*. He says that the sender of the first letter can at the most be compared to a passing traveller; but according to L. 19, § 2, D. *de judiciis*, 5, 1, such a one certainly does not set up a *forum contractus* at every place in which he makes a contract. The *Preuss. Allgem. L. R.* § 113, provides that the form shall be regulated by that law which will best support the transaction. We have already pointed out the unsoundness of this application of the well-known rule of Roman law.

⁸ See, too, Wächter, *ut cit.*; Savigny, § 374; Guthrie, p. 244; Wharton, §§ 435, 410, and the decision of the Court of the Province of Gueldres of 14th July 1871 (*Rev. iv.* p. 659), criticised by Laurent, vii. § 450.

makes the place where the contract is concluded the determinant, that place—*i.e.* place of execution—being held to be the place where the offerer was first made aware of the acceptance of his offer.⁹ The result plainly would be otherwise if the offerer made use of phraseology which is current at the domicile of the other party.¹⁰

Contracts concluded by telegram must be dealt with in the same way as those concluded by letter.¹¹ No difficulty, according to the view we have adopted, is occasioned by the conclusion of a contract by telephone, a thing which is of more and more frequent occurrence, as the contrivance is extended between places more and more distant. It shows still more plainly that it is altogether unprofitable and misleading first to set up artificially a place where the contract is to be held as having been made, and having done that to ascertain the law which is to be applied and the meaning of the contract-declaration, in place of simply taking each limb of the contract in the sense in which the particular circumstances of the case show us it must have been meant to be given on the one hand and taken on the other.¹² [See *supra*, p. 280.]

The case of the domicile of the writer and the place from which he dates his letter being different, is generally passed over; but it must be an event of common occurrence, as, for instance, when one for some time is engaged in carrying on trade in a foreign country. It may easily be solved upon the general principles we have assumed. Under the same conditions under which the law of the place where a contract is made is applicable to a verbal contract, is the law of the place where the letter is dated to be preferred to the law of the domicile of the writer.¹³

§ 271. If an agent, in consequence of a mandant contained in a letter, makes a contract at his own domicile and in his own name, the mandant is liable under the conditions and to the extent prescribed by the law of the agent's domicile; not, indeed, because that is the place where the contract was made, but because the agent has without doubt bound himself by that law, and is to be kept scatheless at the hands of his principal even according to the law of his own domicile.¹⁴ If the agent should buy for himself the

⁹ Wharton, § 435.

¹⁰ Bard, § 199, is right to call attention to the case of a letter or telegram being forwarded to a person at another place, in which he happens to be for some altogether temporary purpose. The contract may have become binding at this place. But is its law, the law of a place of which neither party had any thought, to rule? He, like Massé (§ 579), is of opinion that no universal rule can be set up, but that the circumstances of the particular case must decide. Our conclusion is simply that the whole question as to where the contract was formally made is useless, and may be thrown out of view.

¹¹ Laurent, vii. § 451. He again appeals to Asser on telegraph law.

¹² Windscheid, *e.g.* (*Pand.* § 306), holds that, even when both parties live in the same territory, the point of time from which their respective obligations date is not the same.

¹³ Particularly if *bona fides* requires it.

¹⁴ Cf. *supra*, § 125, Massé, pp. 134-136 (Nos. 137-196), Casaregis; Story, § 285, and the decisions there cited, all confirm this. The grounds assigned are, however, different. Story derives it from the principle that the mandate must be held to have been completed at the domicile of the agent. Massé concurs with this on grounds of expediency—an opinion which

goods entrusted to him, the law of his domicile would rule this sale; for the mandant would have to give any other purchaser that privilege, and he has himself contracted under the same conditions as any other purchaser.¹⁵ If the mandatary does not make the contract in his own name, the principles we have already laid down as to the contraction of obligations by an agent will apply.¹⁶

9. RATIFICATION. CONDITIONAL CONTRACTS.

§ 272. A kindred question is the question whether the place where a contract is ratified, or the place where it is originally drawn up, is to be held as its true place.

Casaregis¹ decides that it must be the place where it was originally made. He says: "*Ratio est, quia ille ratificationis consensus, licet emittatur in loco ratificantis, et ibi videtur se unire cum altero precedente gerentis consensu, qui venit a loco gerentis ad locum ratificantis, retrahitur ad tempus et ad locum, in quo fuit per gestorem initus contractus.*" But the question is not to be so absolutely decided. When any one becomes a party to a contract already validly concluded between others, it may very well be that he can only ratify that contract to the effect and in the terms in which it is already conceived;² and it was that case which Casaregis had in his eye. If, on the other hand, the contract was from the first concluded on condition of obtaining the approval of that third party, this case is to be considered as identical with the case where one sends an offer to another; the representative of the third party has only thrown the contract into the sort of shape which is likely to meet the approval of his principal.³ The place where the contract was drawn up is only of importance for the interpretation of the contract in the technical sense.⁴

On the other hand, where a contract already concluded is ratified by

is no doubt at variance with the rest of his theory ("*Le contrat du commissionnaire perdrait toute son utilité si le commissionnaire ne pouvait agir qu'après avoir répondu par lettres qu'il accepte*").

¹⁵ Massé, pp. 136, 137, "*Le mandat absorbe la vente.*" German Imp. Ct. (i.) 18th June 1887 (Bolze, *Praxis*, iv. § 26, p. 7): the sale and purchase for a period of years of English scrip by the hands of an English broker are to be ruled by English law, even when the agent acted in his own name.

¹⁶ A judgment of the Supreme Court of Berlin laid down this doctrine: "With reference to a commission for the purchase of corn for spring delivery, given to an agent in Berlin, the usage of trade in Berlin, by which delivery must be made on a particular day, will be applicable, if this usage was known to the party giving the order."

¹ *Disc. de commercio*, 179, § 20, according to the citation in Story, § 286.

² In the same way, if one has contracted as *negotiorum gestor* of another but in his own name, and the principal subsequently ratifies the transaction.

³ For instance, a guardian contracts on behalf of a ward on condition that he shall obtain the approval of the court which superintends the curatory.

⁴ Cf. Massé, p. 137. Félix (i. 245) at first proposes that the place where the contract is originally drawn up shall rule, because the agent represents his principal, but subsequently (i. 246) decides the case given in the preceding note in the opposite way.

the same persons, the question whether the law of the place where it was first drawn up, or of the place where the forms required by statute or stipulated by express agreement of parties are gone through, is to rule, depends, as Hert⁵ properly remarks, in the first place, upon whether the form serves merely for authentication or is required to give validity to the deed. In the former case, the place where the contract is put into the required shape cannot be held to be the place of the contract or decisive as to it; in the latter case, it is truly the *locus contractus*,⁶ but the previous agreement of parties is not without importance, in so far as antecedent negotiations may be used to interpret a contract.

If a contract is concluded under conditions, the law of the place where it is concluded, and not that of the place where the condition is fulfilled, will rule. This latter law can only demand attention, in so far as there may be any question as to the fact, which is made a condition of the contract. *E.g.* one promises another a sum of money on condition that he shall have himself naturalised in another country, and buy a manor or barony there. The validity of the naturalisation and of the purchase of the estate is, of course, to be tested by the law of that other country.

10. ALTERATION OF EXISTING OBLIGATIONS. *Dolus, Culpa, Mora.*

DESTRUCTION OF THE SUBJECT OF THE OBLIGATION.

§ 273. The alteration of existing obligations by contract needs no further elaboration. If a new contract is added on to an existing contract, the place of the latter contract is not identical with the place of the former. The second contract concluded, we shall say at B, is formally valid, if it is in conformity with the law recognised at B, although a different form is necessary at A, the place where the first and principal contract was made.¹

On the other hand, the alteration of obligations through the fault of the debtor is to be ruled by the law which is generally applicable to the interpretation of the contract. If the debtor produces an alteration of the obligation through *culpa* or *dolus*, that is merely an indirect result of the fact that by the obligations of the contract he was bound to act differently.²

⁵ IV. 55. Cf. Burge, iii. p. 775. For this decision, see, too, Fiore, § 249; Wharton, §§ 418a, 406; Laurent, vii. §§ 457 and 466.

⁶ Holzschuher, i. p. 74; Haus, p. 41; Massé, ii. p. 138; Felix, i. § 113, p. 258. Judgment of the Supreme Court of Appeal at Jena of 26th October 1826. Seuffert, i. p. 157; Mittermaier, i. § 31 *ad fin.*

¹ For instance, in one country contracts must be in writing; the parties to such a contract add thereto a *pactum displicentiae* in some State in which a contract of the kind may be informally entered into. It must, however, be kept in view that it may be doubtful, looking to the reference to the former contract made in a different country, whether the parties really intended to enter upon a binding engagement, since a particular form was required at the first place, and they did no more than make an informal agreement at the second.

² Cocceji, *de fund.* vi. § 7; Hert, iv. 55; Seuffert, Comm. p. 254; Mühlenbruch, § 74; Story, § 307; Laurent, vii. §§ 471, 472, who notices that the provisions of the Code Civil as to rescission of the contract, if the opposite party fail to perform his part, have their origin in the custom that the parties have of adding a clause to that effect. Testa, pp. 104 and 121.

Nothing therefore depends upon the place in which he has, by reason of this act of *culpa* or *dolus*, incurred liability; the law of this place is only so far of importance as the amount of compensation due to the creditor is to be determined by it.³ We have already examined the opposite theory,⁴ which takes as its fundamental rule the law of the place where the illegal omission or act has been done.

The same principles will determine alterations caused by delay, *mora*, whether it be on the part of the debtor or the creditor, and will also rule the question as to whether there has been any *mora*. Of course, the question whether proper performance has been given or tendered will depend on the law of the place of performance, in respect that the performance is governed by the law or custom that prevails there. Very many authorities fail to distinguish these questions sharply,⁵ and it is no uncommon thing to find that those who in other matters are not disposed to allow the law of the place of performance to rule, do in this class of cases apply it indiscriminately, and sometimes with a reference to the principles of the law of bills. But any such reference, particularly a reference to the law of the protest of bills, is quite inapplicable to this subject, as we shall see. In this connection, however, we find in the literature of our subject very many gaps and a great deal of obscurity, and it is often barely possible to set out even with an approximation to certainty what view this or that writer takes. The liability of the debtor arising from *mora*, is identical with his obligation to timeous performance, and the loss suffered by the creditor in consequence of the failure to accept performance is the immediate consequence of the limitation of the debtor's liability contained in the original contract of obligation to which he was a party.⁶ The disadvantageous results of denying liability in an action, are to be considered as purely penalties imposed upon the debtor⁷ in the course of process, and depend, therefore, upon the law of the place where the suit is proceeding.

After what we have already said, it cannot be doubted that any alteration of the obligation by accident, *e.g.* by the destruction of the subject of the contract,⁸ or by a *commodum* attaching to it (fruits), is to be ruled exclusively by the local law to which the contract is generally subject.⁹

³ *E.g.* if a person uses an article committed to his charge in an illegal way, he must restore the current price of that article at the place where he has so used it. Cf. Story, § 307, who notes that if a vessel has been used in violation of a contract, the amount of damages must be determined by the rate of interest current in that place.

⁴ Felix, i. p. 249.

⁵ Thus, for example, Weiss, p. 804, puts the obligation to grant a discharge under this rule, but more correctly it is only the form of the discharge, which must be valid, that falls under it. So, rightly, Bard, § 200.

⁶ Cf. authors cited in note 2. As to interest upon postponed payments, see *supra*, § 266. Felix is of a different opinion. Bartolus ad L. 1, C. de S. Trin. No. 18, holds that the law of the forum must decide. *Ibi contracta est mora*.

⁷ *E.g.* by Roman law in consequence of the provisions of 18th Nov. c. 8.

⁸ Cf. Arndt's *Pandects*, § 253.

⁹ Savigny, § 374; Guthrie, pp. 256, 257.

11. TRANSFERENCE OF OBLIGATIONS. ASSIGNATION.

GENERAL PRINCIPLES.

§ 274. The transference of an obligation to some other person as creditor is subject to the local law to which the contract is generally subject: the question whether an obligation has been validly transferred, is identical with the question whether an obligation still subsists for the advantage of the former creditor, or whether another person can claim the advantages of it for himself.¹ The law which rules the obligation generally, that is to say, in most cases, the *lex domicilii* of the debtor, will decide.²

But the assignation or transference of a right to compel implement rests also upon an independent transaction between the former creditor and his assignee, it may be upon a sale between them. The essentials of this independent transaction and its operation depend upon a different local law from that which rules the obligation which is transferred. If the transference or assignation of the obligation, considered as an independent transaction between the original creditor and his assignee, is valid, the debtor plainly has no interest to refuse payment to the assignee.³ If he obeys the will of the original creditor, validly declared, that he shall pay to the assignee, he is protected in any question with the original creditor by the *exceptio doli*, and he has no further interest in the matter. The case stands thus: The debtor is free if he pays to a creditor who has right as assignee by the law that rules the obligation which has been assigned,⁴ but

¹ Assignation of a right of action is by Roman law in its form merely a mandate to sue, but in its results it is the same as a real transference of the right (Arndt's *Pandects*, § 254, note 4).

² Fiore, § 340, recognises this. See the judgment of the German Imperial Court cited *infra*, note 4; see also Bolze, *Praxis*, vol. 5, § 22 (Cession of claims of inheritance up to a specified value).

³ Laurent, viii. § 131, notices the relations to third parties, *e.g.* to another assignee, or to one who has arrested the debt. But the question whether the assignation is valid as regards third parties, is precisely identical with the question whether it is operative as regards the debtor. It is plain that, if A has once assigned a claim, which he has against X, to B in such a way that X is forthwith bound to look to B only as his creditor, C cannot subsequently arrest the debt on the ground of some claim which he has upon A. When Laurent says, "I do not understand why the transference of the right in the claim should in its relations to third parties be determined by the law of the debtor" (p. 199), his darkness is simply caused by the fact that, because third parties come on the field, Laurent is bound to hold that there is a "*statut réel*" in the case. But see Fiore, § 341 *ad fin.*

⁴ We may thus agree with the result at which the Supreme Court of Bavaria, on 23rd June 1882 (Seuffert, xxxviii. § 91), arrived. The debtor, who was defender in the action, objected that by the law of the legal transaction, *i.e.* the assignation, itself, the cedent was entitled to recall it without the consent of the assignee, and the right of this assignee could not, as yet, on that account be made good against him. The court repelled this objection, on the ground, which was not, in my opinion, sound, that the contract of assignation was intended to come into operation in the debtor's country, and, by the law of that country, was irrevocable. See, on the other hand, German Imp. Ct. (ii.) 1st June 1880 (Entsch. i. § 157, p. 437): "For the determination of the question whether P's insolvent estate can make a valid payment to no

he is also free if he pays to a creditor who has right by the local law that regulates the independent transaction.⁵ An exception to the former rule occurs only if the debtor knows for certain that the creditor has not yet truly assigned his rights to the pretended assignee according to the law that regulates the assignation; the debtor who should in such a case plead payment would be met successfully by the *replica doli*. For it must be held to be in accordance with all systems of positive law, that no debtor is entitled to pay to one whom he knows not to have right to the debt as against the original creditor.⁶

This is the only theory⁷ which can be actually put in force without hardship. If the local law to which the original contract was subject were alone to decide, the right of the creditor on the one hand would be endangered, and on the other could, in many cases, not be transferred without great difficulties: the former, because a declaration of will, which by the *lex loci actus* would have no binding force, would, by the law of the place of the original obligation, transfer to the assignee the obligation itself, or a right to claim upon it; the latter, because it would frequently be difficult, or perhaps even impossible, in a foreign country to observe the requirements of an assignation according to the local law applicable to the obligation so assigned. If, on the other hand, the law to which the assignation as an independent act is subject were to rule, we should require the debtor to know all kinds of foreign territorial law, that he might at his own risk determine what the right of any pretended assignee was—a requirement all the more unfavourable since the debtor has no power either to foresee or to prevent the assignation.

WHERE AN ARRESTMENT AND AN ASSIGNATION COME INTO COMPETITION.

§ 275. On these principles we can easily determine what is the effect of an arrestment of a right to enforce implement or payment which is said

one but E, is to be determined by the law which prevails at the domicile of the debtor. Again, the German Imp. Ct. (iv.) 28th Nov. 1867 (Entsch. xx. § 53, p. 235), holding that the assignation in its material effects must be tested by the law which prevails at the seat of the legal relation, which is transferred.

⁵ Judgment of the Supreme Court of Appeal at Lübeck, 29th November 1855 (Frankfurt, Coll. of Römer, 2, p. 263), and 31st March 1856 (p. 359). "Questions as to the essentials of the assignation are ruled by the law of the place of the assignation." In both cases it may be observed that the foreign law was favourable to the right claimed by the pursuer. On the latter judgment, cf. Seuffert, vol. ii. p. 162. Judgment of the Supreme Court of Appeal at Lübeck, of 14th September 1850 (Seuffert, vol. x. p. 122, reported from the collection referred to, vol. ii. p. 100): "The form of the assignation is fixed by the law of the place in which it was carried through." In this case, too, the law of the place of assignation was favourable to the transference of the right. That the form should be determined by the law of the place where the assignation was carried through, is a consequence of the rule "*locus regit actum*." To the same effect, German Imp. Ct. (iv.) 28th Nov. 1887, Bolze, *Praxis*, v. § 22.

⁶ The decision in note 2 is not at all contradictory of this. The bare possibility of revocation by one of the parties cannot destroy the effect of the assignation, until that revocation has actually taken place.

⁷ So, too, Stobbe, § 33, note 16; Testa, p. 153. Eccius (Forster-Eccius, § 11, note 33) proposes that the law of the obligation (of the *debitor cessus*) shall alone give the rule.

to have been already assigned. Payment made by the debtor in *bona fide*, in accordance with the law that regulates the principal obligation in question, must be recognised by all creditors; the debtor could not be forced to make payment a second time, even although the assignation were not yet validly completed according to the local law which regulates it. But if payment has not yet been made, the debtor cannot appeal to the territorial law that regulates the principal obligation, with a view of disputing the validity of the arrestment: for by laying on this arrestment it is asserted that an assignation, if such there be, is invalid by the local law that regulates it: until this question between the arrester and the pretended assignee is determined, no *bona fide* payment can be made.⁸

Let us take, in the first place, the case that the law of the obligation itself, *i.e.* the law of the debtor, requires fewer conditions for the validity of the assignation than does the law to which the assignation itself belongs. *E.g.* the former law requires no intimation to the debtor, the latter does. Now, let us suppose that in executing the assignation the former law is satisfied, but not the latter. The result is that, in a question with the arrestment, assuming the validity of the arrestment, the assignation is ineffectual, for the legal transaction of assignation has in itself never had any existence. In the converse case, where it is the law of the debtor that has the stricter requirements, the arrestment is still effectual, and must be preferred to the assignation. For the *jus exigendi* has not yet been transferred in accordance with the law that regulates it, and thus the assignation is, so far as the arresting creditor is concerned, *res inter alios acta*, a transaction which can have no influence on his right.⁹

NOTE T ON §§ 274, 275. ASSIGNATION AND ARRESTMENT.

[The law of Scotland holds that the question of the validity of an assignation of a personal debt must be determined by the law of the place where the assignation is made. An obligation which had been assigned in England, by a deed, which would have availed to transfer it in Scotland, the country where the main contract was to be performed, was not allowed to be sued upon by the assignee in Scotland, because the claim was one which the law of England pronounced to be incapable of being assigned or

⁸ According to the judgments cited by Story, § 396, it seems that, in spite of the arrestment, the first creditor can *pendente lite* still give a valid assignation. This doctrine is hardly in accordance with sound principles of legal security.

⁹ Fiore, § 341, to the same effect. Fiore, however, in substance tests the assignation solely by the law of the *debitor cessus*. In the cases of conflict with which he deals, in which the distinction between the two laws is put upon this only, that the one law (generally that of the Italian Code, § 1539) requires intimation to the *debitor cessus*, whereas the other law (that of the creditor) does not require intimation, the results will coincide with those which the theory adopted in the text will give: for a demand for payment by the assignee is always an intimation. Besides that, the Italian Code expressly says: "The debtor is well discharged if he has paid to the cedent before he or the assignee has intimated the assignation to him." (Cf. Weiss, p. 809.)

transferred (Taylor *v.* Scott, 1847, Ct. of Sess. Reps. 2nd ser. ix. p. 1504). The rule on which the decision bears to proceed is "*locus regit actum.*" It seems a somewhat wide extension of this rule to hold that it regulates not merely the form of the transaction, but its legal possibility, the transaction being one that is to be enforced and performed in another country. It is only right to notice that there was another ground upon which the decision might stand, viz. that the English stamp law had been neglected. A better illustration of the principle is found in the recent case of the Scottish Provident Institution *v.* Cohen (1888, Ct. of Sess. Reps. 4th ser. xvi. p. 112). There the law of the place of assignation of a policy of life insurance was held to determine the validity of the transference. Lord McLaren thus expresses the principle: "The assignment of the right of credit in the policy is a new contract, distinct as regards its nature, mode of constitution, and the law that regulates it, from the contract constituted by the policy itself. And the validity of the assignment will, in general, be determined by the *lex loci contractus*, that is, according to the law of the country in which the transaction is made, or the security given."

Such being the law as to the validity of transfers of the obligation executed abroad, questions have arisen as to whether such transferences, unintimated to the debtor in Scotland, where intimation is necessary to give complete validity to the transference, will prevail against arrestments used in the hands of the Scottish debtor, subsequent in point of time to the foreign assignation. Professor Bell (Comm. ii. p. 18) holds that, if there is no intimation of the assignation to the Scottish debtor, the arrestment must prevail. He does not, however, give any reason for his opinion. In the case of Strachan *v.* McDougle (1835, Ct. of Sess. Reps. 1st ser. xiii. p. 954), a Scottish obligation, a policy of life insurance issued to a Scotsman by a Scottish Insurance Company, was, on the death of the insured, arrested in Scotland. It had previously been assigned in England by delivery of the *corpus* of the policy, but no intimation had been made to the debtor, an assignment good by the law of England, but incomplete, because unintimated, by the law of Scotland. The arrestment was preferred. It will, however, be observed from the report that the point now under consideration, viz. the question whether the validity of the transference should not be determined by the law of England, was hardly submitted to the court. Reliance seems rather to have been placed on the law merchant, as legalising transferences of such rights without the formality of intimation, and it was this contention that was repelled. In the case of Donaldson *v.* Ord (1855, Ct. of Sess. Reps. 2nd ser. xvii. p. 1053), it was held that an English creditor deed, which is not in itself a complete assignation, could not compete with an arrestment used in Scotland. The creditor deed not being a complete assignation, the question in which we are at present interested is not directly presented for decision, but opinions, to which great weight must be given, are expressed to the effect that an arrestment must prevail against a foreign assignation for behoof of creditors if it is not intimated. The ground on which this conclusion is put is that in such a case you have a

competition of diligence for a fund situated in Scotland, that the question is not one of rights, but of the remedies which these rights confer upon their holders, and that that question must be determined by the law of the country in which the competition arises. This is much the same ground as that taken in the text, viz. that it is necessary to consider whether the *jus exigendi* has been transferred by the law that regulates it.

It is doubtful, however, whether on principle this view is well founded. The *jus exigendi* must belong to the person to whom the right of credit belongs: the question is not a question of remedy, but a question of competing rights in the obligation, for compelling payment of which the remedy is given; the question is not one of competing diligences, but of the competing titles of creditors who each claim right to do diligence. If the transference is good, then the arresting creditor has neither title nor right on which to do diligence, for his debtor, in whose right he arrests, has parted with all the right he had by a contract that was valid by the law of the country in which it was carried through. This view derives confirmation from the doctrine expounded by Lord McLaren in the case of the Scottish Provident Institution (*supra*, p. 604), and is very forcibly expressed by Lord Rutherford in the case of Wallace v. Davies (1853, Ct. of Sess. Repts. 2nd ser. xv. p. 693): "The defence that the assignation has not been intimated is not a defence of the same character with that which might be founded on any of the statutory prescriptions, but it is that the right is incomplete; and in case of competition, that it cannot be completed so as to control or affect the right of a third party acquired in the meantime. But if, by the law of the domicile of the cedent—and in this case also of the assignee—the right has been effectually transferred without intimation; intimation which is only necessary to complete the transference cannot be necessary as matter of remedy. . . . If the right be complete by the law of the country which must regulate the transfer, it seems impossible to maintain that, as matter of remedy, something further must be done which the law of Scotland requires for completion of the right in the case only of transfers that are regulated by that law?"

If A has transferred in England to B fully and completely a right to a debt which is localised in Scotland, how can A's creditor thereafter arrest this debt in Scotland? He is not creditor of the person to whom the debt is due: his arrestment is therefore bad.

The principle laid down by Lord Kames, Pr. of Equity, iii. 8, 4, that "the will of a proprietor or creditor is a good title *jure gentium*," that ought to be effectual everywhere, and the dictum of Story (§ 397) that the creditor may transfer any obligation due to him in accordance with the law of his domicile, would also lead to the result we have indicated as the sound solution.

The question of Scots law here discussed came up in the English Courts in the case of the Queensland Mercantile and Agency Co. L.R. (1891), 1 Ch. 536. North, J., decided on the evidence before him as to the

law of Scotland in favour of the arresting creditor, and the Court of Appeal affirmed his judgment (L. R. 1892, 1 Ch. 219). The English Courts, of course, pronounced no opinions of their own as to the soundness of the theory of Scots law, which was put before them in evidence as matter of fact. The case is likely to be carried to the House of Lords, who will determine the point on their own knowledge of the law of Scotland, without requiring evidence.]

In all that has been said it is assumed that the immunity of a debtor who pays in good faith, and after due enquiry, either to a pretended assignee or to his original creditor, will be assured.

The jurisprudence of England and that of the United States has in many cases, as regards the transference of debts, clung to the proposition of English law that debts belong as *res incorporales* to the class of moveables. In that way they thought that they were dealing with a moveable thing which belongs to the creditor. Then, according to the well-known rule "*mobilis personam sequuntur*," the transference of the debts would be ruled by the law of the creditor's domicile alone.¹⁰ But that which may hold good of the transference of a debt as one part of an universal succession—and, in truth, the application of the rule "*mobilis personam sequuntur*" is limited to that case—can never be applied to a singular succession which is founded on an assignment. Accordingly, in more modern times a fashion has been introduced of speaking of a place, a *situs* of the obligation itself, in this sense that the domicile of the debtor is usually looked upon as being such a *situs*.¹¹ This jurisprudence has thus wavered undecidedly between an exclusive application of the law of the creditor's domicile, and the exclusive application of that of the debtor's domicile,¹² without taking sufficient account of *bona fides*, to such an extent that in Westlake it is impossible to discover any distinct opinion. Judicial decisions, too, are full of contradictions. The result is a confusion which is still further increased by an indiscriminate introduction into the subject of the peculiar principles, which are recognised in the transference of bills and of bonds or securities payable to bearer. The laws of these countries have not yet got so far as to acknowledge that debts cannot in this connection be dealt with on the analogy of corporeal things; apparently, however, they are proceeding in that direction.

The law to which the obligation is generally subject must determine whether the assignee can raise an action in his own name against the debtor, or must do so as assignee *alieno nomine*. If this law recognises assignments in the strict sense only, so that the new creditor is only recognised as the *procurator in rem suam* of the original creditor, it is not possible that the debtor should by an assignment in a foreign country be

¹⁰ See decisions in Story, § 397.

¹¹ Wharton, §§ 374 *et seq.*

¹² See Westlake, §§ 236, 237, and 152.

placed in any less favourable position, although the difference may be only formal. But if that law allows a complete transference of the obligation, this further question must be decided, viz. whether such a transference was really entered into according to the law which is applicable to the assignation.¹³ Both local laws must, therefore, concur in giving the new creditor right to sue in his own name, before he can do so. On the other hand, the law of the country where the court is, is in this view unimportant. Although the creditor is as likely to come by his own whether he sues *alieno nomine* or *suo nomine*, the question as to which is the correct method depends upon the provisions of substantive and not formal law.¹⁴ The doctrine of English law has, as is pointed out in the text, fluctuated between the doctrine that the transference of rights in moveable property, including debts, will be regulated by the law of the owner's domicile, *i.e.* the creditor's domicile in the case of a debt which is assigned, and the more modern doctrine that such questions will be determined by the law of the *situs*. These principles are expressed in the cases cited by Mr Westlake, § 150, the latter being laid down by North, J., in a recent case (*in re* Queensland Mercantile and Agency Co. L. R. (1891), 1 Ch. 536, thus: "A transfer of moveable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled:" and his lordship illustrates this proposition by the case of a domiciled Scotsman giving a bill of sale over his furniture in a house occupied by him in London. He cannot dispute the validity of the bill because such a transaction is unknown to the law of Scotland.

For the case of the assignment of a right of credit, the law of the place of the contract, *i.e.* the place to which the contract truly belongs, will prevail; that may be the place of assignment, or the place of the domicile of the contracting parties, according to circumstances. *Lee v. Abdy*, 1886, L. R. 17, Q. B. D. 309.]

INCOMPETENCY OF ASSIGNATION OF CERTAIN CLAIMS. ASSIGNATION FOR A CONSIDERATION LESS THAN THE VALUE OF THE DEBT. (*Lex Anastasiana*.)

§ 276. We must determine in the same way the competency generally of any transference or assignation of the rights conferred by an obligation. If certain rights, or rights under certain circumstances, *e.g.* rights involved in a depending action (*res litigiosæ*, cf. L. 3, D. *de litigiosis*, 44, 6),¹⁵ cannot, according to the local law to which they are subject,¹⁶ be made the subject

¹³ The intention of the creditor really determines this question.

¹⁴ For different views see Story, § 565 *et seq.* There are not, however, wanting decisions which proceed from the point of view here assumed, and these are approved by Story.

¹⁵ The Prussian A. L. R. I. ii. §§ 383, 384, expressly repealed the prohibition on the assignation of *res litigiosæ*, and is now expressly done away with by § 236 of the *Civil processordnung* for the German Empire. Cf. the provisions of the Code Civil, art. 1699.

¹⁶ This is, as a rule, the *lex domicilii* of the debtor.

of assignation, the debtor need not pay any heed, of course, to an assignation carried out in a foreign country.¹⁷ If assignation is permitted by this law, but forbidden by the law of the place where it was carried out, then the assignee cannot appeal to the *lex loci actus* in respect of the form of the assignation.¹⁸

In the same way we can dispose of cases under the *Lex Anastasiana*.¹⁹ This law simply provides that the assignation is invalid, and the debtor is free as regards any sum in excess of the price paid for the assignation.²⁰ Therefore, the local law to which the obligation itself is subject must rule in such a case:²¹ if this law declares that the rights under an obligation may be made objects of exchange without any such restriction as that the

¹⁷ See below as to indorsations and the subject of negotiable notes. Story, §§ 353, 353a. § 1597 of the Code Civil provides that judges, attorneys, officers of court, *avoués*, etc., "*ne peuvent devenir cessionnaires des procès, droits et actions litigieux qui sont de la compétence du tribunal dans le ressort duquel ils exercent leurs fonctions, à peine de nullité.*" We are concerned in this case with an incapacity, established in the public interest, which is in part an incapacity to acquire, *i.e.* an incapacity to have rights. But that is concerned simply with the *res litigiosæ*, *i.e.* the right which is found in the process depending before the French courts. It does not touch the place of the acquisition, and does not raise any question as to the nationality of the person who acquires, as might be in a case in which a foreigner had been admitted to be an attorney or advocate in France. Laurent, viii. § 137, can only reach this result by very artificial means, as he speaks here simply of *incapacité*, and refuses to take any distinction between capacity to have rights and capacity to act. The most difficult question, which is answered neither by Laurent nor Brocher (ii. § 189), is, What is the law as regards debts due by foreign debtors? The true answer seems to be: The acquisition of the debts is in itself lawful, but the person who acquires them cannot sue for them in the courts of France, because the French legislator by this provision has desired not merely to protect debtors—and there was no occasion for him to protect foreign debtors whose own law gives them no such protection—but because the statute has also something of a disciplinary character.

¹⁸ Cf. *supra*, p. 250. The judgment of the Supreme Court of Appeal at Lübeck on 31st March 1856, from the Frankfurt Römer Coll. vol. iii. p. 325, reported by Seuffert, vol. ii. p. 161, seems to contradict this. It pronounces that the validity of assignations of *res litigiosæ* is to be valid, not by the law of the place of the contract, but by that of the place where the process depends. The place of the process and the domicile of the defender were, however, the same. See, too, the judgment of the Supreme Court of Appeal at Munich, 7th January 1845 (Seuffert, i. p. 444): "The act of third persons, the cedent and the assignee, cannot alter the rights and duties of the debtor, which were originally dependent on Prussian law. Roman law, under the dominion whereof the pursuer—who is assignee—lives, no doubt gives the debtor the *exceptio Legis Anastasianæ*. But this has been expressly rejected by the law of Prussia. Seuffert is right in holding (Comm. i. p. 256) that the position of the debtor cannot be altered by the fact that the assignation took place under other laws."

¹⁹ The *Lex Anastasiana* has been repealed by the Prussian A. L. R. I., ii. §§ 390, 391. The Imperial Court (iii.) on 13th November 1885 (Entsch. xiv. § 58, p. 238) decides in this way, and expressly repudiates Savigny's view. But yet we cannot agree in the final result of this judgment: the transaction on which the obligation which had been assigned proceeded—a contract for life insurance—was not to be decided by the law of the assured, on the ground that the company had promised to pay at his domicile. The court thought that the question whether the policies of an insurance company founded on the mutual principle may be freely assigned without any restriction, is not to be answered uniformly in the same way, *i.e.* by the law which prevails at the seat of the company, but that a different law prevailed in each particular case for each individual assured. This result is at variance with the necessities of life.

²⁰ Cf. the provision of the Code Civil, art. 1699.

²¹ See Stobbe, § 33, note 17.

price given must be equal to the sum contained in the obligation, no question as to the law of the place where the assignment took place arises, because this law, in subjecting free trade in obligations to restrictions, cannot reasonably be held to apply to rights which in their origin could be described as open to an unrestricted exchange. The opposite theory, by which it is maintained that the local law of the assignment itself should apply, would make the rights of the creditor entirely dependent on the circumstance that the assignment took place at this or at that place—a circumstance of no importance for the security of the debtor,²² and one that could, besides, easily be planned by a creditor. As a general rule, then, the *lex domicilii* of the debtor will regulate this question,²³ but not universally. We might, no doubt, for the reason that the *Lex Anastasiana* is in the interest of the debtor, hold the *judex domicilii* bound to apply it in every case to any obligation undertaken by one of his countrymen.²⁴ But this would be wrong, for all provisions for the protection of the debtor are not to be applied to obligations he may undertake in a foreign country, or that are to be performed there by him, and the *bona fides* of commerce plainly requires that the creditor should not be hampered in his exercise of a right so highly important as that of assignment, if he has trusted the debtor in reliance upon this right.

Savigny²⁵ maintains, in reference to the *Lex Anastasiana*, that the law of the place of action should rule, and that this statute rests upon the consideration that a traffic in the rights under an obligation sold for a sum under their nominal worth, might be oppressive and dangerous to the debtor, and must therefore be scouted as immoral and mischievous to the public. One may concede these premises without being led to Savigny's conclusion. For, although the law may regard as immoral a traffic in obligations which in their origin are subject to its dominion, it does not follow that the same will be the case with obligations which in their origin are subject to the law of a foreign territory, which gives the creditor an unrestricted right of sale. The contrary, indeed, must be affirmed, especially since some particular kinds of inland obligations, such as obligations on bills, are free from the limitations of the *Lex Anastasiana*, as being in their origin subjects of free trade. It needs no further exposition to show what uncertainty for the debtor might arise if the local law of a place of action, which could not be determined beforehand, were to be applied.

²² The *Lex Anastasiana* exists in the interest of the debtor, cf. L. 22, 23, C. *Mandati*, iv. 35.

²³ To this effect a judgment of the Supreme Court of Berlin, of 16th November 1858 (Striethorst, xxx. p. 353), which refused a *debitor cessus* domiciled in Prussia the right to maintain a plea founded on the *Lex Anastasiana*, although the assignment was executed in a foreign country where this law was recognised, and the cedent was also domiciled there.

²⁴ Cf. a judgment of the Supreme Court of Appeal at Lübeck, in 1831, in the case *Halle v. Tonnies*, Thöl, *Entscheidungsgründe*, p. 139. "The *Lex Anastasiana* passed for the security of the debtor must be applied according to the law of the debtor's domicile."

²⁵ § 374; Guthrie, p. 253.

12. SATISFACTION OF OBLIGATIONS. DISCHARGE. EXCEPTION *non numerata pecunia*. *Beneficium competentiae*.

§ 277. The satisfaction of obligations must be determined by the law to which the obligation generally is subject. In doubt, however, we must hold that, as regards the particular conditions of performance, as has already been noted (*supra*, p. 549), the parties have subjected themselves to the usages and the laws of the place of performance, that is, the place which they have previously selected as the place of performance, either expressly or by implication.¹ On this last proposition there is general agreement.

The way in which performance is to be made is specified by the terms of the obligation, and the question whether an obligation is discharged is coincident with the question whether it still exists.

The performance of an obligation may, however, itself constitute a special legal transaction, and as such may be subject to another law. We shall see the difference with special distinctness if we suppose the case that the creditor may possibly accept something as performance, or payment, which, in the sense of the original obligation, was no performance or payment at all.²

The performance of an obligation, if it consists of an act which cannot be held to be an independent transaction, must be determined exclusively by the law that regulates the obligation in other respects.³ If, on the other hand, it rests upon a special transaction between the debtor and

¹ See in this sense Foote, p. 369; Wharton, §§ 397, 498; Asser-Rivier, § 33. If there is no such special selection of a place of performance as is assumed in the text, in English practice the place where the obligation is entered on is held to be the place of performance. In Germany, in such a case, the domicile of the debtor is held to be the place of performance. In commercial law this is statutory (see *Allgem. Deutsch. Handelsgesetz*, § 324). But in commercial law the seat of the trade or business is preferred to the domicile. A special rule is laid down by § 325 for making over money payments, with the exception of payments upon indorsable documents, or bonds payable to bearer.

² See in this sense Fiore, § 301; Brocher, ii. p. 110. The question is in many cases simplified for those who propose that in all and every relation the law of the place of payment shall rule.

³ Burge, iii. p. 874. Massé, pp. 175, 176, proposes that the law of the place of payment should rule generally in reference to equivalents for payment—*e.g.* as to the effect of consignment of the sum due. Thus the provision of § 1240 of the Code Civil, viz.: "*Le paiement fait de bonne foi à celui qui est en possession de la créance est valable, encore que le possesseur en soit pas suite évincé*," is not to be applied, as Brocher, ii. p. 113, no doubt thinks, to all payments that take place in France, but only to payments on obligations which in themselves are subject to the law of France, and to these payments even in cases in which the payment takes place out of France. Every one who pays a debt in France, which is essentially subject to foreign law, must be aware that all the rules of French law are not necessarily applicable to it, and how is it possible for a foreign judge to be induced to recognise such grounds of discharge, if the obligation is in itself plainly subject to his (the judge's) own law, while the payment accidentally was made in a foreign country? What would become of the security of debts secured by hypothecation, if such rules as § 1240 of the Code Civil should be applied to foreign debts secured by hypothecation.

the creditor, this special legal transaction for discharge of the obligation must be ruled by the law to which that transaction itself is subject, unless we have to infer a reference by the parties themselves to the local law of the obligation originally made. For instance, let us suppose that by the local law of the original obligation payment by bills or drafts is only a conditional discharge, and depends upon these bills and drafts being duly honoured; but, by the law of the place of payment, this condition disappears. If the parties are the same who made the contract at first, then we must infer a tacit reference to the local law to which the obligation was subject from the first. But if the parties, one of whom is tendering payment to the other, are domiciled at the place of payment, the local law recognised at that place must be applied, and the payment must be taken to be unconditional; all reference to the local law to which the obligation was originally subject is in such a case excluded.^{4 5}

The competency of an *exceptio* or *querela non numeratæ pecuniæ*, as against an acknowledgment produced, is to be determined by the same rules.⁶ The matter is not subject to any doubt if it is permissible to insert in the document of debt itself, in any form, a renunciation of the plea or *querela*. But, even although the opposite were the case, that would not show that the plea was applicable in those cases where it must necessarily be assumed that either the transaction to which the payment and acknowledgment have reference, or the transaction of payment and acknowledgment itself, fell under a local law distinct from that recognised at the place of action; for it is undoubtedly a general rule that the application of many provisions of law, which have not been excluded by formal renunciation, may be excluded by the consideration that the *bona fides* of trade requires the application of some other different local law.⁷

It might also be said that this plea of no consideration was merely a peculiar rule of evidence, and that rules of evidence must be settled according to the *lex fori*.⁸ Without disputing this, we may say in answer that, since in such cases the plea rests upon the assumption that an acknowledgment has as a rule been given before performance of the contract, this assumption is inadmissible if the local law of the obligation, or the law of the place of payment and discharge, as the case may be, is such that the parties had or must have had in view the immediate operation of the discharge.⁹

⁴ So it is, too, with the operation of novation, delegation, compromise, and *pactum de non petendo*, or any other contract that is simply intended to serve as a discharge. Cf. Burge, cited above. Fiore, § 301, is of opinion that in the case of a novation, the law of the earlier obligation will always decide, because there is a fiction that the original obligation continues to subsist.

⁵ Cf. Story, § 351a.

⁶ See Sup. Ct. of App. at Lübeck, 8th November 1853 (Seuffert, viii. § 5). In the case of a legal transaction concluded in Vienna and to be performed there, the objection *non numeratæ pecuniæ* was held to be determined by the law of Austria, and not by the *lex fori*.

⁷ See *supra*, § 251.

⁸ On this see the law of process. Cf. Savigny, § 374; Guthrie, p. 248; Holzschuher, i. p. 75; Fœlix, i. p. 254; Massé, pp. 172, 173.

⁹ Cf. Fœlix, i. p. 448.

It is the same with what is termed the *beneficium competentiae*—i.e. the right of the debtor to have his liability limited in certain cases to an amount not exceeding what his means permit him to pay, after deduction of what is necessary for his own maintenance. This right only belongs to the debtor as against particular specified claims, and it rests, therefore, upon the material law of these obligations.¹⁰ In so far, however, as the *beneficium competentiae* is to be regarded as a right that cannot be renounced, resting, as it does, directly on grounds of *boni mores*, and one to be settled therefore by the law which is recognised at the seat of the court which is in course of executing the decree, the debtor will have the benefit of the *lex fori*. As to the *beneficium competentiae* or *moratorium* that arises in bankruptcy, see *infra* on the law of bankruptcy.

The competency of the plea of compensation must be determined by the court in accordance with its own law, in so far as it may fall to be repelled upon formal grounds of process.¹¹ But, on the other hand, a stipulation that this plea shall not be taken against him must be undoubtedly held to be a right of the creditor, springing from his contract, and connected with definite claims under it.¹² This substantive right will not be lost to the creditor, by the fact that process happens to depend in a place different from that to whose laws the contract is in other respects subject.¹³ Conversely, however, the right to plead compensation may be a matter of contract, *e.g.* by virtue of express stipulation, or on account of some direct connection between the counter claim and the claim made by the pursuer of the action.¹⁴

A complete or partial discharge or repudiation of obligations due to a foreign country and to foreigners, or a measure, the effect of which is that foreign creditors chiefly are touched by it, or any confiscation that is at variance with the principles of public law, can never bind foreign States or foreign subjects,¹⁵ even if the repudiation takes place under the style of a substituted payment (*Surrogatzahlung*) or of an arbitrary impost.¹⁶

¹⁰ Savigny, § 374; Guthrie, p. 248; Unger, i. p. 186. See, too, Fiore, § 309, whose view on this subject is not quite clear, because he mixes up with it the question of a *beneficium competentiae* which takes its rise in bankruptcy. Fiore is of opinion that, as the matter here is one of special favour shown by the law to the debtor, the *beneficium* cannot be recognised in another country, unless the *forum contractus* and the *forum domicilii* are identical.

¹¹ The rule, for instance, that both claims must be liquid is a rule of procedure. Cf. Code Civil, 1291, Abs. 1. See Foote, p. 426, to the same effect.

¹² *E.g.* by Roman law (L. 14, § 2; C. *de compens.* iv. 31) compensation cannot be pleaded against a claim upon *depositum*. (Cf. too, the rule of the Prussian law, A. L. R. i. 16, §§ 366, 367, whereby no compensation can be pleaded against alimentary obligations.) Whether a particular claim can be pleaded in compensation depends upon the local law of this counter claim; it determines the extent of the operation of the counter claim.

¹³ Story, § 575, proposes the *lex fori* as the general rule. Cf. Burge, iii. p. 874.

¹⁴ To the same effect, Foote, pp. 426, 427.

¹⁵ See Story, §§ 334, 337, 349. Wharton, § 521: "If it be a gross imposition on a foreign creditor, it will not be recognised as binding by the State of which the creditor is a subject."

¹⁶ Cf. judgment of the German Imp. Ct. (i.) of 4th October 1882, in the matter of the Lemberg-Jassy Railway Company (Entsch. ix. § 2, p. 9).

13. EXTINCTION OF CONTRACTS.

§ 278. The right to challenge a contract is, as we have already said (p. 568), subject to the same law as that which determines the validity of it.¹ Its liability to challenge is in fact simply an incomplete invalidity, and the reduction of the contract on the demand of one only of the parties to it is simply an inherent condition of the contract, whether the fact, on which the reduction is based, was present at the date at which the contract was concluded or happened subsequently.²

The extinction of an obligation by novation or by remission is to be ruled by the law by which the novation itself, as an independent transaction, is ruled.

This is Fiore's opinion too (§ 309), and Foote's (p. 384), who refers to an interesting judgment of Lord Brougham's [*Warrender v. Warrender*, 1835, 9 Bligh. at p. 124, 2 S. and M. 154, in a question of marriage. His Lordship says: "A party relying on the *lex loci contractus*, in construing the import and tracing the consequences of the marriage contract, cannot well be heard to deny that the same *lex loci* must regulate the construction and consequences of any deed of separation between the married pair."]

14. EXTINCTION OF OBLIGATIONS BY PRESCRIPTION, AND IN THE
BANKRUPTCY OF THE DEBTOR.DIFFERENT VIEWS. THE DOMICILE OF THE DEBTOR JUSTIFIED BY
PRINCIPLE.

§ 279. The means by which a contract obligation may be extinguished, with which we have up to this time been concerned, are means which are either inherent in the nature of the obligation itself, or in what may be presumed to be the intention of the parties. Extinction and restriction of the right of credit by prescription or limitation of actions, and by the bankruptcy of the debtor, are extinctions and restrictions which cannot be deduced from the nature of the obligation, or from what may be presumed to be the will of the parties: they are purely positive provisions, although their practical utility has led to a very general recognition of them as legal institutes. The question is, whether they are subject to the law which, in other respects, rules the obligation, or whether some other principles are to be recognised in dealing with them. But, as the discharge of obligations in bankruptcy is in very close connection with the law of bankruptcy, it

¹ Cf. App. Ct. Celle, 16th February 1869 (Seuffert, xxiii. § 102): the challenge of a contract on the head of drunkenness held to fall under the law which in other respects regulated the contract. In that case the law of the common domicile of the parties was applicable (Wharton, § 499).

² Laurent, vii. § 171, to the same effect, as against Félix, i. § 258, who applies in this case his theory of the distinction between the direct and the accidental consequences of the contract which we have already noticed. See, too, Brocher, ii. § 173.

will be of advantage to postpone the discussion of the extinction and limitation of obligations till we deal with the subject of bankruptcy itself, and at present content ourselves with discussing the question of limitation or prescription of actions.

The question,¹ then, by what local law the conditions and the effects of the prescription of personal claims should be ruled, has been much discussed, and much disputed. We may distinguish four different theories.

According to the first theory, which is the ruling theory in the law of England, the United States, and Scotland, this limitation is merely a form of process for dismissing claims, and is subject therefore to the law recognised at the seat of the court.² A further consideration is adduced, viz. that the rules of prescription have for their object the avoidance of disputes over antiquated claims, which have probably been extinguished, in the interest of general peace and security. The law will then be just as unwilling to allow foreigners to bring such claims into court as to allow its own subjects to do so, and just as unwilling to do so whether the obligations are contracted or to be performed in this country or abroad.³

But the right of action is something more than a mere matter of procedure: such rights as are confined in their operation to some particular kind of suit, and the existence of which depends upon the institution of that suit, are mere matters of procedure. Just as it is from no mere rule of procedure that a natural duty, which has no appropriate action, is therefore an imperfect obligation from the first: so neither is it a matter of mere procedure that an obligation, which at first was perfectly

¹ The most thorough treatment of the question in the most modern literature of Germany and Austria is contained in the paper by Grawein, *Verjährung und gesetzliche Befristung*, Leipzig 1880.

² Huber, § 7; Honnelt. Rhaps. Quæst. vol. ii. obs. 402, No. 16; Seger, pp. 25, 26; Mühlentbruch, § 73; Weber. *Natürl. Verbindl.* § 95; Burge, iii. p. 378 (see below, note 17); Wheaton, § 94, p. 125; Story, § 576; Holtschuhler, i. p. 76; Beseler, i. p. 157; Mittermaier, § 91; Judgment of the Privy Council at Berlin, 11th April 1825 (Simon & Strampf, i. p. 325; of the Supreme Court at Berlin, 22nd June 1844 (Devis, 10, p. 1021; of the Supreme Court of Appeal at Darmstadt, 10th October 1840 (Seuffert, xii. p. 446). In these decided cases the place of action and the domicile of the defender were the same. The judgments of the Supreme Court of Appeal at Celle, 28th May 1850, and 6th February 1855 (Seuffert, viii. p. 12 and p. 324), take as their principle the consideration that laws as to the limitation of actions have a distinctly compulsory character. "The limitation of action constitutes an absolutely universal force which operates on all rights on which action can be maintained on similar grounds in each case. This arises and comes into play after the substantive legal relation has been fully constituted, is independent of this relation, and results simply from the conduct of the party with reference to the working out of his rights." Cf. of App. at Rostock, 16th May 1859, 6th March 1863 (Seuffert, xv. § 90, and *ibid.* § 184). Schmid (p. 74) founds the exclusive application of the *lex fori* on the ground that only those claims are to be regarded as well founded in law, which are sure of judicial protection at the place where action is brought. That is a *patito principii* as regards those claims which are in other respects to be ruled by foreign law.

See Westlake-Holtzendorff, §§ 223, 224; Wharton, § 534. See, too, Westlake, Rev. vi. p. 395. Foote (p. 420) supports undoubtedly the *lex fori*, whereas Westlake personally disputes the application of the *lex fori*, and is inclined to apply the *lex contractus*.

³ See specially Oppenheim, p. 378.

valid, should by the lapse of the time, during which it might have been made effectual, fall back into the position of a natural obligation. Besides, we must remember that by many codes of law the operation of such an extinctive limitation or prescription in the case of personal rights of contract is not limited to the restriction of the privilege of suing upon them. For instance, is it not something more than the obligation as a ground of action that is touched by the provision of the Hanoverian law of 22nd September 1850, denying the competency of pleading personal claims by way of compensation,⁴ or by a law which declares that after the lapse of the prescriptive period the obligation is discharged?⁵ In such cases even the adherents of this theory hesitate to apply the *lex fori*:⁶ and such laws cannot be held to mean that obligations such as those we are dealing with are regarded, after expiration of the prescriptive period, in all respects (*e.g.* if a right of pledge has been constituted in support of them) as nullities, in the same way as when an obligation has been entirely performed.

The first reason assigned cannot therefore be held sufficient to support the theory; neither can the second.

The provision that action on certain claims must be brought within a certain time does not mean that actions upon such claims shall not be investigated by the court at all; on the contrary, it is in the option of the defender whether he shall or shall not plead prescription,⁷ and in any case there is nothing to prevent determinations being judicially given as to the previous existence of prescribed obligations, which come under consideration as incidental or prejudicial points.

Upon the consideration that prescription, as we have shown, belongs to substantive private law, rests the second theory, which proposes that the local law to which the obligation is subject generally, should rule in questions as to the prescription of actions. This view is at the present time the ruling theory in German science and practice, although it is not the only theory which is entertained. It has been adopted by the old Commercial Court of the Empire and the existing Imperial Court.

⁴ The like is the case according to the Code Civil, arg. art. 1291 : Zacharia, iv. § 653 : ii. § 262, note 6.

⁵ Cf. Story, § 551 and § 267 *ad fin.*; Prussian A.L.R. i. 6, § 54: "If a person omits to bring his action of damages for wrong suffered, except in the case of a contract, within three years after the nature of the claim and the person responsible to him are within his knowledge, he loses his right."

⁶ Story, as cited above. Foote, p. 424.

⁷ Against determining it by the *lex fori*, see Seuffert, Comm. i. p. 262; Renaud, D. Privat. i. § 42 *ad fin.*; Wächter, ii. pp. 410, 411; Savigny, § 374; Guthrie, pp. 249, 250; Judgment of the Supreme Court at Berlin, 30th October 1855 (Striethorst, xix. p. 70); of the Supreme Court at Stuttgart, 1st July 1852 (Seuffert, viii. p. 2); of the Supreme Court of Appeal at Lubeck of 30th September 1848 (Jurisprudence of the Supreme Court of Appeal on the Subject of Bills, p. 161; Judgment of the Court of Appeal from the Rhine at Berlin, 8th October 1838 (Volkmann, p. 249, 6th March 1843 (Seuffert, ii. p. 163); Opinion of the Faculty of Law at Göttingen, 31st January 1837, in accord with an opinion of the Faculty of Law at Jena on the same subject (Jurisprudence, pp. 224-227; Judgment of the Supreme Court of Appeal at Celle (Magazine of Hanoverian Law, ii. p. 438).

According as the place of execution or the place of performance of the obligation is held to regulate it, so is the one place or the other assumed as regulative on the question of prescription.⁸ The practice of the old German Supreme Court of Commerce and that of the present Imperial Court follow this latter theory.

It does not, however, by any means follow from the fact that the prescription of actions belongs to substantive law, that it is to be ruled by the law of the place of execution or of performance, because the obligation itself must be construed by one or other of these laws. In particular, it cannot be conceded that parties have, by virtue of their contract, a right to a definite period of prescription, which is the reason assigned generally for the application of the law of the place of execution or of performance. Although, as we have seen (§ 249), the effects of a contract are not to be looked upon as the tacit agreement of the parties, it is true that we cannot hold any right to be in accordance with the contract which, if tacitly implied in

⁸ See the former view in Hert, iv. 65; Cocceji, *de fundata*, vii. 12; Ricci, p. 539; Reinhardt, *Ergänz.*, i. 1, p. 32; Renaud, i. § 42 *ad fin.*; Kori, iii. p. 12; in the draft of commercial code for Württemberg, art. 1000, and in a judgment of the Supreme Court of Austria, 9th June 1858 (Goldschmidt, *Archiv. für Handelsr.* ii. 1, p. 135); the latter view in Bartolus in L. 1, C. de S. Trin. No. 19; Alderan Mascardus, Concl. 7, No. 75 (because at the place of payment "*contracta est mora*"); Burgundus, iv. 28 (because prescription is akin to payment); Massé, ii. p. 108, who remarks, in agreement with Troplong (Prescription, No. 334: "*La prescription afin de se libérer est en quelque sorte la peine de la négligence du créancier. Or dans quel lieu le créancier se rend il coupable de cette faute? C'est évidemment dans le lieu où il doit recevoir son paiement. Donc il encourt la peine établie en ce lieu.*" Savigny, § 374; Guthrie, p. 250; Seuffert, Comm. i. p. 262; Schäffner, p. 111; Heffter, § 39, note 5, pronounce in favour of the law which regulates the material stipulations of the contract, without saying whether they mean the law of the place of execution or of the place of performance. So, too, the judgment of the Supreme Court of Appeal at Celle cited in note 6, and at Berlin, 30th October 1855 (Striethorst, xix. p. 70). See, too, Wächter, ii. pp. 411, 412, who, at the same time, considers whether and how far the law of the place of action lays down absolute rules as to prescription apart from the autonomy of parties, and thus in the end comes to the conclusion that, as a rule, the law of the place of action rules. Savigny *ut cit.*; Unger, p. 187; Vesque v. Puttlingen, p. 65; Böhlau, p. 462; Dernburg, *Pand.* § 48, note 6; Roth, *D. Privatr.* § 51 (note 138, although Roth, in other respects, does not hold that the place of performance generally rules). H. Martin, *Archiv. für prakt. Rechtswissenschaft*, N.F.V. (1868) p. 268; Petruszewecz, § 197; Eccius-Forster, § 12, No. 9; Sup. Ct. of App. Berlin, 16th December 1870 (Seuffert, xxv. § 2); Sup. Ct. Stuttgart, 3rd January 1871 (Seuffert, xxv. § 114); App. Ct. of Comm. Nürnberg, 22nd November 1870 (Seuffert, xxviii. § 186); Sup. Ct. Berlin, 24th February 1876 (Seuffert, xxxiii. § 95); Celle, 8th March 1879 (Seuffert, xxxv. § 88); App. Ct. Wolfenbüttel, 31st May 1860 (Seuffert, xix. § 106), with special reliance on Savigny's theory, and 2nd January 1866 (*ibid.*); Sup. Comm. Ct. of the Emp. 17th October 1874 (Seuffert, xxx. § 221), and 5th March 1877 (Entsch. xxii. pp. 88, 89); Imp. Ct. (v.) 17th January 1880; same (i.) 8th May 1880 (Seuffert, xxxv. § 87 and xxxvi. § 92); same (i.) 10th December 1879 (Entsch. i. § 51, p. 125); same (iii.) 17th January 1882 (Entsch. vi. p. 25); same (i.) 8th July 1882 (Entsch. ix. § 60, p. 225); Practice in Saxony (Stobbe, § 33, note 20). See, too, Phillimore, §§ 801-808; Fiore, § 296; Laurent, viii. § 234; Bard, § 211; Lomonaco, p. 172; Treaty of the Spanish American States of 1878, § 33; Asser-Rivier, § 38 *ad fin.*; Lehr, Rev. xiii. p. 518; Trib. Seine, 2nd June 1881 (J. 8, p. 230); Trib. Civ. Antwerp, 17th August 1884 (J. xiii. p. 373). Judgment of the Senate at Warsaw, 6th December 1873 (J. i. p. 333); v. Martens, p. 342, proposes that the intention of the parties as disclosed in their contract, and, in default of any such intention being disclosed, the law of the place of contract, should rule. Félix, i. pp. 239, 240, expresses himself hesitatingly.

it, would be at variance with the express will of the parties. But the express will of the parties applies only to the due performance of the contract, whereas, if we were to assume that a right to any particular term of prescription was implied in the contract, we should have to suppose that at the very outset of their contract parties were contemplating a breach of it, and there could not be a more flagrant contradiction of the *bona fides* to be observed in all contract relations than this. This view would make the law of prescription a premium upon a breach of contract, instead of a penalty upon a negligent creditor, and a protection against claims of long standing and of little substance.⁹

We cannot, obviously, assume that the intention of parties was by implication directed to the period of prescription recognised at the place of execution or of performance, because the contract happens to have been executed or to have its place of performance abroad;¹⁰ and there can be no question of a period of prescription in accordance with contract, when we come to deal with obligations which are not grounded on contract.

Lastly, a certain intimate relation between the prescription of actions and the performance of obligations has been traced by Laurent and Lehr. Laurent (viii. § 234) thinks that the State in which the performance of the obligation is to take place has, comparatively speaking, the largest interest in the obligation, and consequently in the action upon it. This is simply a *petitio principii*. If a Belgian promises another Belgian to deliver something to him in St Petersburg, what special interest has the Russian State in that, or, as Laurent puts it, what interest has Russian society? Lehr, on the other hand, says that prescription is a presumption that performance has taken place, and so as it were an equivalent for it. Suppose for a moment we concede that this is the basis of prescription. Does it follow from that that the *lex loci solutionis* is to be applied? We think it does not: it is reasonable that that law should assert itself as controlling the details of performance and the legal and actual possibility of giving specific implement, but it is not necessarily regulative of the question as to the legal obligation in itself, and that is the question with which we are concerned.¹¹

Besides that, there are very many cases, and in particular those in which no special place of performance is stipulated, in which, by insisting on the place of performance, we find ourselves coming back again to the *lex domicilii debitoris*; for, failing any particular place of performance, the debtor must give performance at his domicile. In this Lehr agrees with us.

⁹ Lord Brougham, in *Don v. Lippmann*, 5 Cl. and Fin. p. 1; Story, § 579, note 1, p. 722.

¹⁰ Gand specially puts his argument upon the intention of parties, Nos. 739, 740.

¹¹ The argument that prescription is a kind of extinction of the obligation, and is therefore unconditionally subject to those laws which rule the obligation in other respects (Asscher, *Akad. Praefschrift*, Amsterdam 1881, p. 56), forgets the distinction between the discharge of the obligation as provided by the parties themselves in terms of their contract, and extinction by the direct interposition of the law.

Finally, the following considerations will serve to exclude the general application of the *lex loci contractus*: If the period of prescription were in reality a *jus quæsitum* of the parties bound up with the origin of the obligation, a new statute, introducing a period of prescription, could not be applied to claims which arose before the passing of the Act. But this result is certainly incorrect; for if that were so, then the very oldest and most dubious claims would be withdrawn from its operation. Parties, too, although they cannot, according to generally received theories, protract the period of prescription by any provision of their contract, would be able, by settling upon any foreign place of performance they pleased, or by making a journey abroad, or by dating a contract from some foreign town, to exclude the period of prescription settled by the law of their own country—a result at variance with the prevailing view of the common law of Rome, and the express enactments of particular systems.¹² If, then, as we must assume, in accordance with the law of all civilised peoples, the law of prescription is an institution intended to give security to general intercourse, how can we say that it is the intention of the law to withdraw the property of our own citizens, and their relations to that property, from the protection of this principle, because a contract is concluded or is to be performed abroad? ¹³

The reasons last adduced meet the peculiar view of Pothier,¹⁴ who proposes that the law of the creditor's domicile should rule. The only principle on which this view can be supported is one which we have already, in dealing with the law of things, shown to be incorrect—viz. that a man cannot lose any right except in accordance with the law of his domicile.

We must, however, recognise that the law under whose sway the contract in itself lies, will be disposed to maintain a right of action as arising from the contract for the full period for which it declares that such a right should subsist. Let us take a contract, which has been concluded by a citizen of State A within the territory of State B, and is to be performed also in State B, and therefore must be ruled by the law of State B. In such a case it would be wonderful if that contracting party could in the courts of B successfully plead that in his own country, State A, there was a shorter period of prescription than in B, and that he could no longer be sued in B. To have regard to the laws of A to any such effect as this would be at variance with the good faith of contract law in B. The result which we reach is, then, that the law which rules the contract in other respects will settle questions of prescription of actions too, but unconditionally only in cases in which the action is raised before the courts of that country itself.¹⁵

¹² Cf. e.g. the Hanoverian law of 22nd September 1850, § 12.

¹³ Thöl, § 85, note 9.

¹⁴ *De la Prescription*, No. 251. (Cf. Fœlix, i. p. 239, note 1.)

¹⁵ Laurent, although he himself is of a different opinion, admits this (viii. § 250).

Finally, a theory which prevails in French jurisprudence, and is widely recognised in practice, makes the law of the debtor's domicile the rule, and, as a matter of fact, the object, which lies at the bottom of all prescriptions of personal actions, justifies to a certain extent the observance of the law of the domicile. The debtor is by means of prescription to be protected against doubtful claims, which probably are unfounded or have been discharged;¹⁶ and by this means the general security of law will be advanced. But if this rule is to attain its object, it must extend to all the obligations of persons who live permanently in the country, as, conversely, it is not to be applied to the obligations of foreigners who remain in our State temporarily only, and do not execute or propose to perform in this country most of the obligations which they undertake. If the law of prescription is not extended to all obligations undertaken by persons domiciled in our country, the result will be that if, for example, there was no such thing as limitation or prescription of actions in the law of the place where the obligation arose, or was to be performed, the creditor would have it in his power to disturb the legal security of our subjects for ever by these claims of long standing; and, conversely, if foreigners happened to be sued in this country, the application of our laws would imperil the legal security—the whole object of this rule of law—not merely of the creditor, but of the debtor also in the highest degree.¹⁷ But, on the other hand, there is no good reason why the law of the debtor's domicile should give the creditor a right of action, if by

¹⁶ See Savigny, v. § 237; Blackstone, iii. pp. 307, 308: “*The use of these statutes of limitation is to preserve the peace of the kingdom.*”

¹⁷ Merlin, *Rép. Prescription*, i. § 3, No. 7 (Fœlix, i. p. 239); Pardessus, No. 1495. P. Voet, 10, § 2; J. Voet, Comm. in Dig. 44, 3, § 12; Boullenois, i. p. 365, pronounce for the *lex domicilii* of the debtor. But see Boullenois, ii. p. 488; Thöl, § 85, note 9; and Grawein, p. 200, who gives a most accurate exposition. Stobbe, § 33, proposes that the *lex obligationis* should rule, but declares that, as a rule, this is identical with the *lex domicilii*. He says: “But if the person concerned is permanently resident abroad, and contracts obligations in this country, the law of prescription must be determined, in cases in which the person concerned lives permanently abroad, and undertakes obligation there, by the law of that place, because it was to be expected that the action would be raised there.”

We may also in a sense include in this class English and American authors. Although they take the *lex fori* as their rule, yet their view comes to coincide with that taken in the text, since by English and American common law personal actions have to be brought at the debtor's domicile. Cf. Burge, iii. p. 880. There is no doubt, however, that in more recent times the *forum contractus* has obtained a stronger hold in the jurisprudence of England and that of the United States (see Wharton, § 713). But on the one hand (Wharton, § 715), the extra-territorial or international validity of so wide an extension of the *forum contractus* is not generally admitted, and on the other hand, as a matter of fact, far less use is made of the *forum contractus* in England and in the United States than *e.g.* in Germany. This fact is pointed out by Grawein (p. 197).

The following recent French writers have pronounced in favour of the *lex domicilii*: Labbé; Massé, i. p. 458; the German jurist Brocher, ii. § 275, p. 408; C. Cass. 3rd Jan. 1869 (Arrêt Albrecht), on which see Laurent and Brocher *ut cit.*; C. Cass. 7th June 1880 (J. viii. p. 263); C. Besançon, 11th January 1883 (J. x. p. 151). See also Clunet's note in J. i. p. 333, note 2.

the law which regulates the obligation in other respects the right of action is prescribed; the creditor, too, has no right to expect the application of any law which shall be more favourable to him than that which is in other respects regulative of the obligation. Accordingly a debtor, who is sued *in foro domicilii*, may appeal also to the law of the obligation, if this is upon the whole more favourable to him.¹⁸

LIMITATIONS UPON THIS PRINCIPLE.

§ 280. But it is just as true that the recognition of the law of the debtor's domicile can by no means be held to be universal.¹⁹ It can only be justified where the courts of that domicile are concerned with the determination of the question. As we have noticed, the law of the country to which the contract is in other respects subject, would have no ground for refusing, to the detriment of security of legal intercourse, to set itself in motion within its own territory; while the special considerations of protection are only applicable to persons who belong permanently to the territory, and are thus matters of concern to the law and to the courts of third States. The rule which we reach is this: the debtor may, it is true, appeal to the prescription, which exists by the law of his domicile, but only as against an action taken before the courts of his domicile.

Again, appeal to a prescription which has come into play by the law of the domicile must be excluded, in accordance with the rule of international law which requires that *bona fides* should in all events be observed, wherever the application of that prescription would run counter to *bona fides*. That is to say, if the debtor by himself leaving the territory of the State in which the *forum contractus* lies, or by removing all his property from it, has put an end to that *forum* to all international effects, he cannot plead at once that the action, which can no longer be instituted *in foro contractus*, is already prescribed by the law of his domicile, but

See judgment of the Supreme Court of the Netherlands, 4th April 1874 (J. i. p. 141), in favour of the *lex domicilii debitoris*.

Brocher, *Nouv. Tr.* says: "Prescription is, generally speaking, a measure of civil police intended to consolidate rights." He draws no particular conclusion from this. In my opinion he must needs have recourse either to the debtor's personal law or to the *lex fori*.

¹⁸ A number of the codes of States of the American Union contain provisions of this kind, e.g. the Alabama Code, § 2911, says: "If the laws of another country bar a suit upon a contract or act done there whilst the party sought to be charged thereby was a resident of such country, it is barred in the same manner here." Kentucky's revised statutes, § 12: "If the action is barred in the country where the cause of action arose, it is barred here as between any parties." See Piggott, pp. 524-530.

¹⁹ See, in this sense, Brocher, ii. pp. 408, 409, and C. de Lyon, 17th March 1881 (J. ix. p. 412). The latter judgment is put on an unsound foundation: the application or non-application of this or that territorial law of prescription cannot be based on the capricious choice of the parties.

must allow the creditor a reasonable time for the prosecution of his action.²⁰

The result, then, at which we arrive is that to some extent we must recognise the law of the contract and the law of the domicile concurrently, according as action is raised *in foro contractus* or *in foro domicilii*. By this means we shall, as it seems, be just to the kernels that lie within each of the leading theories, in each of which there is a relative truth; and we shall also do justice to the circumstance, that the matter with which we are concerned is a prescription of actions and not of rights, and that, on the other hand, the rules of actions and the rights of parties, as known to the law of the court in which the suit depends, are in very close connection the one with the other. This intermediate theory may also seem to reconcile what is comparatively the largest number of judicial decisions upon the point, since, as a general rule, the action is brought *in foro domicilii*, and the law of the debtor's domicile will besides be the law of this contract. Taken in connection with the principles, which we shall expound below, as to the extension of the *forum contractus* in an international sense, it seems to answer to all the requirements of commerce and trade.

RESULT IN THE CASE OF A CHANGE OF DOMICILE BY THE DEBTOR.

§ 281. But what shall we say, if the debtor changes his domicile, while the period of prescription has not yet run out?²¹ In my former edition I laid it down that in such a case there would require to be a proportional calculation of the different periods.²² In this way, if, for example, the period of prescription had run half its course according to the law of the earlier domicile, it would be held to be half run by the law of the subsequent domicile.²³ The creditor would thus still have one-half of the period of prescription recognised by the law of the debtor's new domicile

²⁰ It will be observed what an intimate connection there is between this proposition and the principles expounded below, which regulate the *forum contractus* in its international sense.

²¹ The expiration of the period of prescription in accordance with the law of the earlier domicile gives the debtor, of course, a *jus quæsitum*.

²² Brocher, ii. p. 415.

²³ It would be utterly illogical to hold that the period of prescription must be tested by the law of the subsequent domicile with reference to the time during which the debtor was subject to the law of the earlier domicile. But yet, Savigny (§ 374, Guthrie, pp. 249, 250) and others urge this objection with the purpose of confuting the theory which pronounces in favour of the law of the debtor's domicile. If this mistaken view were correct, it is said the debtor would have it in his power, by changing his domicile, to acquire any prescriptive term he pleased. The judgment, reported in J. viii. p. 230, of the Trib. Civ. Seine of 2nd June 1881, is therefore right in its result. A Frenchwoman, domiciled in St Petersburg, who had contracted debt there, could not effectually appeal to the French law immediately after she had transferred her domicile to France. But in order to arrive at this result it is not in the least necessary to have recourse for grounds of judgment to the exclusive validity of the *lex loci obligationis*.

available to him. But, apart from the practical difficulties of such a calculation, the sounder doctrine seems to me to be that the protection of the law of prescription should be extended to the debtor from the moment at which the new domicile is acquired, while, on the other hand, no good reason can be given for putting the creditor at any advantage in the prosecution of his suit, simply because the debtor has changed his domicile. We thus reach the simple solution of the question, which Grawein has defended (p. 202): the debtor may appeal to the law of prescription of his former domicile, or to that of his subsequent domicile, according as the one or the other is more to his advantage.^{24 25} But prescription, in accordance with the law of the subsequent domicile, cannot be made to run from any date further back than the moment at which that new domicile was acquired.

A crowd of difficulties, which would arise from a partial application of the law of the old domicile and a partial application of that of the new, is avoided by a consideration of either the one or the other as alternatives.²⁶ Systems of law may differ not merely as regards the period of prescription, but as regards other conditions necessary to prescription.

DOMICILE, AND NOT NATIONALITY, THE TEST. THE AUTHOR'S FORMER VIEW. DISTINCTION BETWEEN EXTINCTION OF AN OBLIGATION BY LAPSE OF TIME, AND LIMITATION OF ACTION.

§ 282. Another question still may be raised, viz.: Is it the law of the debtor's domicile or of his nationality which should rule in cases in which regard is to be had to the debtor's personal law? We must hold that it is the law of his domicile. Actions on contracts which do not belong to the law of the family, the law of succession, or the law of things, must be referred to the court of the domicile and not to that of the native State, which may possibly be at a great distance. The prescription of actions inclines therefore in its nature to the law of the domicile. In the law of obligations in general, putting aside questions of capacity to act, nationality is postponed to domicile, and any appeal to the law of nationality, which may be quite unknown to the party who contracts

²⁴ Tittmann (*De compet. leg.* p. 12) proposes that this or that system of law should be admitted according as it is favourable to the creditor. The reason which Tittmann gives arises simply from a good-natured desire to prevent a right from being lost. This is in truth no reason, for the debtor deserves as much consideration as the creditor.

²⁵ Weiss, p. 806 (cf. too, Aubry et Rau, i. p. 108), proposes that the *lex fori* should always be available to the debtor, if it is more favourable to him than any other law which might be applied. In this way Weiss is for an alternative application of different systems, but his proposal is something different from the view which has been adopted in the text.

²⁶ An alternative consideration of one of two systems of law is admitted as being, to a certain extent, sound in cases in which there is a change from one to the other within the limits of the same territory (see Savigny, § 391; Guthrie, p. 369; Unger, p. 147; Code for Saxony, § 17).

with him who now desires to make this appeal, will be rejected as being at variance with the expectations of parties, and therefore with *bona fides*. Still less can any such appeal be listened to in the matter of limitation of actions. This consideration must prevail even with the legislature of the native State. No one denies, of course, that a State, by establishing prescriptions of a fixed and a shorter duration, has in view the protection of its own citizens. But it cannot carry through that purpose without paying any heed to the disadvantages entailed upon foreign creditors, if the debt was contracted, as it happens, at a foreign domicile. Lastly, since the domicile of a person who owns a trading or manufacturing establishment is completely cast into the background, when contrasted with the place where that establishment actually exists, we must necessarily, in the case of all debts that are contracted with reference to some particular trading or manufacturing house, fix our attention, in so far as prescription is concerned, not on the law of the domicile of the proprietor or occupier, but solely on the law of the place in which the house is set up, in so far, that is to say, as the law of the domicile would, if we were dealing with individual persons, be regarded as regulative.

In my former edition (§ 79) I declared too absolutely for the application of the law of the debtor's domicile; subsequently ²⁷ I had to recognise the force of the reasoning, which recommends the application of the law that governs the obligation in other respects; and I have now persuaded myself that no one of the three leading theories can claim an exclusive sway. The theory I now adopt is an intermediate theory. I hope it will not be said against it that it is devoid of principle; for, although it takes up an intermediate position, it points out quite sharply what the different considerations and possible states of fact are. It has this advantage, that it can cite in its own support most of the decisions which have actually been given by the courts, and in the most recent French jurisprudence we may see an inclination to some such intermediate view. Again, it is particularly likely that the requirements of trade and commerce, and men's instinctive feelings of justice, should find themselves at variance, in the first place, with the theory which indiscriminately applies the *lex fori*, and, in the next place, with the theory which makes the *lex obligationis* decisive, but makes this *lex obligationis* dependent solely upon a place of performance, which may, possibly, be quite arbitrarily chosen. This latter view, which, as we have noticed, may be said to be very nearly supreme in Germany, may again very easily come into conflict with the *lex fori* and the *lex domicilii*. We must, however, take a distinction between the extinction of an obligation by the lapse of a particular period of time and the limitation of action upon a claim within a certain period.²⁸ The period

²⁷ *Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft* (München, xv. 1873, p. 34).

²⁸ See Grawein, p. 22, on the distinction between these two things. Although the general theoretical distinction is simple enough, its application to many particular cases and enactments is difficult enough.

at which an obligation is to terminate is, of course, regulated by the *lex obligationis*. Thus, for instance, the period of ten years, during which an architect's responsibility lasts by § 1792 of the Code Civil, is to be treated as a period at the end of which all obligation ceases,²⁹ whereas, on the other hand, it would not be right to set up exceptional rules for the regulation of all cases of limitation of actions which require shorter periods.³⁰

The same territorial law which regulates prescription generally, must also be applied in questions of interruption of prescription and of privileges allowed to particular persons.³¹ But, of course, the question whether the action in any particular instance has been, in so far as form is concerned, well raised, must be decided by another law.

The question whether a period of prescription, which has begun, has been interrupted, is identical with the question, whether the time, which elapsed up to the occurrence of the event which created the interruption, is to be counted; and the question whether a particular person has a privilege with reference to prescription, falls to be considered and determined along with the question whether a longer time will be required for the expiration of the prescription in the case of some exceptional kind of claim or demand.

NOTE U ON §§ 279-282. PRESCRIPTION.

[The main conflict on questions of prescription or limitation of action has been between the law of the *forum* and the law of the place to which the contract concerned properly belongs. The latter—the *lex loci contractus*—has been sanctioned by some French writers, such as Fœlix and Demangeat. The former says (i. p. 241, § 100): "This opinion" (that the law of the place where the action had its origin—i.e. where the contract was made—should rule) "is perhaps the best established in theory, and has been adopted by the courts of Douai and Paris;" and the commentator, Demangeat, at the same place, after enumerating the various possible rules, selects this as the prevailing rule, and fortifies his selection by the citation of a series of French decisions. To these cases may be added a decision of the German Imperial Court at Leipsic on 5th March 1877, in the case of *Hervey v. Engelbert* (J. v. p. 627), and a decision of the Tribunal of Commerce of Moscow, 1877, in the case of *Bloumberg v. Wahlberg* (J. viii. p. 189). In the latter case the drawer of

²⁹ Cf. Brocher, ii. p. 422.

³⁰ Laurent (viii. § 256) is of a different opinion: the judgment of the Cour de Chambéry of 12th Feb. 1869, which he cites, is to the same effect.

³¹ So, too, judgment of the Sup. Ct. at Berlin, 15th Jan. 1845. Cf. Koch on 33rd section of Pruss. All. L. R. i. 1, p. 45. It is worth notice that the forty-fifth article of the draft made at Berne in 1886, for an international agreement as to the law of railway freights, while in other respects it lays down a uniform rule for actions arising out of the treaties for transport with which it deals, provides at the close, "*L'interruption de la prescription est régie par les lois du pays où l'action est intentée.*"

a bill payable to order, the bill being drawn in Poland and accepted there, sued the acceptor, a domiciled Russian, in the courts of Russia. The period of prescription on such an obligation is in Russia ten years—in Poland thirty. The Russian pleaded his prescription, but the court held the period of prescription to be determined by the *lex loci contractus*—viz. Polish law. This, too, was the doctrine sanctioned in Scotland by an unanimous judgment of the Court of Session in the case of *Don v. Lippmann*, 1836, Ct. of Sess. Reps. 1st. ser. xiv. p. 241. We shall see that that judgment was reversed by the House of Lords upon appeal, on the authority of the Institutional Writers as well as on general principles; but the decision lays down the rule so clearly that it is worth while, since the opinions of jurists on the subject are so much divided, to quote a few sentences from the opinion of Lord Corehouse, well known to Scottish lawyers as a most learned and accomplished judge. He says: "To decide the question of prescription, as applicable to the bills," for the contents of which the action was raised, "it is necessary to enquire whether the debt sued for is a French or a Scotch debt, and that depends in this case on the point whether Scotland or France was the place where the bills were payable. If they constituted a Scotch debt, it is plain they are subject, not to the French quinquennial, but to the Scotch sexennial prescription. . . . On the other hand, if France was the place of payment, and if the bills in consequence constituted a French debt, the case must be viewed in a different light. Our decisions have not been uniform on this point, but it seems the better opinion, that if a debt be payable in a foreign country, the law of that country must apply, in so far as its extinction is concerned, although the debtor resides and must be sued in Scotland." This, we repeat, is not now law in Scotland, although it may be taken as a statement by an eminent jurist of the principle on which he held that such questions should be determined. That the law of the place of the obligation to some extent influences the application of prescription is admitted by the very authorities who have established the *lex fori* as the rule for England and America. The American courts have held that a defender who is free by the *lex loci contractus*, and has resided in the territory of that law during the whole of the period necessary for his release, cannot be afterwards sued in the court of a foreign country to which he has proceeded, if the prescriptive period there is longer (*Walworth v. Routh*, 14, A. 205; *Story*, § 582; *Wharton*, § 538); and Lord Brougham, in giving judgment in the case of *Don v. Lippmann*, 26th May 1837, 2 Shaw and Maclean, p. 730, 5 C. and F. p. 1, adopting this view, said: "There is no occasion, with a view to the decision in this case, to question the doctrine laid down by Dr Story in his able work on the conflict of laws, and approved of by the Court of Common Pleas in *Huber v. Steiner* (2 Bing, N.C. 202), that if the *lex loci contractus* makes the obligation wholly void after a certain time, and if the parties have resided within the jurisdiction during the whole of that period, it may be taken as the guide of the court where the action is brought."

The law of the place of the contract is also, by the law of countries which as a rule adopt the *lex fori*, allowed to affect the period of prescription upon a debt in this way, that if a debtor, during the subsistence of his debt, removes to another country where a shorter prescription than that of his own country avails to extinguish the debt, although he cannot be sued in the courts of that foreign country, he will, on returning to the *locus contractus*, be liable to action during the period of prescription there recognised. In the case of *Richardson v. Countess of Haddington*, 16th June 1824, 2 Shaw's App. 406, the House of Lords held that a person who had contracted debts in this country, and had afterwards gone to Russia, where a decennial prescription prevails, and remained there for upwards of ten years, was yet liable to be sued on returning to Scotland throughout the years of the long prescription. In that case the *lex fori* and the *lex loci contractus* were the same, but it is upon the applicability of the latter to the prescription that the judgment to a considerable extent proceeded.

But although there is thus a considerable body of authority in favour of the *lex loci contractus* as the rule, later decisions on the continent have tended to establish, and in England have beyond question established, both for that country and Scotland, the *lex fori* as the rule. In England the courts have made the *lex fori* so exclusively the rule, that they have thrown aside the qualification admitted by Lord Brougham *ut supra*, and have established both for themselves and Scotland, that so long as a claim is admissible by the *lex fori*, it matters not that the law of the contract has extinguished it (Westlake, p. 279, and cases there cited). The law of America follows the same rule as it is laid down by Story (Wharton, § 535); the supreme courts of Berlin and Warsaw have taken the same course; and so, too, have the later French decisions. The authorities on the law of England are collected by Westlake, pp. 278, 279. The leading authority on Scotch law is the case of *Don v. Lippmann*, cited *supra*. Lord Brougham says, at page 724: "Limitation of action belongs to the head of remedy, *ad decisionem litis*, as some jurists term it, or *ad tempus et modum actionis*, as others express themselves," and is, therefore, subject to the law of the court to which appeal is made. This decision has settled the law in Scotland, and this law has, like that of England, taken a further step, and, as is laid down by Mr Dickson (On Evidence, § 530), "the Scotch court is not bound or entitled to give effect to a prescription of either of those natures"—*i.e.* limiting the mode of proof or the right of action—"prevailing in the *lex loci contractus*." It is worth while to note that Lord Brougham rejects the authority of the *lex loci contractus* on grounds similar to those urged by the author. Limitation or prescription of action, he argues, is no part of the contract, and cannot have been in the contemplation of parties: "nothing can be more violent than the supposition that the breach of the contract is in the contemplation of parties, and, indeed, nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing they are contem-

plating not doing it, and considering how the law will help them in the non-performance of a duty."

Acting on the principles of this decision, the Scots courts have held that where a limitation, such as the limitation of the liability of a cautioner in a bond under the Act 1695, c. 5, for seven years, is truly a condition of the contract, then the *lex loci contractus* will apply; it is part of the contract, and not a regulation of the method of enforcing a remedy (*Alexander v. Badenach*, 1843, Ct. of Sess. Reps. 2nd ser. vi. p. 326). This distinction accords with that taken in the text between a limitation of actions and an extinction of all obligation. The same distinction is recognised in America (Wharton, §§ 536, 537).

With reference to the period from which prescription runs in the event of a change of domicile, a case decided by the Supreme Court of Posen (*Wiernzowski v. Cegielka*, 1875, J. iv. p. 243) may be cited: there a defender, who had, since incurring an obligation, become a Prussian, was sued by another Prussian upon that obligation; he pleaded the Prussian prescription of two years, and that as the rule of the *lex fori* was sustained; but it was only allowed to run from the time at which he first became amenable by domicile to the jurisdiction of the Prussian court.]

15. TRANSMISSION TO HEIRS.

§ 283. The following principles appear to determine the question whether a contract obligation descends to heirs.

The local law, in conformity with which the heir enters upon the succession, will in the first instance determine what obligations¹ must be taken over by him as a condition of taking up the succession. But before the obligations in question can bind the heir, this effect must be also attributed to them by the law to which the obligation is in itself subject.

Thus, the heir of a person domiciled in a country where the common Roman law is in force,² would not be bound to carry on a partnership in which his predecessor had been engaged in France, although the contract of partnership by the force of special statutory provision does in French law pass to heirs.³

[The law of Scotland, however, holds that the question whether a foreign obligation, a promissory note, will affect the heir of the debtor, must be determined, not by the foreign law, which frees the heir, but by the law of Scotland, the place in which the inheritance is situated, and by the laws of which it must be taken up. *Kinloch v. Fullerton*, 1739; *Morison's Dict.* p. 4456; House of Lords, 1 Pat. App. 265.]

¹ The heir never undertakes more than what is fixed by the law under which he takes the succession.

² Cf. L. 40, D. *pro socio*, 17, 2.

³ Code Civil. art. 1868.

That the obligation should on its other side pass to the heirs of the creditor, it is necessary that the law to which it is in its origin subject, and the law which regulates the succession, should both provide for this.

C. PARTICULAR CONTRACTS.

1. SALE. LETTING AND HIRING. MANDATE. LOAN. CAUTION.

§ 284. We now propose to touch upon some contracts of special importance. We have already touched upon the contract of sale from more than one point of view.¹ The principal points for consideration are:—

(a) The passing of the property. In accordance with what has already been set out at length, the question whether parties intended the property to pass is, failing a special declaration on that head, to be determined by the law which generally rules the obligation; but the further questions—viz. whether this intention is sufficient, whether any particular forms are necessary for the passing of the property, and what these forms are—are to be determined by the *lex rei sitæ*.

(b) The passing of the risk. In the case of a concluded contract of sale, the law of the domicile of each of the parties will rule as regards his obligation; and if their provisions are irreconcilable on the question as to whether the buyer or the seller is to bear the loss of the subject if it should perish, then the law which favours the defender is to prevail. For instance, by Roman law the risk passes to the buyer when the contract is complete: by Prussian law, A. L. R. I. 2, § 100, the sale is held to be broken off, if the subject of it is by any accident entirely destroyed.² Now, in the case of a contract by letters, the buyer [of some article that has perished after the conclusion of the contract] who is domiciled in Berlin cannot be required to pay the price at the instance of the seller who is domiciled in Hanover; but conversely, the seller, if domiciled in Berlin, cannot demand the price from the buyer domiciled in Hanover, while it is always incompetent to claim repetition of a price which has once been paid.

(c) Claims of warrandice are to be settled by the rules which determine in other respects the local law of the contract:³ the same law will settle all questions as to rejection or restitution or abatement of price, and as to the obligation of one or the other of the parties to make good to the other in whole or in part the costs of the deeds and the stamp duties.

Contracts of hiring and lease of immoveables are, almost without exception, to be determined by the law of the place where the subject of the contract is. There is still less reason to suppose that there should be

¹ Cf. Fiore, § 334; Laurent, viii. § 126; Brocher, ii. § 188.

² For an exception, however, see i. 2, § 340.

³ Boullenois, ii. p. 460; Molinæus, ad L. i. C. de S. Trin.; Fœlix, i. p. 230. Laurent, viii. § 154, takes the view that the autonomy of practice alone can give the rule.

exceptions to this rule in such cases rather than in the case of sale, since the contract of lease is bound up with the permanent use, and, as a rule, with the permanent presence of the lessee at the place where the subject of his lease lies. The *lex rei sitæ* determines, then, the conditions of tacit relocation, of abatements of rent, and questions as to rent and warning.⁴

All that need be said as to the contract of partnership has been said already in treating of agency.

The law of mandate is of special importance for the completion of contracts by letter. We have already dealt with this matter. As a general rule, the law which prevails at the domicile of the mandatary, as being the place in which the mandate is to be executed, will indirectly decide the question of the extent of the mandatary's responsibility. For, if he has executed his mandate duly, he must be kept scatheless, and in many cases this can only be effected by the mandant taking over from the mandatary the contracts, as they have been concluded, and indemnifying him for them. On the other hand, if the transactions are forbidden, and give, therefore, no right of action at the place where the transactions are to be carried out, the mandatary has no such claim for indemnity, even although the law of the mandant's domicile knows nothing of the prohibition.⁵ This is the simple and direct consequence of the fact that the transaction, which the mandate has in view, is forbidden at the place in which it is proposed that it shall be carried out. It is this local prohibition which makes the whole bargain null, even although in other respects the mandant's responsibility is determined by the law of his own domicile.

As regards loan, reference may be made to what has already been said upon interest, the plea *non numeratæ pecuniæ*, and the *Exceptio SCi Macedoniani*. We must dispose of all provisions of particular systems of law, by virtue of which particular persons are declared incompetent to bind themselves by acknowledgment of loan, in the same way as we dealt with the *Senatus Consultum Macedonianum*.⁶ We need only note that by the very nature of the contract of loan, the lender is entitled to recover the full amount of the capital he has lent. The result of this is that, if it is arranged that payment shall be made at some other place, or if payment actually takes place there, the debtor may no doubt pay in the currency recognised there, but the amount of the debt will be determined by the currency of the place where the loan was made:⁷ further, the debtor has to bear the cost of transmission, and if he pays in bills he must make good to the creditor the difference in the rate of exchange between his own domicile and that of the creditor.⁸

⁴ Demangeat, in his note (c) to Félix, i. § 109, p. 250; Story, §§ 270 and 364.

⁵ See judgment of the Imp. Ct. (i.) of 10th May 1884 (Entsch. xii. § 8, p. 34), which arrives at the same result. The question dealt with here was a commission sent from Berlin for a speculation in differences on the Parisian Exchange. By § 421 of the Code pénal such transactions are visited with a penalty, and by § 1965 of the Code Civil give no right of action.

⁶ E.g. subaltern officers.

⁷ Massé, ii. § 124.

⁸ Cf. Grant v. Healey, cited by Story, § 284a.

We have already (p. 315) considered the limitations which some systems of law place upon the undertaking of cautionary obligations by women. As regards the *Senatus Consultum Velleianum*, the *lex domicilii* will as a rule be applied for this reason, that the application of that law, which is the general canon in the law of contracts, is in this connection less restricted by exceptions: the requirements of *bona fides* do not so often in the case of cautionary obligations call upon us to observe the *lex loci contractus*. Although, for instance, the traffic at fairs and markets makes it absolutely necessary to apply the law of the place to the contracts usually concluded there, the like need not necessarily be true of a contract of guarantee connected with some contract of the former kind: it must also be shown to be usual to undertake such contracts of guarantee at that place.⁹ The import of the principal contract will regulate the extent of the obligations undertaken by the surety, and therefore to a certain extent the law applicable to them.¹⁰ On the other hand, the conditions under which the surety is bound or is free, although the principal obligation continues, do not depend upon the law that rules it. In this way, too, must the question, whether the surety can plead the *exceptiones excussionis* and *divisionis*, and whether he has the *beneficium cedendarum actionum*, be decided.¹¹

2. DONATION IN PARTICULAR.

§ 285. Donation, strictly speaking, only belongs in part to this division of the subject: it is only the promise of donation, and the obligations which he who receives the donation incurs towards the donor by acceptance, that we can deal with: the donation, on the other hand, in so far as its object is to confer or to transmit real rights, must be assigned to the law of things. Systems of law, however, generally lay down the same leading principles to regulate donations constituted by a direct creation of a real right (*i.e.* delivery of the thing), and donations constituted by undertaking an obligation (*i.e.* promises to give). These principles have their origin in the special protection which the law desires to extend to a person, who is given to liberality, against his own hasty resolutions or the abuse of his good-nature by others, and to extend also to his family or his heirs. From the former point of view we may at once lay down that

⁹ Kritz, p. 117, who no doubt justifies it by the consideration that suretyship never gives rise to more than an *actio nascitura*.

¹⁰ Bouhier, chap. 21, No. 197.

¹¹ To the same effect, Imp. Ct. (i.) 23rd May 1883 (Entsch. ix. § 46, p. 185); Imp. Ct. (iv.) 17th Jan. 1887 (Bolze, *Praxis*, iv. § 20, p. 6). We do not mean to say that circumstances may not force us to determine such an obligation by the law that rules the principal contract — *e.g.* if one becomes surety for an officer of the State, and the obligation can only be undertaken in conformity with the law of the government which he serves (Story, § 290). The surety in this case knows, or ought to know, that he can only become surety in the way prescribed by these laws.

the personal law of the giver will desire to rule the matter, in so far as it is possible for it to do so with reference to the actual sphere of operation of some other territorial law. The second point of view leads also to the same result, in so far as the personal law of the person who leaves a succession regulates matters connected with that succession. The result we reach, then, is this: we must look for the special rules, by which the validity of donations is to be determined, in the personal law of the donor. It is only in so far as there may be some enactment of a restrictive character, the object of which obviously is to protect the donee against obligations, to which the acceptance of the donation may give rise—quite a possible state of the law—that we must observe all the requirements of the donee's personal law as well, if it is intended that the donation shall set up some obligation on the part of the donee. The obligation, however, to repay to the donor the amount by which the donee has been enriched must be recognised, if the law of the donor permits it. It is simply a withdrawal of the donation in so far as it is still, as a matter of fact, to be found in the donee's estate.

In this matter of donation,¹ it comes out very plainly how sound a course it is to hold that, as a matter of principle, the law of obligatory contracts must be determined by the personal law of the parties; in the case of donation this will obviously and almost in every case mean the personal law of the donor, because the donee undertakes no obligations, if we put out of view his obligation to refund the donation in certain cases in so far as he is *lucratus* thereby, and the case also of a donation *sub modo*. The logical result of the theories which would apply to the law of contracts any other law, *c.g.* that of the place of performance, would be to land us in hopeless opposition to the considerations which are undoubtedly germane in questions of donation, viz. the protection of the person who makes the donation and his heirs. If the law, for instance, makes certain provisions for the validity of a donation, is it to be said that the parties can withdraw themselves from the necessity of observing these directions

¹ The authors of the new Belgian bill (art. 7, see Rev. xviii. pp. 464, 470, 471), following Laurent, have given donations a peculiar position, have referred them to the personal law of the donor, just as testaments are referred to the personal law of the deceased, a treatment to which no doubt the system of the Code Civil (Bk. ii. title 2) attracted them. We reach pretty much the same result in the text. But we must not go too far in assimilating donations *inter vivos* and *mortis causa* dispositions in questions of private international law. See C. de Paris, 12th March 1881 (J. viii. p. 355). By this judgment a foreigner, who is barred by his personal law (*loi nationale*) from taking a donation, is also barred in France. [Count Garcia de la Palmira, a Spaniard, gave his daughter, the Countess Antonelli, who became by marriage an Italian, a share of his real estate on the occasion of her marriage. At the date of the marriage the count was resident in Italy, and the marriage contract, in which the gift was contained, was executed there. The estate was situated in France. By Spanish law the donation was illegal; and on the death of the count subsequently in France, the French courts, applying the law of Spain, declared the donation bad, and gave effect to the contentions of the Count's heirs, who had challenged its validity. The restriction of the Spanish law was held to be a personal disqualification, which followed a Spaniard everywhere.]

of the law, by choosing at their own pleasure some foreign place of performance or payment, where there are no such provisions?²

The contract of donation, properly so called, is, however, to be distinguished from the contract by which, in carrying out the intention of donation, a real right in something is constituted. Even if the donation as such were invalid by the personal law of the debtor, it would not by any means unconditionally follow that the transference of the real right was also invalid, or that the right of third parties in possession would be affected thereby. It is only the *lex rei sitæ* that can determine to what extent the real right is effected by the contract to which it is originally traceable.

1st, The rule "*locus regit actum*" prescribes the form of the donation. It may be, however, on the one hand, that the personal law of the donor displaces this rule, although there is no presumption that that will be so; and on the other hand it may be—if e.g. the donor's own law requires some special form for a binding donation, the effect of which is to hinder donations generally, while the *lex loci actus* has no such forms—that if the forms prescribed by the personal law of the donor are not observed by him, it will be left in doubt whether he intended to make a binding contract.³

If the *lex loci actus* lays down some form, which throws difficulty in the way of donations, and if the donor in the particular case fails to observe this form, the donation might be valid in accordance with the personal law of the donor, if he had the intention of putting himself under an obligation, because the rule "*locus regit actum*" has no more than a permissive force.

A distinction must also be taken between the form of the donation itself and the form of the transference of real rights in particular things. The latter will always be regulated by the *lex rei sitæ*. It may, therefore, be indispensable, in order to create a real right by way of donation, to observe the *lex rei sitæ* as well as the personal law of the donor.

2nd, But, apart from the rule "*locus regit actum*," there is no reason for submitting donation to any other local law than the personal law of the donor; for donation, even if it is considered as a contract obligation, does not belong to the ordinary obligations of commerce, in which *bona fides* demands the application of the *lex loci actus*.⁴ We must, however, make a distinction between the form of the donation and the form of the transference of the real or other right, which constitutes the subject of the donation. For instance, although the *lex rei sitæ* might be satisfied in this

² This is in part the source of the difficulty with which Laurent contends in his detailed and interesting discussion (vi. § 281). No doubt Laurent's confusion is in part due to his erroneous terminology, to which we have called attention more than once. As we have pointed out, he often gives the title of *statut réel* to all law of a coercive character, which are not amenable to the intentions of the parties; but, of course, a personal statute, e.g. the *lex domicilii*, may have that character. But yet Laurent contrasts these *statuts réels* with personal statutes.

³ Boullenois, i. pp. 519-523, demands that in every case a donation shall be judicially registered, if that is necessary, by the law of the domicile of the donor, without regard to the local law of the place of the donation.

⁴ Cf. Imp. Ct. (i.) 6th October 1886 (Bolze, *Praxis*, iii. § 19).

respect, the donation as an obligation might still be null in accordance with the personal law of the donor, and in this way might indirectly be invalid for the transference of the real right.⁵

3rd, Grounds for recall of a donation are to be tested in the same way by the *lex domicilii* of the donor. We must look at the matter just as if the donor had made, and the donee had accepted, the donation under the express condition of recall. But, of course, we cannot without special cause hold the donee responsible to any further extent than the extent to which at the time when the recall is intimated to him he is *lucratus*.⁶ For the recall can do no more than recover from the estate of the donee so much of the donation as is still to be found there. Any further obligation upon the donee would only be possible if his own personal law allowed it.

4th, The restrictions imposed upon the donor by the existence of heirs, or of persons having claim to legitim out of his estate, or claims of a similar kind, are all consequences of the rights which these claimants may have upon the estate of the deceased, and are conditional upon the state of his property at the time of his death. They are, therefore, subject to the law under which the succession falls (the *lex domicilii* of the deceased, or the *lex rei sitæ*).⁷ If the person whose estate is thus subjected to a claim changes his domicile, then, if the question should turn at all upon the *lex domicilii*, the donation can only be challenged by these claimants in so far as that is competent by the law of his last domicile, and also by that of his earlier domicile at the date of his donation; for, on the one hand, assets of the estate, once validly given away, do not afterwards form part of the estate; and, on the other, the heirs can ask no more than what the law that regulates the succession, and pronounces them to be heirs, bestows.⁸

In the matter of donation the personal law must be understood to be the national law of the donor, and not that of his domicile, in so far as we are concerned with rules of law, the object of which is the protection of the donor. The reasons which we advanced (§ 252) for the application of the law of the domicile in the sphere of the law of obligations are not applicable here, and these coercitive rules of law, on the other hand, stand in close connection with the law of succession and with the law of the family.⁹

⁵ See the interesting, and, as I think, perfectly sound decision cited in the foregoing note.

⁶ The question whether he is *lucratus* depends, first, on the personal law of the donor, and, second, on the law under which the donee is bound. He is only bound to restore to the extent to which both systems bind him.

⁷ On the principles of Roman law, the *querela inofficiosa dotis* and *inofficiosa donationis* are anomalous, since no heir has by Roman law any claim upon the estate of his predecessor while he is alive. It is otherwise by German law. See, too, Code Civil, art. 913; Zacharia, *Civilr.* iv. § 586; Judgment of C. de Paris, 12th March 1881 (J. viii. p. 354). The limitations imposed upon a donor by his national law, with reference to the existence of children, cover his real estate in a foreign country. See Esperson on the preamble of the Italian Code, art. 8 (J. ix. p. 273).

⁸ Cf. Boullenois, ii. p. 276.

⁹ On donations between spouses, see i. § 187; on donations to juridical persons, i. § 107.

II. OBLIGATIONS BY FORCE OF LAW. (OBLIGATIONS *quasi ex contractu* AND *ex delicto*.)

GENERAL PRINCIPLES.

§ 286. Obligations, which do not rest upon any intention of parties directed to the creation of an obligation, are either consequences of other legal relations, *e.g.* consequences arising from family law, or from the law of things, and must therefore be regulated by the law of this leading relation;¹ or they are consequences of the general obligations which every one owes to every one else within a certain territory. Obligations of the latter kind are obligations *ex delicto*, and those obligations which are usually described as being *quasi ex delicto* and *quasi ex contractu*. It is obvious that the territorial law must desire, in so far as obligations *ex delicto*, and obligations of an analogous character, *obligationes quasi ex delicto*, are concerned, to subject foreigners as well as its own subjects to those general regulations. In the interests of public order, the law necessarily assumes a coercitive character. Foreigners, if they were to be exempted from its operation, would enjoy a privilege which would offend the public sentiment of justice and general legal security.

But the question arises whether other States are also bound to recognise these obligations, and the legal consequences attached to the breach of them by the law of the place of residence. Older authorities answered this question in the affirmative without any investigation, as much in questions of delict² as in questions of *quasi* contractual relations.³ The same theory was as a rule inclined to submit all obligations directly

¹ Brocher, ii. p. 144, and *Nouv. Tr.* § 127, declares in favour of this doctrine. For instance, obligations specially affecting the owners of land, such as those which refer to the *actio aquæ pluvie arcendæ* of Roman law, are, in accordance with this rule, to be determined by the *lex rei sitæ*. Indeed the nature of the subject will always forbid any other law than that of the real estate, against which the action is directed, to rule. A foreign sovereign cannot in such cases impose any obligations. Thus no one can raise an action in State A, because some one in State B has polluted a stream, or has executed some operation in the stream that is prejudicial to him. The law of State B, and as a rule its courts, can alone deal with such matters. If the law of B is inequitable, then the only remedy is by diplomatic representation. In the opposite sense, Imp. Ct. (v.) 27th October 1886, according to Bolze's report (*Praxis*, iii. § 31), no doubt rather a brief report.

² So Burgundus, v. 2; Seuffert, Comm. i. p. 253; Reyscher, i. § 82; Phillips, i. § 24, p. 192; Kori, iii. p. 13; Renaud, *Privatr.* i. § 42, note 28; Mittermaier, § 30, p. 116; Eichhorn, § 36; Schäffner, p. 124. So, too, an act of the Supreme Court of Appeal at Munich, 5th June 1855 (Seuffert, 9, p. 325). See, too, the grounds of judgment of the Supreme Court at Berlin, 5th August 1843 (*Entsch.* ix. p. 381).

³ Burgundus, v. 1; Christianæus, Decis. vol. i. decis. 283, No. 14; Alderan Mascardus, Concl. 7, No. 15; Seuffert, Comm. i. p. 256; Renaud, *Privatr.* i. § 42, note 28; Schäffner, pp. 123, 124; Massé, pp. 139, 224; Burge, iii. p. 1003; Fœlix, i. p. 259. Mühlenbruch, *Pandects*, i. § 73, proposes that obligations *ex lege* should be determined by the law of the domicile of the person under obligation. As to assignation, transmission to heirs, and discharge of the obligations dealt with in this paragraph, see *infra*, § 289.

created by the law to the *lex loci actus*, making a tacit exception in those cases only which were an accessory of some other legal relation, such as *e.g.* is the duty of aliment *intra familiam*. More modern theories, or at least a certain number of them, on the other hand (in Germany substantially under the influence of Wächter and Savigny), will recognise nothing but the *lex fori*⁴ in cases of delict and claims of that class, while obligations *quasi ex contractu* are in the case of many authors not dealt with at all.

The reason assigned by Savigny (§ 374, Guthrie, p. 253) is simple, viz. that the matters here in question are coercitive, strictly positive laws. We have already several times remarked that we cannot recognise this ground in this shape. But in truth it seems as if the law could only sanction claims of this kind if it thinks that to do so would coincide with its own ideas of morality and equity, and if it did, would give effect to them unconditionally. It seems thus that no legal system of law could take as its guide the standard set up by any other system.

This reasoning, however, overlooks the fact that a State can make no claim to rule men's conduct and behaviour except within its own boundaries, and that a rule of conduct, which may be quite proper within our territory, may possibly be unsuitable for any other. The result is:—

First, That in any case conduct which does not give a right to damages or penalty by the law of the place where the act is committed, cannot have this effect if the action be raised in another country.⁵ The opposite view plainly implies an invasion of the sovereign power of the State within whose territory the act in question has taken place. If, for instance, we should allow one of our subjects, who thinks that during his stay abroad he has been wronged by some act of a foreigner abroad, to claim damages in conformity with our law—supposing that by some chance he could raise an action in this country—we are simply claiming for our citizen a privilege in a foreign country over the citizens of that country, and attempting to make foreigners in their own country conform to a law of which they may very well know nothing.⁶ This is the extreme injustice, which the adherents of Wächter and Savigny's theories propose to put in force under the guise of absolute justice, a thing which, in their

⁴ See to this effect Wächter, ii. p. 389; R. Schmid, pp. 75, 76; Wyss, p. 95. Sup. Ct. Stuttgart, 25th June 1856 (Seuffert, ii. § 3); Sup. Ct. of App. Darmstadt, 30th September 1853 (Seuffert, ix. § 1); Sup. Ct. Stuttgart, 3rd January 1871 (Seuffert, xxv. § 115, deciding an *Actio Pauliana* from the point of view of the law of the delict on which that action proceeds). Muheim, p. 180, in recent times defends the *lex fori*, but gives no new argument in its favour.

⁵ See Foote (p. 476), and the English cases which he cites on this point. It is possible that the act or conduct should be begun in a country in which it is permissible, and completed in a country in which it is forbidden, and in which it gives rise to a claim for damages. Damages are in that case due (see Foote).

⁶ It is not enough that the *lex loci actus* forbids the act under a penalty; it must give a right to claim damages, if such a claim is to be made in another country. (See Foote, 479, 480.)

definition of it, does not exist at all. One might perhaps appeal to the protective theory, which is so often applied in criminal law, which gives our State the duty of protecting our citizens abroad in conformity with our law, which is calculated for a particular territory only. But be it observed that a man who acts perfectly lawfully in so far as the *lex loci actus* is concerned, cannot well imagine that a foreign State will quarrel this act with reference to a subject of its own, who is a party to the transaction, but whose citizenship is not written upon his face.⁷

To determine the matter by the *lex fori*, where the *lex loci actus* gives no claim, or one that does not go so far, is utterly unjust, and all the more that it rests on the good pleasure of the pursuer in many cases whether the action shall be raised at this or at that place.

Secondly, It follows that a claim for damages, even if it is not well founded in the circumstances of the particular case according to the *lex fori*, must be allowed, if it is sanctioned by the *lex loci actus*. It is quite untrue to say that legal systems only recognise claims of damages, if and in so far as they are in accordance with their conception of absolute justice. On the contrary, there are many cases in which, on grounds of expediency, the law casts responsibility for claims of damages arising *ex quasi delictis* upon persons, who, on strict investigation, would be shown to be entirely blameless, or whose fault could at least be very questionable. We need only recall, for instance, the Roman actions *de effusis et dejectis* and *de pauperie*, or the provisions of French law as to the liability of parents or employers for acts of their children or servants, which have caused injury, or the provisions of the German statute of liability of 7th June 1871. It is therefore inadmissible to apply the test of absolute justice according to our law to a claim of damages for some act or course of conduct in another country. We must rather recognise everywhere claims of damages which have validly arisen according to the law of the place where the act was done. It is only by holding fast to this principle that we shall achieve a real equality of natives and foreigners in relations of private law in all civilised States, and it is only in this way that a man, who lives in this or that territory, can know on what guarantees for his legal rights he may rely, since foreigners cannot withdraw themselves from their obligations to pay damages, by betaking themselves to their own country.

In any event, the injustice which is involved in the non-recognition by the *lex fori* of a claim which has arisen by the *lex loci actus*, is much less

⁷ It is therefore impracticable, and it leads to strange results to apply, as Eccius applies (Förster-Eccius, i. § 11, No. 5) the law of the parties' own country, where they both belong to one and the same country, for the reason that a man even abroad cannot withdraw himself from the law of his own country and from the obligations which it involves, and that on the other hand the State has to protect its citizens even abroad. Both of these propositions are irrelevant *petitiones principii*. The protection of citizens abroad is not a matter of criminal law, but of public law, and if we allow our citizens to put themselves under a foreign system of law, we must as a rule allow them all that that system allows them.

than the injustice of the theory which allows the *lex fori*, dependent, as it is, upon the choice of the pursuer, to give rise to a claim. In cases which are plainly concerned, not with damages, but with penalties, a limitation of this kind must be conceded.⁸ For a State can only punish in so far as it can itself declare the punishment to be just; it cannot recognise the foreign sentence as one that may possibly be just, nor can any principle of distinction be found in the circumstance that the produce of the penalty goes not to the fisc, but to the private person who sues for it.

Brocher (*Nouv. Tr.* § 127) is right in calling attention to the intolerable insecurity, which would necessarily result from the application of the *lex fori*. An act, which was completely legal in the country where it was done, might found a claim for damages, if the one party succeeded in entangling the other, against whom he alleges a claim of the kind, in a lawsuit in some other country, the law of which took a different view of the transaction.⁹

The great balance of opinion at the present time on the continent of Europe is in favour of determining obligations *ex delictis* by the *lex loci actus*, at least in so far as the question of damages is concerned.¹⁰ Whereas the law of England and that of the United States seem only to sanction claims upon delicts or *quasi* delicts, in so far as these claims are good both by the *lex fori* and the *lex loci actus*.¹¹

⁸ No doubt it may sometimes be questionable whether a particular claim is a claim for damages or for penalty. In such a case, the proper course will be to let the *lex loci actus* rule.

⁹ It may be, however, that a law which fastens responsibility *e.g.* on the State or on some public undertaking, should operate beyond the limits of the territory *e.g.* as regards injuries suffered by officials of the State or the company, on duty. This law may have the effect of a contract, and may operate accordingly outside the territory. On this ground we can justify the decision of the Imperial Court (ii.) of 13th February 1886 (reported by Bolze, *Praxis*, ii. § 27, p. 6), which held that the direction of the Prussian East Railway was liable for the injuries of one of their servants which had been inflicted upon Russian territory, but upon the system of the East Railway Company.

¹⁰ In agreement with the text, Stobbe, § 33 *ad fin.*; Unger, p. 188; Vesque v. Püttlingen, p. 65; Stobbe, *ut cit.*; Dernburg, *Pand.* § 48 *ad fin.*; Beseler, § 39, vi.; Roth, *D. Privatr.* § 51 *ad fin.*; *Bayer. Privatr.* § 17, note 117 (with reference to judgments of the Supreme Court of Bavaria); Förster-Eccius, i. § 11, No. 5; Laurent, viii. § 12; Asser-Rivier, § 40 (p. 86); Haus, *Dr.* § 134 (with reference also to *quasi* contracts); Brocher, *N. Traité*, p. 315; Esperson, J. ix. p. 287; Bard, § 194; Sup. Ct. of Comm. for Germany, 19th January 1878 (Seuffert, xxxiii. § 185; *Entsch.* xxiii. p. 174); Imp. Ct. (i.) 20th September 1882 (*Entsch.* vii. § 116, p. 378); Belgische, *Praxis* (Picard, J. viii. p. 483); New Belgian Draft, art. 8 (Rev. xviii. p. 482): "*Les quasi-contrats, les délits civils et les quasi-délits sont régis par la loi du lieu où le fait qui est la cause de l'obligation s'est passé.*" Imp. Ct. (ii.) 24th November 1881 (Bolze, *Praxis* ii. § 26): the responsibility of the treasury for the ill-treatment of a soldier by a sergeant is to be determined by the law of the country where the act was done, and to which both parties belong. See, too, v. Martens, p. 340.

¹¹ Westlake Holtzendorff, § 185; Wharton, § 474 *et seq.*; Westlake, Rev. vi. pp. 394, 395. Decision of the App. Ct. in England [February 1876, *The Moxham*, L. R. 1, P. D. p. 107, J. iii. p. 381. See, also, Westlake, §§ 196 *et seq.*]. See judgment of the Appeal Ct. of Vermont of 20th January 1887 (J. xiv. p. 668): held that an individual could have no action for penalties on account of usurious interest in another State. See, too, Foote, p. 476.

SPECIAL QUESTIONS CONNECTED WITH OBLIGATIONS *ex delicto*.

§ 287. In the law of delicts the following special questions have still to be answered:—

First, What is the place of the act in the legal sense which must rule in such matters, if we suppose that the act itself in the narrowest sense (the manifestation of the will), and its result, on the other hand, fall under different territorial laws?

The question, in so far as civil obligations are concerned, must be answered, for the same reasons as prevail in criminal law, in favour of the place of the act itself.¹² On the one hand, the results of any act may be lost in uncertainty, in a certain sense show themselves everywhere and nowhere, so that an attempt to decide such questions by the law of the place of the result would lead to the utmost uncertainty as to men's rights. Besides, the conception of an "act," which is derived from some positive system of law, cannot be taken as a means of defining international jurisdiction. In that matter we must start from the local situation of a thing or of a person, *i.e.* his domicile or his nationality, as the case may be. In truth, so soon as we allow that the question is not to be ruled by the place where the act was done, or, to speak more exactly, by the place of the person who is alleged to be liable, at the moment at which he is alleged to have made himself liable, but regard the place where the act has its results, its operation, as decisive, we take away the decision of the question from the *lex loci actus*, and commit it to that of the domicile of the person who is said to have been injured, or to that of the place in which

¹² See the resolution of the Institute for International Law to this effect taken in 1883 at Munich, Ann. vii. pp. 129 and 156. To the same effect in civil matters, Roth, *Bayer. Privatr.* i. § 17, note 117; Eccius-Förster, § 11, note 35. The judgments of the Supreme Court of Bavaria of 1847 and 1856 (Seuffert, iii. § 295), cited by Roth, hold that in the case of a wrong done by letter, the law of the place where the letter is posted will rule. The contrary is laid down by Field, § 620, but he gives no reason for it. A judgment of the Appeal Court at Milan, of 19th September 1881 (J. x. p. 73), lays down that the insertion of a slanderous article in Italian newspapers will found an action before Italian courts, in accordance with Italian law, against a person who has sent it from another country. Press delicts seem in truth to demand a separate treatment, to the effect of regarding the place where they are published as the place of the act. The author may make himself acquainted with the law of this country when he is sending his articles there for publication. See, too, Löwe, *Comm. Zur deutschen Strafproceßordn.* 4th edn. 1884, p. 808. But the proposition is not so obvious as it is thought to be. It is, however, at all events more reasonable than the view which will regard, in the case of such an offence, every place in which the publication is distributed as the place in which the delict is committed.

The decision of the Germ. Imp. Ct. (ii.) of 23rd September 1887 (Bolze, v. No. 13) seems to proceed on the theory that in the case of an act, constituting a good ground for an action of damages committed by means of a letter sent through the post, the place where the letter is received must rule. But it is just in such a case as this, *e.g.* where a merchant has unjustifiably recommended his goods, that the danger of this view comes out. The man who writes the letter knows not what obligations he is incurring.

he happens to be for the time. The law of this place is to chalk out the proper line of conduct for persons who reside in some other country !

In the second place, What is the law if the act which is complained of is done in a country belonging to some savage race, or on a desert island, and not within the territory of any civilised State ? As there is no territorial law in such a case to guide us, or at least none to which the subjects of civilised powers can be made subject, the only plan left is to have recourse to the personal law.¹³ The person against whom the claim is made is thus liable only to the extent allowed by his personal law, but, as reciprocity in such cases is an irresistible requirement of justice, he is only liable in so far as the pursuer would *in pari casu* be liable to him. Besides, the application of the personal law is in accordance—with perhaps some modifications—with the recognised usage in the case of Europeans living in the non-Christian States of the East.¹⁴ On the other hand, the application of the *lex fori*, which many¹⁵ recommend in this case, is simply a dangerous mode of avoiding the difficulty. We shall have occasion to deal with this question again in connection with the subject of maritime law.

In the third place, If the question is one of liability for damage done by beasts, or by other persons, such as children, servants, etc., it is obvious that the liability can never be broader or go further than the law of the place, where the damage takes place, permits.¹⁶ But just as little can it go beyond what is sanctioned by the law of the nationality or domicile of the person against whom the claim is made. For the law of the domicile of the person or the beast that actually does the injury cannot have any power to affect others beyond that territory. We should not ascribe this effect as a matter of course to the law of a domicile that was accidental and merely temporary ; but again, on the other hand, the circumstance that the guilty person or the vicious beast was staying at the place where the accident happened, with the consent of the head of the family or the owner, may be taken into account in testing his liability.¹⁷ If, however, the rule of law prevailing at the place where the damage was done passes the property of the thing that does the damage to the person who suffers it, or to the fisk, we should adhere to the general rule in respect of the *lex rei*

¹³ According to the Code of Saxony, §§ 11 and 708, it would appear that the law of the domicile of the injured person ought to rule. Cf. Stobbe, § 33, note 34.

¹⁴ Judgment of the Appeal Court at the Hague, 19th March 1878 (J. xi. p. 211).

¹⁵ *E.g.* Eccius-Forster, § 11, note 36 ; Foote, p. 481. The case, however, cited by the latter of damage to a submarine cable proves nothing, for the injury was done within the three-mile limit which is held to belong to the territory, and the *lex fori* was therefore identical with the *lex loci delicti commissi*. [Submarine Telegraph Co. v. Dickson, 1864, 15 C.B. N.S. 759.]

¹⁶ Cf. judgment of the Appeal Court in England quoted by Westlake, Rev. x. p. 541. [The Moxham, 1876, L. R. 1, P. D. p. 107.]

¹⁷ See judgment of the German Imp. Ct. (ii). of 19th Jan. 1878 (Entsch. xxiii. p. 174), in a matter of this kind. The court laid down that a foreign building contractor had subjected himself to the liability imposed by the law of the place in which the building was proceeding.

sita which would then come into play.¹⁸ On the other hand, in such cases as these we cannot refuse to give a certain amount of weight to the *lex fori*. If the *lex fori* should be such as to make the judge who is dealing with the case think that it would be altogether unreasonable to fix liability on the defender,¹⁹ he could not well find him liable even according to the *lex loci actus*. To this extent, in accordance with what we have already (p. 96) said, the theory of the so-called coercitive law is, no doubt, sound.

NOTE W ON §§ 286, 287. OBLIGATIONS *ex delicto*.

[The law of England is as it is stated in note 11, and the author, in the concluding sentences of the immediately preceding paragraph, reaches very nearly the same position. The law of Scotland apparently coincides with that of England, but there are not many illustrations of it in the books, so far as civil liability is concerned. In the case of *M'Larty against Steele*, however (1881, Ct. of Sess. Reps. 4th ser. viii. p. 435), the court held that, in an action of damages by one Scotsman against another for slander uttered in Penang and Singapore, it was not necessary for the defender to aver or prove any special damage suffered, although by the law of Burmah that would have been necessary. But it would seem that this decision was not intended to touch the general doctrine, for it was said that the question decided was merely one as to the evidence by which injury might be shown to have been done to the pursuer, and that, although by the foreign law redress could not be given without proof of special damage, that did not import that by that law verbal slander was lawful.

In the case of *Horn v. N. B. Ry. Co.* 1878 (Ct. of Sess. Reps. 4th ser. v. p. 1055), a person sued a railway company for damages in respect of the death of his son. The company sued was Scots, but the accident happened while the deceased, upon a through ticket, was travelling in England. In defence it was pleaded that the law of England must rule the liability, and that as it, unlike the law of Scotland, gives no remedy by way of *solatium*, the claim must fail. The court, without very distinctly pronouncing whether the basis of the action was contract or delict, held that the question stated above was a question of the remedy rather than of the right, and must be

¹⁸ By a judgment of the App. Ct. at Berlin of 15th Aug. 1843 (Entsch. ix. p. 381), in an action *de pauperie*, the law of the place where the damage was done, not that of the domicile of the person sued. It is to be noticed that in the case on hand the action was raised at the domicile of the defender, and that the law of the place where the damage was done was unfavourable to the defender. Koch, in his commentary on § 34 of the introduction to the Prussian A. L. R., and Bornemann, i. p. 66, express themselves to the same effect. In Massachusetts the owner of a dog is liable for double the amount of any damage that may be done by his dog. A dog, belonging to a person domiciled there, escaped and bit a man in New Hampshire. It was held that the law of Massachusetts had no application. Wharton, § 478, note. Dudley-Field, § 619, agrees with this.

¹⁹ A judge in a territory where the common Roman law prevails might take this view in certain cases where § 1384 of the Code Civil imposes liability, at least in the extensions of that § which one finds in practice.

determined by the *lex fori*. It is proper to notice that an application of the law of the place of contract, viz. Scotland, would have given the same result, and would, it is thought, have been more in agreement with the authorities. Lord Gifford seems inclined to put the judgment on that ground. It has, however, been held in a recent case, *Rosses v. Thakor Sahib of Gondal*, 1891, Ct. of Sess. Reps. 4th ser. xix. p. 31, that a person who sues for damages in respect of an act done abroad, must show that that act is, by the law of the country where it is done, a wrong carrying with it a claim of damages in reparation, before a claim can be allowed in Scotland. The *lex fori* will not rule such a question, but the *lex loci actus*. Savigny's authority was considered in this case and deliberately rejected. It did not, however, raise the question whether the *lex fori* must concur in holding the act to be a wrong before a remedy would be given.

In the case of *Waygood & Co. v. Bennie* (1885, Ct. of Sess. Reps. 4th ser. xii. 651), it was recognised that a court has jurisdiction to prevent a wrong being done to its own subjects by the circulation of printed matter (a printed trade-circular) within its own territory, but sent from a foreign country.

On the question whether the place where the act was done, or where its results came to light, is to be regarded in such matters, there is no body of authority in Scotland in civil matters. As regards criminal responsibility, the law of Scotland undoubtedly gives jurisdiction to the courts of the country where the crime was completed by taking effect where, as it is said, the engine exploded. "If one compose and print a libel in England, and circulate it here, or if one forge a deed abroad and utter it here, certainly the proper courts for the trial of such a case are those of this country, since it is here that the main act is done which completes the crime. . . . Nay, more, it may be plausibly argued that he shall be subjected to the same course of trial who shall write an incendiary letter in England, and put it into a course of conveyance thence, by means of which it is received in Scotland" (Baron Hume on Crimes, i. 173). This principle has been applied in the leading cases of *Bradbury*, 1872, 2 Couper, 311; *Witherington*, 1881, Ct. of Sess. Reps. 4th ser. viii. (J.C.) p. 41. The decisions in these cases are all the more forcible, as the crime charged was in both cases the obtaining of goods under false pretences, the *species facti* alleged constituting no criminal offence in England, by the law of which country the prisoners in both cases claimed that they should be tried.

Where the crime is one recognised in all countries, there is probably, as is suggested by Lord Neaves in *Bradbury's* case, a concurrent jurisdiction in the two countries: the difficulties of adopting the law of the place where the result is produced as determining the quality of the offence are forcibly stated by Lord Young in the case of *Hall* tried at Perth, 1881, Ct. of Sess. Reps. 4th ser. viii. (J.C.) 28.

In England it is determined by the cases of the *Queen v. Keyn* (1876, L. R. 2 Ex. D. 63) and *re Smith* (1876, L. R. 1 P. D. 300), that in the case of offences or torts, committed by means of the collision of one ship with another, it is not sufficient to give the English court jurisdiction that the

ship suffering damage, or on board of which the offence—in Keyn's case manslaughter—take place, is an English ship. The point for consideration is not in what place the act was completed, but in what place the actor was.]

OBLIGATIONS *quasi ex contractu*.

§ 288. Although most authors treat *quasi* contracts in the same way as delicts and *quasi* delicts, Laurent (viii. § 1)²⁰ sets up a different rule for the treatment of *quasi* contracts. He proposes to treat them more after the analogy of real contracts, because he thinks that the obligation *quasi ex contractu* rests upon the will of the parties, as that is presumed to be by the law, whereas the obligation *ex delicto* operates against the will of the parties. Thus the law of the place where the act is done is only to decide, if the parties are of different nationalities, while the personal law gives the rule, if both parties belong to the same nationality.

This argument goes too far. As the authors of the new draft of a code for Belgium notice, it is not applicable to the obligation *quasi ex contractu*, which arises by the payment to any one of an *indebitum*, and again, with the help of presumptions as to the intention of parties, one can prove everything or nothing in private international law. Again, to determine the application of the law, according as the persons concerned belong to the same or to different nationalities, will by no means in every case satisfy men's sentiments of justice. At the same time, we must not overlook the fact that there is something sound at the root of Laurent's theory. If the law treats an obligation, which arises directly *ex lege*, and is not dependent upon the intention of any one for its existence, in spite of that as a *quasi* contract, and not as a delict, that is an indication, in so far as private international law is concerned, that it may be that, instead of the place in which the obligation arose, some other place, possibly the domicile of the parties, should rule. Such an obligation, which, to a certain extent, is to be treated on the analogy of a contract right, may, in this matter, be treated as if it really were such a right.²¹ We may thus under certain circumstances disregard the place of the actual *factum* from which the obligation springs, holding it to be a mere unimportant accident, substan-

²⁰ See, too, his Sketch of a Code, p. 109, § 7: "*Les quasi contrats sont régis par la loi personnelle des parties si elles sont de la même nationalité. Les obligations qui résultent de l'autorité seule de la loi sont régies par la loi personnelle de celui dans l'intérêt duquel sont établis les administrateurs légaux.*" We have already noticed that Mühlenbruch proposes to regulate obligations *ex lege* generally by the law of the domicile of the person who is put under obligation. This sharpwitted commentator on the Pandects must have observed that the common theory, by which the *lex loci actus* is applied exclusively, often leads to absurd results. But he has pronounced too decidedly and too generally on the opposite side.

²¹ The idea which Brocher (ii. p. 140) takes as regulative of *quasi* contracts—viz. that the law in such cases takes upon itself a local duty of protection, e.g. to prevent foreigners from mixing themselves up with the affairs of the proprietor against whom the claim is made, rests upon this foundation. We hold the seat of the relations with which the law is to deal—and Savigny's expression is apt enough for this case—to be determined by some other consideration than the purely material fact of the act taking place at some particular spot.

tially for the same reasons as frequently induce us to regard the place where a true contract is concluded—apart from the application of the rule "*locus regit actum*" in matters of form—as immaterial. In this way it may often be that, if both parties belong to the same State, the law of this State will rule, although we need not, as Laurent does, deduce from this a hard and fast rule. If²² A and B belong to the same State and know each other to be citizens of the same State X, and A pays B an *indebitum*, while they are travelling together in State Y, it would not be equitable to test the obligation to repay the *indebitum* by the law of State Y, but rather by the law which prevails in the country in which both parties have their home.²³ Again, in the case of *negotiorum gestio* without authority, which is not confined to one State, as may very well be the case, it would be absurd to apply a different law to each of the acts of this *gestio* which may stand in close connection one with another. In such cases, as Laurent, too, points out, the application of the law of the parties' domicile may very often be proper, because *negotiorum gestio* in fact stands in close connection with mandate. But if a man takes possession of a deserted house or an abandoned article of any kind, without knowing who the owner is, it would, on the other hand, be absurd to have regard to the parties' personal law, even if they should both belong to the same State.

LIABILITY OF THIRD PARTIES. FINAL OBSERVATIONS.

§ 289. In any case, however, an obligation *quasi ex contractu* in accordance with the *lex loci actus*, can only attach to a person who is subject to that law, be he so subject by reason of residence within its territory, or because that law is his personal law. Thus a *negotiorum gestor* by his actings may bind himself according to the rules of the *lex loci actus*, whereas it may well be that the law of the domicile of the principal will be the only rule for determining what is all that is necessary to found the *Actio negotiorum gestororum contraria*. Accordingly the decision of the Court at Celle on 28th Nov. 1871, in a very interesting matter, was in our opinion entirely sound.²⁴

²² Rev. xviii. p. 483.

²³ Laurent (viii. p. 11) would treat the receipt of an *indebitum*, where there is *mala fides*, as a delict, and would accordingly deal with it in quite another way. But *mala fides* can very often not be proved, and accordingly a treatment so radically different, according as the receipt is *in bona fide* or *in mala fide*, is unpractical. The German Imp. Ct. (iii.) on the 14th June 1887 (Entsch. xxii. p. 296), in the case of a *condictio* on the head of recompense, held the law of the domicile of the person, who was said to have benefited, as regulative. This was no doubt in respect of § 705 of the Saxon Code, which makes the domicile of the obligant the place for the performance of the obligation, in default of any provision to the contrary or of any distinct implication from the nature of thing to be done. Seuffert, Comm. i. p. 256, says: "The law of the place where the thing was given will rule a claim for its return, but, when the question is raised whether what was given was an *indebitum*, or was given without any legal right to demand it, regard must be had to the law which regulates the relation, which gave occasion to the payment." See, too, Fœlix, i. p. 239, and, on the necessity of taking two systems of law into account in some cases, see Brocher, ii. p. 142.

²⁴ Seuffert, xxvi. § 217.

On the transference, extinction, and prescription of claims founded originally on delicts²⁵ or on *quasi* contracts, we have nothing special to say.

We have already shown that the obligation of one who has been compelled to pay aliment to the mother of an illegitimate child cannot be called an obligation *ex delicto*; whereas, on the other hand, the obligation to make payment to one who has been seduced, by way of compensation for the loss of a respectable marriage, has the character of a true obligation *ex delicto*, and is therefore subject to the *lex loci actus*.²⁶

²⁵ Judgment of the C. de Bruxelles, 7th April 1880 (given by Dubois, Rev. xiii. p. 66): in Belgium a Belgian cannot be sued in a civil action on the ground of a delict committed abroad, if the action is prescribed by the *lex loci actus*. See *supra*, § 278.

²⁶ See Wächter, ii. p. 396; Stobbe, § 33, note 34; Beseler, § 39, note 28; Sup. Ct. at Berlin, 27th September 1875 (Seuffert, xxi. § 196); Laurent, viii. § 16, with special reference to the distinction taken in the text and *supra*, § 205. It is obvious that an action must be thrown out if the law of the court before which it comes holds it to be indecent or immoral. This is no peculiarity of actions on delict (cf. i. § 36), although it occurs most frequently with them. As regards the law of France, in particular, we may say again that it does not by any means give the maxim "*la recherche de la paternité est interdite*" the same absolute force as German authors attribute to it. See Laurent *ut cit.*

Of course, all those who apply the *lex fori* exclusively in all cases of delict, do so here also. *E.g.* Schmid, p. 76. See, on the contrary, the practice in Prussia. Eccius-Forster, § 11; note 35.

Eightb Book.

COMMERCIAL LAW.

I. GENERAL PRINCIPLES.

A. COMMERCIAL AFFAIRS. CHARACTER OF A PERSON AS A TRADER.

§ 290. 1st, The question whether a legal problem is to be treated as a commercial matter, or as a matter belonging to ordinary municipal law, may arise in various aspects.

(a.) The law may prescribe that commercial matters shall be disposed of according to rules that are in substance different from the ordinary rules of municipal law. To that extent the answer to the question, whether a transaction is a commercial transaction, and must therefore be disposed of according to the provisions of a commercial code or not, depends upon the question to what territorial law the transaction generally is to be referred. For commercial law is simply an aggregate of legal rules belonging to this territorial law, and of course the law that regulates the matter must say which of its own rules is to be applied to the case. The presumption, which some systems of law attach to certain kinds of transactions, that they belong to the sphere of commercial law (cf. *e.g.* German Comm. Code, § 274), must be recognised by foreign tribunals in accordance with the deliverance of the *lex loci obligationis* upon it.

(b.) The law may provide that commercial matters shall be dealt with by particular courts. The definition of a commercial matter must be taken from the *lex fori*. If the courts of a State are competent to entertain a process, it is the law of this State that must settle all questions of competency between this court and that court; the subsumption of an action under the head of a commercial action is, in so far as matters of process are concerned, simply a deliverance of this kind in an abbreviated form.¹

(c.) The law may provide that in commercial matters certain particular kinds of proof shall be recognised, which would not be admitted, if the

¹ Asser-Rivier, §§ 91, 92, agrees with the results of (a) and (b).

subject matter of the action were not a commercial matter. Thus, *e.g.* by the 109th article of the French Commercial Code, proof by witnesses is admitted to a larger extent in commercial sales than in the case of other contracts. Here the question may be raised, does the law, by which the substance of the contract is ruled, determine this question, or does the *lex fori*? This question must be answered when we come to deal with the law of process.

As regards question (a) it is possible in other respects, as we have shown before, that a legal transaction should for some purposes require to be dealt with by the law of place A, and for other purposes by the law of place B. An instance of that is the matter of the rate of interest to be allowed. If, then, an obligation, which has arisen in A, must be tested by the law of B, in so far as questions of interest are concerned, and the law of B allows a higher rate of interest in commercial transactions than in other transactions, it is a simple application of the proposition stated under head (a) to hold that the question, whether the creditor can claim the higher interest attached to a commercial transaction, is a question that must be dealt with by the law of B.

Secondly, The question whether a person is a merchant or trader in the eye of the law, may be a question prejudicial,²

(a.) For the decision of the further question, whether any particular transaction is or is not a commercial matter, supposing the law to say that a transaction is only to be regarded as a commercial transaction if it is arranged by a merchant or trader. In that event the case is precisely the same as if the law, in place of using the shorthand expression "merchant" or "trader," had repeated in detail its description of the persons, whose participation in any contract makes it a commercial contract. The law which regulates the transaction itself must therefore rule in this matter, and the law of the domicile of the person has nothing to say in the matter.³

(b.) It may also be a prejudicial question with reference to certain obligations that have to be performed in the public interest: *e.g.* the obligation to keep business books, to enroll oneself as a merchant in some commercial register; or to ensure certain special privileges, such as the special rights of a trading firm. In respect that such obligations can only be discharged at the seat of the trading establishment, and such privileges are simply an appurtenance of that trading establishment, the law of the

² This comes out specially clearly in the provision of § 272 of the German Code of Commerce *ad fin.* When it is said that the transactions described in § 272 are to be regarded as commercial transactions, even "where they are done as an isolated matter by one who is a merchant in the course of his business, which, as a rule, is directed to different objects," it is plain that by the term "merchant" we are to understand a merchant in the sense of that German Code, and not a merchant according to the definition of some other code.

³ Asser-Rivier, § 93, do not take a sufficiently accurate view of the matter, for they simply make the law of the place, in which the person *a fait l'acte ou exercé l'industrie dont il s'agit*, decisive.

domicile or of the trading establishment, as the case may be, is the only law that can be applied.

If the law makes the character of merchant dependent on majority or a *venia ætatis* (the emancipation of the French law), this fact is a fact to be determined exclusively by the personal law.⁴ The same law, *i.e.* the personal law, must decide whether a wife needs the consent of her husband before she can become a trader,⁵ and whether this consent can be obtained by judicial procedure, if the husband himself unreasonably refuses to give it, and whether a consent, once given, can be recalled. For the matter in question in all such cases is a true incapacity of acting, which is prescribed in the case of a wife in the interest of married life in general, but may be waived if the husband consents. The consequences of a consent are, of course, excepting the legality of a recall, to be determined by the law of the place in which the trading establishment or firm is carried on. For it is there that the whole legal relation, for the constitution of which this consent is one element, is to be realised, and the *bona fides* of commercial intercourse demands that the matter shall be so treated.

We shall deal with the questions of the weight of business books as evidence, and of the obligation to exhibit them, when we deal with the law of process.

As to the law of the firm name, see *supra*, § 98, and *infra* on the law of trademark.

B. MANAGERS AND ASSISTANTS AND TRADING PARTNERSHIPS.

§ 291. The legal questions, which arise from the employment of managers or assistants in commercial law, are to be determined on the same principles as regulate agency and mandate.

In this way the person who holds an authority or procuration will represent the principal with all the powers with which the law of the place, in which the principal is domiciled, or in which his trading establishment is situated, as the case may be, invests the agent.¹ But this person holding this authority has these powers only. Although the law of the country, in which the representative of a foreign trading house makes contracts, should invest such representation in general with more extensive powers, that is no reason for saying that the *bona fides* of trade requires the application of the *lex loci actus* to determine the extent of the authority of the foreign representative. In the case of a foreign minor, it may be that

⁴ In such cases it is nationality that must rule. For here the question is the fundamental question, whether a man is a merchant; if this is once established, then, in accordance with what we have said *supra*, § 252, the *lex domicilii* and not the law of nationality is the law that is to be considered with a view to the determination of the particular problems of commercial law in so far as they touch this person.

⁵ *E.g.* a wife separated from her husband, her personal law not admitting true divorce.

¹ Imperial Court of Commerce, 4th Dec. 1872 (Seuffert, xxviii. § 48), the place where the authority is given will rule. See, too, Asser-Rivier, § 97).

his character as a foreigner is not visible, and that there is, therefore, no occasion for enquiring what his personal law is, and the bargain itself may not by reason of its subject-matter give rise to any such enquiry. But a transaction with a foreign commercial agent, who gives himself out as such, always gives rise, to a sufficient extent, to the suspicion that there may be some divergence between his law and that of the country in which he is. Again, on the other hand, the principal has no means at all of protecting himself, if the commercial agent can extend his powers at pleasure by crossing the frontier just as he chooses. Further, what is to be the result, if the various territories concerned lay down different conditions for the competency of placing restrictions upon such authority, or of recalling it? The provisions of the German Commercial Code, and nowadays of the Swiss Code also, as to the necessity of registering procurations and alterations upon them in the commercial register, afford an excellent illustration of the soundness of these propositions. It is simply impossible that foreign firms and foreign establishments should make such entries in the German Empire or in Switzerland.

2nd, The same principles must of course regulate the liability of the partners in a commercial partnership.² In fact, this liability may be traced to the recognition of one partner as an authorised agent of the other partners, or to the fact that a third person as authorised agent performs his office for several persons simultaneously; and in respect that some kinds of trading partnerships are invested with something of the character of juridical persons—a subject which we are not to investigate at present—the same result may be obtained on principles already laid down (i. § 139).

That foreigners, except in the case of uncivilised countries, noticed in note 2 *ad fin.*, cannot set up a trading establishment to be carried on in another country except in the forms recognised by that country,³ needs hardly to be said. The rule "*locus regit actum*" acquires a coercitive character from the fact that in commercial matters the country where the business is carried on takes the place which the personal law holds in other departments of law, except in so far as personal capacity to act is concerned.

If a person enters a joint-stock company, as one of the original shareholders or holders of stock, he subjects himself to the law of the place where the company has its seat, or to any proviso on this subject, which

² See judgment of Appeal Court at Celle, 31st May 1876 (Seuffert, xxxi. § 303). The liability of the partner of a trading establishment in Peru, who lives in Prussia, is to be primarily determined by the law of Peru. See, too, Imperial Court of Commerce 17th February 1871 (Seuffert, xxvi. § 101). Imperial Court (i.) 5th November 1884 (Bolze, *Praxis*, i. No. 41, p. 10), any question as to the necessity of suing the company is to be settled by the law of the seat of the company. A special difficulty may arise if the company is established in a country (*e.g.* in the East) in which the local law does not bind Europeans, while the partners are citizens of various European States. A case of this kind is determined by the judgment of the Imperial Court of 2nd July 1884, to the effect that for a commercial partnership the law of the country in which it proposes to carry on its business may furnish the rule.

³ Judgment of tribunal of commerce at Marseilles, 7th February 1878 (J. v. p. 381).

the conditions of the company may lay down, to a certain extent.⁴ He does so, *e.g.* in so far as his obligation for further contributions is concerned, and he submits himself to special forms of citation in any process connected with the liquidation of the company, or the enforcement of calls.⁵ But there is no good ground for maintaining that the transferee from an original shareholder is bound in every case, in a question with that original shareholder, to make good in his room payments that fall due upon the transference, although the law of the seat of the company may provide to that effect.⁶ In such cases it is rather the law which regulates the transference itself that must rule, unless the transferee is referred to some other law, by a note upon his share certificate.⁷

The law which prevails at the seat of the company will be applied to the relations of the shareholders *inter se*. It will not be the law recognised at the place where any piece of business, *e.g.* the conduct of a mine carried on account of the company, has its seat (see Imp. Ct. (i.) 15th November 1885, in Bolze, *Praxis*, ii. § 31, p. 8).

II. NEGOTIABLE NOTES OR BONDS PAYABLE TO BEARER.

GENERAL PRINCIPLES.

§ 292. Notes or bonds payable to bearer present substantial difficulties in matters of private international law. It will not, however, be necessary to go very deeply into the highly debatable theory of the construction of the obligations embodied in written documents. This much we must hold to be beyond all doubt. The debtor, who issues the note, will become debtor to the person who acquires right in the note with the intention of becoming creditor.¹ The debtor, too, will, may, and must, without further enquiry, accept any one who is actually in possession of the note as invested with these rights, putting out of view special cases in which an exception must be made, *e.g.* the case of a stoppage of payment duly intimated or judicially laid on, where notes of the kind have been stolen or gone amissing. It is self-evident that no law but the law of the debtor's domicile can regulate this obligation of the debtor² in itself. To escape this the debtor would require, by issuing the notes in another place and

⁴ Of course, that is still more true for any rights which the shareholder may have against the company, and this is as true of transferees as of original shareholders. C. de Paris, 2nd January 1875 (J. iii. p. 105). See, too J. ii. p. 440.

⁵ [Copin v. Adamson, 1875, L.R. 1, Ex. D. 17.]

⁶ Belgian Statute of 18th May 1875, art. 42.

⁷ Trib. Comm. de la Seine, 18th June 1881 (J. ix. p. 527), affirmed this absolutely. If the only question is one as to whether calls are or are not due, then the law of the company is absolutely decisive.

¹ Some one may get possession with the intention of acquiring right in the note and the claim it represents for some one else.

² Accordingly, as a rule, the law of the debtor's domicile will decide the question, whether he can issue notes payable to bearer, of particular descriptions, without the express permission of the Government.

promising to pay them at that other place, to have thus submitted his liability by anticipation to some other law. But the debtor has made the fate of his liability, in so far as the person of his creditor is concerned, dependent on the right which any unknown third party may acquire in the note, which is a corporeal moveable. This right is subject to the *lex rei sitæ*, i.e. more exactly to the law of the place where the note happens to be at the time of the transaction by which it is transferred.³ If, then, a holder is compelled, be it by the law and by the courts of the country of his domicile or residence, to make over his right in the note to some one else, the debtor must recognise this right the moment there is a right in the note, i.e. a right according to the law of the place where the delivery of the note, following on the judgment, took place. All that preceded the possession of the note by this person, before any claim was made against the debtor, is no concern of his, or at least only concerns him in so far as the law, by which the obligation of the debtor himself is ruled, i.e. generally the *lex domicilii* of the debtor, requires some investigation to be made.⁴ The result is that the legislature may facilitate or impede the vindication of all notes circulating in its territory. But, in so far as foreign notes, notes issued in another territory, are concerned, the effect of such provisions may, on the one hand, cease⁵ so soon as the note is brought outside the State in which they are enacted, a result arising from the principles of the law of things. On the other hand, no law except that which regulates the liability of the debtor can say to what person he shall or may pay.

THE FRENCH STATUTE OF 15TH JUNE 1872.

§ 293. The questions just discussed have acquired special importance in France, and, indirectly, in all those countries that are closely connected

³ The necessity of obtaining the license of the sovereign power for notes that are to be put into circulation will in doubt be restricted to notes which have been issued within the country, and will not extend to notes issued beyond it, although by citizens belonging to it. Imp. Ct. of Comm. (iii.) 8th October 1874 (Entsch. xii. § 101).

⁴ This is in consonance with the principles already laid down for assignments. The debtor is discharged if he pays to the person who is authorised, by the law that regulates the debt, to receive payment. In the case of notes payable to bearer, no exception to this can be recognised. The debtor will also have the advantage, which may also indirectly be an advantage to the creditor, of not being required to investigate the title of the holder who claims to be his creditor any further than the *lex domicilii* of the debtor requires that to be done, e.g. where payment of such notes is by some exceptional measure stopped for a time.

⁵ It will, of course, be of importance to see what is the precise import of the legal provisions of the territory into which the note has passed. If the law there recognised gives a direct protection to the holder, it is of no consequence under what circumstances the holder may have acquired possession in some other territory. If it protects the acquisition, its rules will not go to protect the holder, but the person who acquires the documents in this territory. See *supra*, § 236 *ad fin.*

with transactions on the French Exchange, since the French statute of 15th June 1872 anent *Titres au porteur*.⁶ That statute contains:—

First, Provisions as to payments which a person who has lost notes or bonds payable to bearer may, notwithstanding that loss, demand under certain conditions from the establishment that issued them. All are agreed that these provisions affect none but French debtors.

Second, Provisions to the effect that notes or bonds payable to bearer, the loss of which has been advertised in a particular way, in a sheet appointed for that purpose, and published by the committee of the Exchange at Paris, cannot thereafter be validly transferred as against the former holder who makes the advertisement. In other words, these are provisions which give the person who has lost the documents a right to vindicate them against all holders who acquire them subsequently to this advertisement, and cannot connect themselves with any holder who held them before this advertisement. The extent to which these provisions should be recognised in international relations is much debated.⁷

One view is that the law should be restricted altogether to French scrip.⁸ This theory, however, is very scantily supported; practice, and in particular the opinion of the Court of Cassation, are against it. The conclusion that, because one part of the enactment is, as we have seen, applicable only to French documents of debt, so the other part also should be applied exclusively to the same class of documents, is erroneous. The course of the law has, however, gradually extended the claim of vindication given by French law beyond the case in which foreign scrip has been stolen in France and negotiated there. It has upheld that claim where this latter condition was absent, and where the scrip had become the subject of commercial dealings in a foreign country among foreigners. It is, of course, a condition of the application of the law of France, that the action should be capable of being raised as a real action *cum effectu* in France. It must therefore be directed against a person who is domiciled there, and, as it would seem according to some decisions and the theory of Vincent, which I shall again notice, the scrip must be within French territory at the time when the claim is made. The reasons on which this doctrine, which, as Clunet trenchantly and truly says, leads us in the end to a "*statut universal*," i.e. a kind of universal supremacy of the law of France, are extremely feeble. On the one hand, it is maintained that we have here to do with a provision of protective police, which should on that account be applied indiscriminately to all dealers in scrip within France. On the other hand, it is further asserted that all the statute does is to set up a kind of presumption of *mala fides* against any one who acquires such

⁶ Reported and criticised by Mittermaier in Goldschmidt and Laband's *Zeitschrift für das gesammte Handelsrecht*, xix. p. 153.

⁷ See Weiss, p. 809.

⁸ Lyon-Caen et L. Renault, *Droit Commercial*, i. p. 198; Trib. Seine, 1878 (J. v. p. 613). To the opposite effect, e.g. Buchère (J. vii. p. 260); Weiss, *ut cit.* C. de Cass. 13th February 1884 (J. xi. p. 75).

scrip after notice has been given in France, in the way we have mentioned, that it has been lost. But it is impossible that the former argument should avail to upset all other rules of private international law in commercial matters, and enable us to assert that the measures adopted in France can impress upon such scrip the *character indelebilis* of non-negotiability, even where it afterwards is found in a foreign country. The second argument implies the absolute claim—a most unjust one—that the advertisements of the sheet published by the French Exchange should be read all the world over by every man who buys such notes. This demand is all the more inequitable that the regulations for dealing in stocks in France, on which the French law proceeds, are not recognised by the whole world.

We may suggest the following as the sound theory. The law is undoubtedly to be applied to scrip stolen in France, although issued abroad. The non-negotiability of such scrip, however, will operate so long only as it actually is within the territory of France, in any case only so long as no transference of it takes place in a foreign country, the effects of which transference operate in accordance with the law of that foreign country.⁹ If this transference gives the person who acquires the note an unassailable right as against the person from whom it has been stolen, a Frenchman who comes after him in the chain of transmissions must, of course, have the same unassailable right. It seems, therefore, to be specially unsound to apply the law, irrespective of any intermediate transmissions in a foreign country, to a subsequent French holder.¹⁰ Even in the case of French scrip or notes, the French law could not exercise any extensive effect in international intercourse,¹¹ without thereby damaging the character of all such paper. For their distinctive character lies in the fact that, whatever may be the accidents attendant on the property or the possession of them, the claim of debt will always be instructed by them. Of course, the answer will be made that the whole object of the French law will fail of attainment, at least in great measure, since persons who have stolen or embezzled such documents, will easily

⁹ Similarly Buchère, *ut cit.* He speaks incorrectly of the application of the rule "*locus regit actum*" to this matter: now the law of things is a sphere in which this rule is not applicable.

¹⁰ But Buchère, *ut cit.* holds this view, particularly on the ground that the French holder may be charged with carelessness. But if a man buys from one who is the true owner, as the foreign holder in the case supposed is, there is no carelessness in the transaction.

¹¹ The judgment of the Trib. Civ. Seine of 8th August 1885 (J. xii. p. 681) is bold, but it is unsound, and really unfounded. It says, "*Les titres français, en leur qualité de droits incorporels, forment une catégorie à part de meubles; leur siège est véritablement en France, puisque c'est en ce pays qu'est délivré le capital cédé dont ils sont la représentation fiduciaire.*" That is a flat contradiction of the true character of notes or bonds payable to bearer. That shows how much can be proved by Savigny's theory of the "seat of the legal relation." According to it, the subsequent acquisition abroad will not avail against the French law of vindication. To the contrary, and soundly decided, is the judgment of the C. de Paris, 29th April 1875 (J. iii. p. 363). See, too, Vincent (J. xv. p. 345).

manage by some means to convey them into a foreign country.¹² That may be quite true, but it is not sufficient to justify an application of the law of France to an extent far beyond what is authorised by any precedent. We shall be all the less warranted in proceeding upon it, since the acceptance of notes or bonds of this nature beyond French territory would be seriously prejudiced, unless sufficient provision were made for advertising the loss of them beyond French territory as well as in France. It is, besides, quite conceivable that the vast development of the traffic in such negotiable securities makes it impossible for any single State to hit upon any protective measures which shall be of real efficacy even within its own territory, and that the only means for devising adequate security is by international agreement, the difficulties of which cannot be overlooked. In spite of all, however, the French law has in point of fact an influence even in other countries which is not to be underestimated, just as private advertisements of the loss of such documents may have. In such circumstances, there may be ground for suspicions of *mala fides* in the holder, even where the negotiation has taken place in a foreign territory. But if the law of France should attempt to set itself up still further in the direction which we have indicated—a 'direction which seems to us to be erroneous, and to many eminent French jurists highly debatable—the result may perhaps be to produce undesirable effects upon the business of the French Exchange. At the same time, we can see what important consequences a general agreement for the execution of foreign judgment might have, since the law of a single country shows itself to be so desirous of claiming extra-territorial effect for its provisions.

TAKING NOTES OUT OF CIRCULATION. JUDICIAL PROCEDURE FOR THIS PURPOSE.

§ 294. The same is to be said of the case where by statutory enactment the holder of a note for value, which is payable to the bearer, has the power of taking the same out of the circle, either by noting it for himself,

¹² Vincent (J. xiii. pp. 676-683, especially p. 679) defends this proposition, which undoubtedly raises this hardship or difficulty, viz. that the ruling law should be the law of the place where the holder is when the action is raised. The intermediate transmissions of the scrip abroad might then simply be ignored, which would result in giving the former French holder an advantage. Vincent's opinion is that this proposition is in conformity with the principles of private international law, and appeals to the operation of the rule "*possession vaut titre*." That rule, however, on the contrary, protects a new acquisition in conformity with the law of the territory into which the thing has passed. It never recalls any older right to life, even although that older right may at one time have existed in the very same territory. See the rule recognised in the more modern Belgian bill (§ 216, p. 499, note), and Durand, p. 411. Vincent brings "*ordre public*" into the field, by which any conclusion you please can be reached. In the continuation of Vincent's paper in the Journal (xv. p. 343), it is still more evident that the whole theory is based upon an erroneous conception of the rules that regulate the law of things in its international bearings.

or by the process of having it noted by some Government officer.¹³ Such a process only binds the debtor in so far as his *lex domicilii* provides that it shall do so.¹⁴ On the other hand, in so far as a claim for recovery of the note is to be ruled by the law of the land in which the operation of noting has taken place, the legal import of this operation will determine the relations of the pursuer and defender in any such action for recovery. Any noting by which the scrip is again put into circulation, *i.e.* again made negotiable, is, as regards its form and its effect, to be ruled by the law of the place where this noting takes place. Any such operation plainly makes the position of the debtor more favourable, for it relieves him from all inquiry into the title of the bearer. There is, therefore, no reason for referring to the *lex domicilii* of the debtor, a result which is in accordance with the rules that prevail in the law of things.¹⁵

The debtor is always free from any claim at the instance of the holder, if he is free according to the law which originally regulates the performance of the contract. But he cannot be discharged by any other law. From this it follows that a decree of discharge or cancellation of such a note, if it has been lost, can only be obtained under the conditions and before the court¹⁶

¹³ Cf. *e.g.* *Preuss. Allgem. Landr.* i. 15, §§ 47 *et seq.*; Prussian Statute of 16th June 1835 and 4th May 1840, and the Prussian Ordinance for the newly acquired provinces on 16th August 1867, which goes very far in this direction: see, too, Stobbe, *D. Privatr.* iii. § 180, No. 9.

¹⁴ Judgment of the Imp. Ct. (ii.) of 19th March 1881 (*Entsch.* iv. § 41, p. 139). "Negotiable notes acquire their peculiar character from the intention of the person who issues them, or from the local law which gives legal force to this intention; accordingly, the inference is obvious that the same local law must govern the conditions under which their peculiar character shall continue to subsist, or, on the other hand, be destroyed."

¹⁵ The judgment cited in the last note does not by any means import an admission of the *lex loci actus*, and the circumstances of the case put that entirely out of view. We must, however, deny any more extensive operation to noting for the purpose of taking such documents out of the circle. We might be inclined to hold, if Stobbe's theory (cited in note 22) were to be adopted, that it required no special sanction by the legislature to take a note out of the circle. But it is not correct, however, to say that no one's interests are endangered by the operation. In the first place, these notings may be overlooked by subsequent holders, and, in the second place, they touch the interest of the original obligant very seriously. They lay upon him the burden of testing the title of the holder, which is sometimes a difficult task, and they may interfere with the circulation of the scrip in the market. The opposite theory, adopted by Beseler (§ 86, note 84, where the other theories too are discussed) and others, is therefore to be approved, although the Imp. Ct. in the judgments cited in the last note declared the right to take notes out of the circle to be a doctrine of common law, a deliverance which was certainly unsound.

¹⁶ The German *Civilprozessordn.* § 839, provides: "The courts of the country which the document itself indicates as the place of performance, are competent for the declaratory process. If the document gives no such indication, then the court to which the person who issues the document is generally subject is competent. . . . If the claim upon which the document proceeds is recorded in any register of real rights or securities, the court *rei sitæ* is the only competent court." These provisions are not quite correct from an international point of view; they are influenced by Savigny's erroneous theory of the place of performance. Foreign financial houses and foreign States, which set up in our country offices for payment of their obligations, certainly do not thereby intend to recognise that our courts have jurisdiction to declare these obligations invalid, and thus declare the debtors to be bound to issue new obligations. (See *C. de Paris*, 31st Dec. 1877, *J. v. p.* 165, to the contrary: the objection taken to payment

sanctioned by the law of the debtor's domicile.¹⁷ It is, however, quite a different question whether or not the person who has lost such a negotiable note, by neglect of some obligation incumbent on him by the law of his domicile—*e.g.* by neglect of some necessary advertisement—is bound to give up the document, which he has received from the court in place of that which was held to be discharged or cancelled to the holder of that document itself. See note 16 *ad fin.*

NOTE X ON §§ 292-294. NEGOTIABLE INSTRUMENTS IN ENGLAND.

[The question has arisen in the courts of England whether certain papers were or were not "negotiable instruments," so as to pass from hand to hand, and to confer on a *bona fide* holder a good title from the mere fact of possession *in bona fide*, without the necessity of a formal transfer or assignation. In the case on hand the bonds were Prussian bonds, which had been stolen from the plaintiff, the sheet of coupons remaining, however, in his possession, and had come into the possession of the defendants *in bona fide*. There appeared to be a conflict of evidence as to whether the bonds without the coupons were, even by Prussian law, negotiable, but the court assumed that they were. The decision was that, unless the documents were known to English law and English trade as negotiable, they could not be allowed to pass by mere delivery in England, and that as there was no evidence to show that the custom of English traders was to hold such bonds to be negotiable, the plaintiff must succeed, since the defendants had no good title. Lord Justice Bowen likens the character of negotiable documents to that of the currency of a country: the fact that

being made, the validity of interdict must, in so far as regards Italian notes, be determined exclusively by the law of Italy, although the obligations themselves and their coupons are paid through a French bank, and although it may be held to be competent for French debtors, although not for foreign debtors, to rely upon the law and the courts *rei sitæ* as the only competent law and tribunals to determine their personal liability.) It may be, however, that the person who asks for a sentence of cancellation will have to observe some of the provisions of the law recognised at his domicile or place of business, as well as the rules of that law to which the foreign paper itself is subject, if he desires not to expose himself to claims which may be urged against him on the ground that he acquired the scrip at the former place. See Vogt in the *Neue Archiv. des Handelsrechts*, by Vogt and Heinichen, i. p. 31; and the judgment of the Supreme Court of Appeal at Lübeck, reported there, of date 20th October 1856.

¹⁷ If, however, the document itself does not indicate any particular place of performance within the German Empire, and the debtor has no domicile within that empire, it is impossible, according to the statute for the regulation of procedure in Germany, that there should be any decree of cancellation there at all. This is at least the view which is adopted by the great majority of commentators. Cf. Struckmann and Koch, *Civilprozessordn.* on § 839, note 1. Seuffert, Comm. § 839, note 2. The Hannoverian ordinance of 28th January 1826, § 4, and the statutes of the Hannoverian *Landescreditanstalt*, § 49 *ad fin.* promulgated by ordinance of 18th June 1842, proceed on the principle that the *judex domicilii* of the debtor is competent. The Hessian ordinance, too, of 18th Dec. 1823, tacitly assumes that a decree of discharge of inland notes payable to bearer is all that the courts of any country can pronounce; and the like, too, is enacted by the ordinance of the free town of Frankfurt, 8th July 1817, art. 4 (Schumm, p. 234).

certain things, be they coins, cowries, or documents, are part of the currency of A, will not make them part of the currency of B. *Picker v. London and County Banking Co.* (1887, L.R. 18, Q.B.D. 515).

Again, it was held that the validity of a transaction in share certificates, the shares being shares of American railroads, but the transaction having taken place in England, must be ruled by the law of England, and unless the holder were validly in possession by that law he could have no claim to the certificates or right to them. If, however, he were validly in possession by that law, the import of the possession, the character of his right and its extent must be determined by the law of the document, *i.e.* American law. *Williams v. Colonial Bank* (1888, L.R. 38, Ch. D. 388).]

III. FREIGHT.

GENERAL PRINCIPLES. FREEDOM OF CONTRACT.

§ 295. According to the theory which is most widely prevalent, and which in our opinion is the sound theory, a contract of carriage or freight by land, and on board vessels on inland waters, must be ruled by the law of the place where it is made,¹ or more exactly by the law of the place in which the carrier's business is carried on.²

It is this law, and not that of the place of performance (which on this important point is altogether set out of view in practice), that will regulate the obligation of the carrier for timeous delivery, and for damage or loss of the goods in transit, and his obligation to follow the directions of the person who sends the goods. It will also regulate the obligation of the sender to pay the freight, and to make compensation for anything in the condition or in the packing of the goods that is illegal or in breach of contract, and is thus productive of damage. On the other hand, the law of the place of delivery will determine the shape which the transference of the property to the consignee should take, and his obligation to pay freight, unless it should hold that he has already validly bound himself in accordance with the tenor of the bill of lading; it will also determine whether there is to be implied any waiver on the part of the consignee of claims of damage for injury to the goods,³ and whether the carrier has any right of retention over the goods.⁴ The same doctrine holds good of all conditions affecting

¹ See in particular Wharton, § 471, and also note 8, *infra*; Brocher, ii. § 206 (p. 221).

² Wharton calls attention to this. In the United States, agents of carrying companies canvass for contracts of carriage in States with which they have no connection.

³ C. de Nîmes, 9th July 1881 (J. ix. p. 216): "Art. 105 of the Code of Commerce is not applicable to goods, which are delivered to a transport agent from France to Russia." It was accordingly held that an estimate of damage in accordance with the law of Russia was sufficient to restrain the consignee from any further claim of damages.

⁴ See § 22 of the *Convention internationale sur le transport de marchandises par chemins de fer* proposed at Berne in 1886: "The operation of rights of retention is to be determined by the law of the country where delivery took place."

delivery,⁵ in so far as these are either subject to imperative laws or usages of the place of delivery, or cannot at least be disturbed without the consent of the consignee or special expense or trouble to the carrier which cannot in reason be imposed upon him. There are circumstances in which to a certain extent we may say, without drawing any exact line, that parties must be held to have submitted themselves to all the usages of the place of delivery.

But the legal problems may present themselves in a complicated form, if the first carrier hands over the goods to another carrier for further carriage, or is compelled to do so by force of circumstances, while the second carrier is subject to a different law from that which bound the former. The general theory on this subject, which is in correspondence with the rules for inland carriage,⁶ holds that each carrier in turn, by taking over the bill of lading and the goods themselves, makes himself a party to the contract of the first carrier, and takes over his obligations;⁷ on the other hand, the first carrier is responsible to the measure of his own contract for the diligence of all the carriers that are to come after him. The result, of course, is that the last carrier can be sued directly by the consigner and by the consignee, and for faults which are to be imputed not to himself, but to some one who comes before him in the chain. Thus the provisions of the contract concluded between the first carrier and the consigner, and the law applicable to that contract, rule at the same time the contract of the last carrier.⁸ But this simple state of legal relations is, in so far as practical consequences are concerned, as a general rule apparent only, at least in all questions connected with great carrying agencies, particularly railways. The carrier who is a party to the first contract, or to one of the earlier contracts, where there are several, may, by reason of the freedom of contract that belongs to him, stipulate that he becomes a party to the contract only on the conditions of his own law, *i.e.* the law that is recognised in the country where he carries on business, or in which his line of railway runs, or on the conditions of some special bargain which he tables. Then, if the original bill of lading, embodying the contract of carriage, contains such a stipulation, the result is that very various laws will as a

⁵ Brocher, ii. p. 222.

⁶ See German Comm. Code, § 401; Wharton, 473; Trib. Seine, 18th March 1875 (J. iii. p. 358).

⁷ See C. de Cass. 23rd February 1864 (J. i. p. 14, and again p. 310) for the proposition that on principle the law of the place where the contract is made, and not the law of the place of delivery, should rule.

⁸ See Eger, vol. ii. p. 47. Judgment of the Sup. Ct. at Berlin, 29th June 1869 (Striethorst, *Arch.* 75, p. 214, and Eger *ut cit.* Sup. Ct. of Comm. 17th March 1874 (*Entsch.* xiii. p. 317). The administration of the Royal Prussian Eastern Railway took over at the frontier station Eidtkuhnen goods addressed to the pursuer with a direct bill of lading from Dünaburg to Berlin, which had been badly loaded. By taking over the bill of lading, they were held to have taken up the obligations of the first carrier, the great Russian Railway Company. Judgment of the Belgian Ct. of Cass. 31st Jan. 1879 (J. viii. p. 72); Trib. Seine, 31st Dec. 1879, and C. de Paris in the same case, 15th Feb. 1881 (J. viii. p. 424); App. Ct. of New York, 16th Nov. 1880 (J. viii. p. 270).

matter of fact be applicable in the different territories through which the goods have to pass.⁹

UNIFORM INTERNATIONAL CODE FOR CARRIAGE ON RAILWAYS.

THE CONVENTION AT BERNE IN 1886.

§ 296. One result of the evils thus associated with the law of carriage has been the voluntary association and agreement of railway companies to regulate their through carriage on the same principles. Another result has been the project of setting up one international code of railway law for traffic between different countries. The association of German¹⁰ railway companies, established in 1846, had in 1879 an extent of upwards of 34,000 miles of railway conducted on the same principles as regards carriage, a common system of carriers' law. Again, in 1873, on the suggestion of Switzerland,¹¹ an international congress met for the purpose of working out a common international code of carriers' law, while again in 1881, and lastly in 1886, more international congresses were held on this subject. It is probable that the scheme drawn up in 1886 will be adopted and sanctioned by statute in a majority of the States of Europe; it is possible that all Continental States may so adopt it.

We may quite properly pass over the provisions of this scheme.¹² It is a codification of the most generally recognised rules for railway traffic in the different States concerned, and an attempt to bring these rules into harmony. In countries in which these new rules may in time to come be recognised, there will no longer be any opportunity for the application of the principles of international law, just because the law of every State will be identical. This or that provision may, however, exercise some influence upon rules of private international law which are recognised independently of this new code, or upon the usages which the individual States adopt in

⁹ See Sup. Ct. of the Emp. (ii.) 11th Oct. 1876 (*Entsch.* xxi. p. 57), and the judgments of various German courts cited by Eger *ut supra*, pp. 48, 49. Goldschmidt's *Zeitschr. für Handelsr.* xii. p. 597; see, too, the interesting report presented in July 1878 to the International Congress for the development of means of carriage. Paris 1878.

¹⁰ On this subject, see the memorandum of the United German Railway Board upon the Bernese sketch for an international union on the subject of railway carriage, drawn up at Salzburg in 1879, at the general meeting held there. The German Railway Boards had, no doubt, an easier task in establishing a common code, because German law, and afterwards the German Code of Commerce, allowed them larger freedom of contract than was sanctioned by French law. They were in a position to limit their responsibilities very substantially. The French lines felt themselves compelled to give up direct contracts of carriage beyond the French frontier, because their liability was more extensive, and could not be limited.

¹¹ De Seigneux and Christ did much to effect this. See on the whole matter Eger, *Die Einführung eines internationalen Eisenbahn-Frachtrechts*, 1878; v. Bulmerincq, *Rev.* x. p. 83, and Asser, p. 101; and now, too, the comprehensive exposition of Meili, 1887. C. D. Asser, junr., has written a detailed paper on the congresses at Berne: "*Internationaal goederenvervoer langs spoorwegen*, Gravenhage, 1887.

¹² For a complete version of the text, see Meili, p. 62, and Asser, p. 387.

carrying out their theories of international law, particularly upon the usages which they adopt in matters of process.

Private international law would not, however, lose all its importance in the law of carriage even if the Convention of Berne were generally adopted. That convention, in any case, only covers railway carriage; it does not touch carriage by water, and in many doubtful cases, which must inevitably occur, we shall perforce have recourse to general principles for assistance.

SPECIAL LEGAL QUESTIONS. RESPONSIBILITY OF RAILWAY COMPANIES
BEYOND THEIR CONTRACTS.

§ 297. We desire, therefore, to call attention to the following special problem, which may easily come to be of importance, and which has been discussed more particularly among French jurists. The exclusion of liability in certain events by contract provisions is no doubt in general to be determined by the law of the place where the contract is made, *i.e.* the place where the goods are entrusted to the carrier,¹³ and this proposition holds good even if a subsequent carrier, and in particular the carrier who has to deliver the goods, would, as a general rule, by the provisions of his own law, incur a larger responsibility. But this rule suffers an exception, if by the law prevailing in the country in which the later stages of the carriage take place (*i.e.* as a general rule, by the law of the domicile of the railway or carrying company that takes charge of these later stages), so extensive an exclusion of liability by contract is looked upon as inadmissible, as being *contra bonos mores*, or at variance with *ordre public*.¹⁴ Thus, in France, a clause importing a general freedom from responsibility in favour of some carrying agency cannot be pleaded to meet the consequences of negligence that has taken place during the transit in France, even although it would be valid in the country in which the contract was made, it may be in consequence of some special privilege of the company or the State that is in possession of the railway. But, by a judgment of the Court of Cassation, it is held to be quite possible to allow a clause in a passenger's ticket, issued abroad, by which the company is not liable for the simple loss of unregistered luggage, the custody of which is undertaken by the traveller himself, to take effect in France.

¹³ Thus, for instance, there is a rule of law at the starting-point, that a cargo of coal is to be accepted as complete, if the whitewash covering remains intact: this rule will be recognised as authoritative in France to this extent, that it will relieve the French carrier of the presumption, which would otherwise obtain, that it was through his fault or that of the other carrier that there was a shortcoming (see French Ct. of Cass. 28th Nov. 1876, J. iii. p. 454).

¹⁴ Cf. Laurent, viii. § 174, and the judgment of the Court of Paris, of 4th Dec. 1877, there criticised. It was not held in this judgment that any violence had been done to *ordre public*, although the compensation to which the consignee was entitled to by the rules of the railway on which the transit began was so small as to be illusory. But the judgment would have been the other way, but for the fact that the sender had it in his power, on payment of an extra rate, to declare what the whole amount of his interest in punctual delivery was, and, if he had done so, to recover it (see Ct. of Cass. 19th July 1876, J. iv. p. 351).

The opinion, however, expressed both by Laurent and the Court of Cassation, that a clause of relief from responsibility, which, taken absolutely, will be treated by the law of the country, and perhaps by the law of every country, as invalid, may yet have the effect of shifting the *onus* of proof, is an opinion which we cannot completely share. Our notions of law may well detect a disadvantage, or an actual denial of justice to one of the parties, in deducing even a presumption from such an invalid stipulation.

If a railway company is asked to pay damages on the ground of some liability outside their contract, as, *e.g.* may be the case in connection with the German law of liability of 7th June 1871, then, as we are concerned with an obligation *quasi ex delicto*, the law of the place in which the fact said to infer liability occurred must be applied; and that will be so even although, in virtue of some public treaty, a foreign company had the management of the traffic in its hands.

NOTE Y ON §§ 295-297. CARRIERS' LIABILITY.

[The law of Scotland and England on this subject is the same. In the first place, "it is quite fixed," to use Lord Gifford's words in *Horn v. N. B. Railway Co.* 1878, Ct. of Sess. Reps. 4th ser. v. 1055, "that a railway company who issues a through ticket undertakes the whole contract of carriage, although the journey involves passing over lines or even journeying in steamships which do not belong to the company issuing the ticket. . . . If 'goods' are lost or injured, the loss or damage must be made good by the company who undertook the through transit, wherever the actual loss or injury may have taken place." For the law of England, see Hodges on Railways, p. 620 *et seq.* This rule is the same as that applied in the case of two inland railway companies (*Metzenburg v. Highland Railway Co.* 1869, Ct. of Sess. Reps. 3rd ser. vii. 919). The rule as to the conveyance of passengers is the same as that as to goods (*Lord Gifford, ut supra*).

It may often be of importance to determine what is the law of the contract in such cases, with a view to determine, *e.g.* questions as to the legality of certain stipulations contained in the contract, these being lawful in country A, but forbidden in country B. This is quite a distinct question from that stated in the last paragraph. The law of the place of the contract, *i.e.* the place in which the contract was made, was at one time supposed to give the rule (*Shand v. P. & O. Co.* 1865, 3 Moore, P.C.N.S. 290, as explained by the Lord Justice Clerk Moncrieff (who had been of counsel for the pursuer in that case), in *Horn v. N. B. Railway Co.* cited *supra*). The doctrine established by more modern decisions (*e.g.* *Cohen v. S. E. Railway Co.* 1877, L. R. 2, Ex. D. 253, and *Re Missouri S.S. Co.* 1889, L. R. 42, Ch. Div. 321) seems to be that while, *prima facie*, the *lex loci contractus* will prevail, it is not always to rule, and preference will be given to the country with which the con-

tract has a substantial connection, performance, like the execution of the documents and the domicile of parties, being an element for consideration. If there be anything, however, in the contract plainly immoral, and forbidden by positive law, effect will not be given to its provisions. Westlake, while approving of the results arrived at in these judgments, is of opinion that too much weight has been attached to the intention of parties, § 212.]

IV. CONTRACT OF INSURANCE.

§ 298. In this subject an application of the general principles which regulate the law of contracts gives as the following result: *First*, the contract is, in so far as the obligation of the insurer is concerned, subject to the law which prevails at the place where the insurance office is established, provided this office makes its contracts on general principles, published once for all, and does not work through agents established in a foreign country, who in making their contracts avail themselves of the language of that country, and never direct the attention of the policyholder distinctly to the law which prevails at the place where the company is established. No particular notice need be taken of contracts of insurance occasionally made by individuals as insurers or underwriters. The practice of England and that of the United States lay weight exclusively upon the consideration of the place in which the contract becomes binding in form, and it is therefore of importance to consider whether the contract becomes binding for the company by the agent's subscription, or only comes into force when it has been transmitted to the company's head office, and subscribed by the directors.¹ This is not in harmony with the requirements of *bona fides* in commercial intercourse.² A foreign insurance company, which retained agents in the German Empire, and issued its policies to German holders in the German language, without making any reference to its own law, which was different from that of Germany, could not, in my opinion, successfully appeal to any provisions of its own law which might be more favourable to it.³

¹ See Wharton, §§ 465-467.

² The judgment of the Court at Besançon of 6th March 1871 (J. i. p. 239), which was upheld by the Court of Cassation, may be defended substantially on considerations of *bona fides* looking to the *data*.

³ Emérigon, *Traité des Assur.* i. c. 4, § 8, par. 2, says as to the local law of policies of insurance: "Contracts concluded abroad by one Frenchman with other Frenchmen will, in France, be judged by the law of France: for the law of their country will follow the parties all over the world. The law which prevails at the place in which the contract is made will, however, rule contracts of insurance made by a Frenchman with foreigners abroad. The same rule holds, if a Frenchman carries on the business of insurance on his own account abroad." These rules, however, are not universally applicable. If a man carries on the business of insurance, as generally happens, as his livelihood at some particular place, the *lex loci contractus* will be applied without any regard to the law of the insured's domicile. Voigt and Heinichen, *Archiv. für Handelsrecht* (1858), i. p. 210. If, on the other hand, two subjects of the same country conclude a contract of insurance by accident in a foreign country, the first rule laid down by Emérigon is sound.

Should the contract be null by the law of the insured, the insurer cannot for all that appeal to that law, since the law of his own domicile will, in accordance with what has been said, determine his liability.⁴ He may do so, however, so long as the first premium is not paid, since he has in that case the *exceptio non adimpleti contractus*. If the transaction is forbidden by the law of the policy-holder's domicile, and is also according to that law—although this does not necessarily in every case follow—null, of course no action for a premium can be raised in the courts of the country to which the insured belongs.⁵

In the second place, the contract can only be validly executed in point of form by satisfying the conditions of the *lex loci actus*, in cases in which the insured and the insurer are not both subject to the same law.

If any system of law forbids or declares to be null insurances in particular circumstances upon considerations of police, as, for example, the French commercial law does, in the case of insurance of maritime freight not yet earned, that does not necessarily import that such a contract of insurance will never receive effect or found action in a country where that prohibition is the law of the land. If the contract in the circumstances in which it was made truly belongs to another territory where it is permissible, and if some subsequent accident brings it to pass that it comes to be pleaded in a country where it is illegal, it must still remain effectual in this latter country, unless it can be maintained that according to the legal ideas which prevail there some positive violence would be done to the rules of morality or decency. That, as a rule, will not be the case. This distinction, which is quite in accord with the general principles we have already laid down, is of special importance in the law of insurance, and Lyon-Caen and Renault are right in calling attention to it (*Dr.* ch. ii. §§ 2090, 2091).⁶

NOTE Z ON § 298. INSURANCE CONTRACTS.

[To determine the question whether a contract of insurance is of one country or another, the policy having actually been taken out in one country through the hands of an agent of the company residing and trading there, and the company having its seat in another country, the cardinal point in Scotland has been held to be whether the agent had himself power to bind the company, or acted merely as its hand. If he had such power, then the contract belongs to the country in which he lived and traded; if not, the contract belongs to the country in which the company carries on business and has its head office. In *Parken v. Royal Exchange Ass. Co.* (1846, Ct. of Sess. Reps. 2nd ser. viii. p. 365), "the agent of the company

⁴ Trib. Civ. Anvers, 24th May 1877 (*J. v.* p. 512): the foregoing rules must determine the question whether an insurance on the life of a third party falls to his heirs or to the insurer.

⁵ Wharton, § 467 *ad fin.*

⁶ As to maritime assurance, see *infra*, §§ 332-336.

in Edinburgh had no power to take and accept risks without reference to the head office," which was in London, and the company "determined on and accepted the same, the proposals being only transmitted by him with his own opinion as to the propriety of acceptance. On the other hand . . . the policy, when completed, was sent by the office in London to their agent here," *i.e.* in Edinburgh, "was delivered by him to the insured, and the premium paid *simul ac semel*" (Lord Justice Clerk). "The agent . . . had no power to complete insurances. He was a mere hand to transmit and to receive and deliver policies. What was delivered? An English contract, a policy granted by a company having its place of business in London, executed according to the forms of the law of England, and bearing no reference to any foreign *locus solutionis*, either of the premium or of the sum insured" (Lord Cockburn). The contract was accordingly held to be English.

On the other hand, in the case of *St. Patrick Ass. Co. v. Brebner* (1829, Ct. of Sess. Reps. 1st ser. viii. p. 51), the company, an Irish company, employed agents in Scotland, advertising that their contracts commenced so soon as an order of insurance was accepted by one of their agents, and that all claims under the contract would be settled on the spot. This was held to make a contract concluded with an agent in Scotland, by a Scotsman, a Scots contract. To the same effect is the decision in the case of *Albion Fire and Life Insurance Co. v. Mills* (1828, 3 W. and S. 218), by the House of Lords. The insurance company then was established in England, but as Lord Chancellor Lyndhurst says: "Here is a contract entered into, not in London but in Glasgow, written in Glasgow, dated in Glasgow, and subscribed in Glasgow; the consideration paid in Glasgow at the office established, and for a long time established, in Glasgow. Why is it, then, to be said that that contract . . . was not a contract in Glasgow? If I send an agent to reside in Scotland, and he, in my name, enters into a contract in Scotland, the contract is to be considered as mine where it is actually made. It is not an English contract, because I actually reside in England." Accordingly the contract was held to be a Scots contract.

Again, in a case in which a foreign ship belonging to Nova Scotia was insured by her agents, who were domiciled Scots traders, with a Scots insurance company, for trade between Glasgow and Havanna, it was held that the standard of seaworthiness which was required by the policy was the Glasgow standard, and not that of Nova Scotia. The *forum*, the *locus actus*, and the domicile of both parties were here in Scotland. *Cook v. Greenock Marine Insurance Company* (1843, Ct. of Sess. Reps. 2nd ser. v. p. 1379). See below on maritime insurance.

The law of England seems to be that the contract of insurance is to be governed by the law of the place where its execution was completed, and it became a binding and operative contract, and not necessarily by the law of the place where it is dated. The case of the *Albion Fire and Life Assurance Company*, as a decision by the House of Lords, not depending on any special principles of Scots law, is of authority in England as well as in Scotland.]

V. LAW OF BILLS.

INTRODUCTORY. CAPACITY TO DRAW BILLS.

§ 299. The object of all traffic in bills is that the creditor shall receive a certain sum of money at a certain time, and generally at a certain place. But since the creditor may find it more profitable to receive this sum, or more correctly speaking, its equivalent, at some other place or some other time, he has the privilege given him of transferring his right in the bill absolutely to some other party, and getting his equivalent out of the consideration paid him. To attain these objects, which are not identical with those of a true paper currency, although they resemble them, the obligation in a bill consists of an accurately framed undertaking to pay a particular sum; and this undertaking, in contrast to the other legal relations which arise between the holder of a bill and the debtor, is visibly expressed in a written declaration of intention, and is governed by this expression of intention alone; but at the same time, just because the obligation of the debtor is so exactly defined, there is laid upon the holder, in order to preserve his privileges and to prevent them being lost, a series of obligations as to the diligence which he must use.¹ And lastly, to ensure prompt payment, a specially summary process is allowed against the debtor in the bill, and at one time there was even introduced a special kind of execution against his person.²

From all this we may deduce, with the help of the general principles which rule the law of obligations, the proper international theory of the law of bills.³

In the first place, we need not trouble ourselves further to investigate the proposition that capacity to undertake obligations by bill, must depend solely on the personal law of the person who is said to be under obligation, except in so far as it may be necessary to make an exception (as we noted *supra*, p. 314) in favour of a person contracting *in bona fide*, and of those who succeed him in his rights.⁴ The law of England, however, and

¹ Strictly considered, the matter here in question is not one as to the performance of obligations, but as to the observance of certain conditions, on which the law makes the existence of the claim or the right to enforce it dependent.

² For the literature of this theory, founded chiefly by Liebe and Thöl, see a paper of Jolly's in Pözl's *Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft*, 1866, p. 537, and Beseler, § 242, note 10. This special execution on bills is, as we know, in modern times gradually falling out of sight. See *e.g.* German statute of 29th May 1868; French statute of 22nd July 1867.

³ Monograph by Esperson, *Diritto cambiiale internazionale*, Firenze 1870. Of older date the exhaustive papers by Pöhls (in Asher's *Rechtsfällen aus dem Gebiete des Handelsrechts*, Hamburg 1837, pt. 3, pp. 1-40) and Brackenhöfft (in the *Arch. für deutsches Wechselr.* ii. pp. 129-162, 278-301). See, too, O. Wächter's *Wechselr. des deutschen Reichs*, § 9. The thorough-going provisions of the English statute of 1882 (45 and 46. Vict. c. 61, § 72, are of interest).

⁴ Fiore, § 344; Esperson, *D. Camb.* § 7; Weiss, p. 813; Lyon-Caen et L. Renault, *Dr. comm.* i. § 1311; Phöls, p. 15, proposes that in general the *lex domicilii* should decide, but that peculiar provisions should not be recognised, because privileges, which are more a matter

the law of the United States apply,⁵ on grounds we can well understand, the *lex loci actus*,⁶ but in addition modern legislation, following in this as well as in many other questions the model of the German statute on bills,⁷ exhibits an inclination to hold that a foreigner who binds himself in any country by a bill must submit to have his capacity to do so effectively determined by the law of the country where the obligation takes place.⁸ There is, no doubt, much to be said for a thoroughgoing application of the *lex loci actus* to rule capacity to undertake these obligations, such as prevails in the jurisprudence of England and in that of the United States, although it does not suit the circumstances of the Continent of Europe, and may, as intercourse goes on increasing, soon bring obvious disadvantages even to England and to the United States. On the one hand, however, the distinctions which fall to be made according to the 84th article of the German statute on bills, have an artificial character,⁹ and on the other hand, few people remember that this exceptional rule was only adopted at the well-known conference at Leipsic, the result of whose labours was this statute, after animated opposition, by ten votes against nine,¹⁰ i.e. by a bare majority. It would therefore need very serious consideration whether so debatable a paragraph could be generally introduced as an international rule without very thorough trial. The strict rule, the expediency of which is doubtful, will in truth, in general, be found to be of importance in the case of bills which are used to cover transactions which do not themselves court the light. All conceivable requirements are satisfied by the provision suggested by Norsa in his bill (art. 2 and 3)

of public law, cannot have any operation beyond the frontiers of their own country. Lyon-Caen and Renault also say that no regard should be paid in France to incapacities, which are at variance with the *droit public* of France, e.g. to *privileges de caste*. That, however, is going too far, if the obligation is entered into in that person's own country.

⁵ Wharton, § 447. [But as regards the law of England and Scotland, see below, note AA, p. 692. It is doubtful whether the place of the contract or the domicile will regulate the capacity in these countries.]

⁶ Phillimore, § 838, points out that it is precisely in the law of bills that the consistent application of the *lex loci actus* offers special advantages. See, too, Pardessus, §§ 1483, 1485.

⁷ Art. 84. "The capacity of a foreigner to undertake obligations by bill, will be determined by the law of the State to which he himself belongs. But a foreigner who by the law of his own country has not that capacity, will be bound by undertaking such obligations in this country, if by the law of this country he has capacity to do so.

⁸ See Hungarian Statute, 1876, § 95, Swedish Statute, § 84; Swiss Statute of Obligations, § 822; Servian Comm. Code, § 168 (J. xi. p. 168). See, too, Association for Reform and Codification (1877, at Antwerp), Rev. ix. p. 411; Institute for International Law (1885, Brussels), Annuaire, viii. p. 97; lastly, the Congress on commercial matters summoned in 1885 by the Belgian Government at Antwerp; see their proposals in § 2 of the *actes du Congrès*; all these authorities adopt this proposition.

⁹ Cf. judgment of the Supreme Court of Austria of 23rd February 1881 (Seuffert, xxxviii. § 92). It is there held, and we concur in the judgment, that the 84th article of the German Statute, which is law in Cis-Leithanian Austria, does not apply to bills undertaken by foreigners in a foreign country, which is not their native country. In such cases the personal law is the proper law to apply. It would thus appear that there is not to be a thoroughgoing application of the *lex loci actus*.

¹⁰ Protocols of the Conference, ed. by Thöl, p. 156.

proposed, with concurrence of the present author, at the conference of the Institute of International Law in 1883, viz.:—

“Art. 2. *A l'égard de ceux qui sont étrangers à la présente loi*¹¹ *la capacité de s'engager par lettre de change ou billet à ordre est déterminée par la loi du pays auquel ils appartiennent.*

“Art. 3. *Néanmoins, un étranger incapable de s'obliger par lettre de change ou billet à ordre d'après la loi de son pays, mais capable d'après la présente loi, peut,*¹² *en ce qui concerne les actes de change passés dans le pays où cette loi est en vigueur, être considéré comme valablement obligé à l'égard du contractant bona fide et de ses cessionnaires.*”¹³

§ 300. It was, of course, primarily intended, in drawing the 84th article of the German statute, to strike at all the special incapacities which many systems of legislation had set up in connection with obligations constituted by bill, although, in all other matters save bills, there was the most complete capacity.¹⁴

This was the only reason which could justify the restriction of the exceptional provision by which capacity for incurring obligations by bill is to be regulated by the *lex loci actus*—the rule of the 84th article of the German ordinance on bills—to subjects of States in which that ordinance was not recognised. In States in which it was recognised, the provisions of the first article, by which every one who can bind himself by any sort of contract, has capacity to do so by bill, must also be recognised, and all special incapacities are thus swept away. But the conception of the 84th article goes beyond this, probably because the distinction was not quite clearly apprehended. On the one hand, in the case of the subjects of those countries which have adopted the German statute, any incapacity for bills which exists by their personal law will be absolutely recognised in spite of the non-recognition of it by the *lex loci actus*, this incapacity being shown to rest upon some general, or, at least, more extensive incapacity for legal action, such as minority, or dependence on the head of the family,¹⁵ and in such matters there was no unanimity within the territory affected by the German statute, and, indeed, there is not even yet complete unanimity.¹⁶ But then, by this 84th article, a person who does not belong to these States, although by his own personal law he or she may be generally incapable of

¹¹ It is assumed that a majority of States would adopt the bill. The “*étrangers à la présente loi*” are therefore the subjects of States who have not adopted it.

¹² It would be better to say “*doit*,” or simply “*est considéré*.”

¹³ We find arts. 1 and 2 of the bill laid before the Antwerp Congress of 1885, by the Belgian Commission, in substantial conformity with this.

¹⁴ See Savigny, § 364 ; Guthrie, p. 158, and *supra*, § 143.

¹⁵ See especially Sup. Ct. of Comm. of 26th June 1872 (Entsch. vi. p. 356), and Borchardt, *Die Allgem. Deutsche Wechselordn.* 6th ed. 1882.

¹⁶ *E.g.* even at the present time (1887) there are diverse laws within the German Empire as to the capacity of wives to incur such obligations, as there are too on the question whether they can so bind themselves without their husbands' approval. Stobbe, *Deutsch. Privatr.* iv. p. 157.

legal action (*e.g.* because by that law the age of majority is deferred, or because of the incapacity attaching to a married woman), will yet be treated as capable of undertaking obligations by bill, if this would be so by the *lex loci actus*.¹⁷ Such a provision as that is only tolerable in international intercourse—unless we are to recognise the doubtful principle, now specially adopted in the United States, that questions of capacity to act are to be determined solely by the *lex loci actus*—because the recognition and execution of foreign judgments have serious difficulties to encounter, or will in many cases be refused without a previous investigation of the judgment which it is proposed to carry into execution. In these circumstances the creditor, as a matter of fact, will generally be forced to bring his action in the *forum domicilii* of the alleged obligant, and the judge of the domicile will assuredly refuse to apply the foreign debatable rule of law, which is in flat contradiction to the rules of his own law, on this question of capacity. But, if we assume that judicial sentences will be capable of being executed in the countries in question, even if they have been pronounced against absent defenders *in foro contractus*, we should inevitably find ourselves in an intolerable position, where the rule as to the period of majority was different in those States, or where their law as to the obligations of married women or of children in family was different from our own. An extravagant ward, who was in want of money, would only need to sign bills to a usurer from a spot just over the frontier. The rule that none but the *bona fide* creditor and those who take from him should be protected, gives some security against such contemptuous evasion of the law. The conception of the German law, which, as is so often the case, has frequently been copied, simply because it contains some excellent provisions, is, however, faulty in another respect. In all reason, it is quite immaterial to consider whether the whole German statute on bills has been adopted in the State of the debtor; the question should be whether in that State the capacity to contract obligations by bills is simply a result of general incapacity to act, whether, that is to say, the special incapacities in the matter of bills have been removed, or have never been recognised there. But by the German statute the capacity of a Cis-Leithanian Austrian subject to bind himself by a bill will be determined by his *lex domicilii*, while the capacity of an Hungarian to do the same thing will on the contrary be determined by the *lex loci actus*, if the bill is drawn within the German Empire, although the Hungarian law of bills has precisely the same principle as to capacity, and, generally speaking, does not differ much from the German statute.¹⁸ Such a

¹⁷ See Sup. Ct. of App. Darmstadt, 18th November 1863 (Seuffert, xviii. § 154).

¹⁸ The 1st and 2nd articles of the scheme laid before the Congress at Antwerp contained a sounder interpretation :—

“1. *Toute personne appartenant à un pays soumis à la présente loi est capable de s'obliger par lettre de change ou billet à ordre lorsque, d'après sa loi nationale elle a la capacité ordinaire de s'obliger.*

“2. *La capacité des personnes n'appartenant pas à un des pays où la présente loi est en vigueur*

distinction will be altogether absurd, where there is a common statute on the law of bills covering a much larger territory, made up of different States, while within this territory the most diverse rules as to general capacity to act are recognised. The very fact that the State, to which the person who is alleged to have bound himself belongs, has entered such an union for the purposes of the law of bills, would be likely to lead any person not fully versed in law to the belief that all the material provisions as to capacity within the whole territory would be in substance identical. The fact, however, would be, that if, *e.g.* Spain should join the union, while Norway and Portugal held aloof, a Spaniard, undertaking the obligations of a bill within the territory of the union, might appeal to the fact that by the law of Spain he was still a minor, while Portuguese or Norwegians, who, as much as a Spaniard, are still minors at 24, could not do so. There would thus be a peculiar kind of statutory premium put upon adhesion to the union, if it should adopt the law of bills which prevails in the German Empire or in Austria. We should almost be reminded of the war of statutory tariffs which is so popular at the present day.

If, on the other hand, the theory adopted by the Institute for International Law, and by the Congress at Antwerp in 1885,¹⁹ is to be held to mean—as it seems to mean when read literally²⁰—that, even within the union of States with a common law of bills, capacity to bind oneself by bill in the way there described is to be held to be present or absent according to the deliverance of the *lex loci actus*; every one of the States that joins the union will open the door to an invasion of its own laws in a way hitherto unfamiliar upon the Continent of Europe. The upshot would be, that even the State to which a person incapable of contracting obligations by bill belonged, would be forced to regard him as possessed of that capacity so far as concerned any obligation undertaken by him in a foreign country, *i.e.* in some other State of the union, if he were so by the law of the place where he signed the bill. Up to this time, that is not the law either in the German Empire or in Austria. Art. 84 of the German

est régie par leur loi nationale. Toutefois si elles contractent dans un de ces pays, elles peuvent être considérées comme valablement obligées à des tiers de bonne foi lorsque d'après leur loi nationale elles ont la capacité ordinaire de s'obliger."

This impractical hard and fast rule was adopted by only 24 votes against 20 at Antwerp. I would propose the following, *viz.*—

"Every one who can bind himself by any contract can do so by bill. It is immaterial whether or not a person had capacity to bind himself by bill, be that incapacity a result of a general incapacity to contract or not, if by the law of the place where the bill is issued the debtor had this capacity, and the person who sues on the bill or some predecessor of his in title was in good faith when he acquired the bill. Good faith is presumed."

¹⁹ See note 22.

²⁰ This question, so important in itself, and specially important for any union for the purposes of the law of bills yet to be created, was never stirred either in the Institute or at Antwerp. And yet it must have been made perfectly clear that the recognition of the *lex loci actus*, as a general principle for determining capacity which should receive reciprocal recognition, had a meaning entirely different from that which art. 84 of the German statute had for Germany.

statute was, so far as I am aware, recognised in so far as it was unfavourable to foreigners, but not so as to prejudice German subjects also. Nor can it be supposed that the consequences of such a doctrine in the law of bills will be trifling. By signing bills in an adjoining country while upon a journey, a married woman, a ward, or a child, could make themselves independent of husband, guardian, or father, in money matters, with very prejudicial results.

The theory, however, which is embodied in a judgment of the Supreme Court of Austria,²¹ whereby performance within the territory is placed in the same category as the undertaking of an obligation within the territory, is certainly mistaken. The validity of the *lex loci actus* rests simply upon the view that the other party to the contract, or one who subsequently acquires the bill, shall not incur loss by the existence of any incapacity in the debtor which may easily remain unknown. It does not rest on any theory that the person who proposes to become bound may subject himself to any foreign law he pleases, by stipulating at his pleasure for this or that place of performance. The resolutions of the Institute and of the Antwerp Congress are both opposed to this latter idea.²²

§ 301. The security of any one who acquires the bill is besides, in spite of the rule adopted by the Institute and by the Congress of Antwerp, by no means so great as might at first sight be supposed, unless this further rule is recognised, viz. that the place, from which the obligant in the bill dates his obligation, shall be recognised as his domicile, and that the place so specified shall determine what local law is to be applied, unless of course some declaration to the contrary is appended to the bill. Judgments of the old Supreme Court of Prussia, and of the Supreme Commercial Court of the Empire,²³ have rejected this rule, partly on special grounds which are applicable only to the German statute, but partly from the consideration that provisions as to capacity to act, and particularly as to capacity to contract, are absolute provisions, which cannot be excluded by the intention of parties, or be restricted as parties may arrange. This latter ground must be recognised, if the rule is to be regarded as unconditional, and not dependent upon the *bona fides* of the creditor in the bill.

It would in truth be absurd if a person, who by his personal law had

²¹ Judgment of the 24th Jan. 1866. See, Borchardt on art. 84. On the other hand, see the Austrian judgments of 1875, reported in J. v. p. 287.

²² The final edition of the articles which were then under consideration runs thus according to the proposals of the Institute:—

“Art. 1. *Est capable de s'obliger par lettre de change ou par billet à ordre quiconque est capable de s'obliger par contrat.*”

“Art. 2. *L'étranger incapable de s'obliger par lettre de change ou par billet à ordre, en vertu de la loi de son pays, mais capable d'après la loi du pays où il appose sa signature sur la lettre de change ou le billet à ordre, ne peut pas invoquer son incapacité pour se soustraire à ses obligations.*”

The words “*civilement ou commercialement*” are inserted at the end of art. 1, instead of “*par contrat*” in the last edition of the proposal.

²³ See Supreme Ct. of Comm. 3rd May 1878 (Seuffert, xxxiv. § 238).

no capacity so to bind himself, could withdraw himself from the operation of this incapacity by simply choosing some other place as the place for the issue of the bill. But it is far from absurd to hold that the *litera scripta* shall have this effect in favour of a *bona fide* holder of the bill and the rights contained in it.²⁴ The principle of regarding nothing but the *bona fides* of the person who acquires the bill guarantees a wider security, whereas the principle of accepting rules of capacity absolutely according to the *lex loci actus* makes it impossible to have any such security, which is so essential to the despatch of commercial dealings.

In so far, however, as the personal law of the obligant is to determine the capacity of that person to undertake obligations by bill, we must hold it to be quite immaterial on what grounds the personal law rests the incapacity. It is purely arbitrary, for instance, to distinguish between incapacity which is based on political considerations, and incapacity which is based on non-political considerations, and leads to further doubts and uncertainties.²⁵ In such cases we shall, again, be much more likely to arrive at an equitable result by holding that no such incapacities can be pleaded against a *bona fide* holder if the obligation has been undertaken in a foreign country.

This principle of *bona fides*²⁶ is all the more to be recommended because it may be admitted, even by that State by whose laws the obligant would be incapable of contracting such obligations, without giving too much countenance to evasions of its own law, that, if *bona fides* is taken as the guiding principle, there will be all the less risk of divergence in the judgments of the courts on questions as to the various obligations involved in bills, a divergence which may have very serious consequences for the parties interested (see *supra*, § 142, p. 314).

²⁴ By far the greater part of the obligations in a bill are undertaken at the debtor's domicile, and this the endorsee may assume to be the case. But Brackenhöfft goes too far when he maintains (p. 139) that the place which the bill states to be the place where its obligations are to be undertaken is really to be so considered in all circumstances. The parties cannot by the terms of their contract withdraw themselves from the operation of the local law. The following cases may be noticed here: A merchant sends to his correspondent in London blank bill forms, merely signed by him, and dated from Ireland, that the correspondent may fill in the name of the drawee, the sum, the place of payment, and the date of issue: these bills will be held to have been drawn in Ireland (Story, § 289). Again, a bill was drawn in Manchester upon a firm established in Boston, and was accepted by a member of the firm then in Manchester in name of his firm. The court held, without any question as to the capacity of the person to draw bills or accept them being raised, that the bill must be treated as if accepted in Boston, and that the diligence done upon the bill in accordance with the law of that place was in order (Story, § 319). [Snaith v. Mingay, 1 Maule v. Selwyn, 87; and Grimshaw v. Bender, 6 Mass. 157.]

²⁵ For instance, it was held by the C. de Paris, on 26th Nov. 1850, that an ordinance of the King of Naples, by which all the members of his Royal House were deprived of the capacity of drawing bills, could have no effect in France, as being against the French *Droit Public*.

²⁶ The principle of *bona fides* came, however, with something like a shock on Herr Jitta from Amsterdam. The simple question, "*Pourquoi le législateur, en posant des règles, tiendrait-il compte de la bonne ou mauvaise foi des contractants?*" was sufficient to induce him, and apparently the majority of the Congress at Antwerp, to reject the principle of *bona fides*. The debates of a congress do not always tend to improve the proposal originally laid before it.

FORM OF BILLS.

§ 302. There is no question that, as far as the form of the bill and its transmissions are concerned, the rule "*locus regit actum*" must be recognised. The obligation contained in the bill is validly undertaken if it is in conformity with the law recognised at the place where the declaration of liability is made.²⁷

But in this connection, again, the rule "*locus regit actum*" has no more than a permissive force.²⁸ Thus, for instance, in the German statute, art. 85, subsec. 3, it is expressly recognised that bills, used by a German as a means of putting himself under obligation to another German in a foreign country, have legal effect as bills, although they satisfy the requirements of German law only.²⁹ But we may go still further. Since the obligation incurred by a bill is an unilateral obligation, it can never be of any consequence to enquire what is the nationality of the creditor, or of the indorsee,³⁰ and it is obvious that the security of commercial dealings in bills takes nothing but advantage from this circumstance being left out of account. Doubts, however, may very easily arise as to the intention of a person to bind himself by a bill, if the obligation is according to the requirements of his personal law, and that law requires fewer forms than the *lex loci actus*. Again, just as there may be cases in other departments of law, in which the personal law of the parties has nothing to say to the regulation of the obligation (except in so far as questions of capacity to act may be involved), so in the law of bills there must also be cases of that description, and there, as much as in other cases, it will be quite out of the question to submit the form of the obligation to the test of the personal

²⁷ Story, § 360; Massé, p. 143; Fiore, § 345; Esperson, § 13; Wharton, § 448; Weiss, p. 816; Lyon-Caen et Renault, *Dr. c. i.* § 1313. For instance, a bill drawn in the German Empire, which does not bear to be for value received, is nevertheless valid in France [where such a declaration is necessary]. It is the same with regard to "*remise de place en place*." Conversely, a bill drawn in the German Empire, which does not contain the word "bill," will not be regarded as a bill in France, in respect of the provisions of German law [which require the use of this word]. The following are important divergences in the rules as to bills: According to the Code de Commerce, art. 110, 137, 138, the original bill and all indorsements must bear to be for value: that is not necessary by the *Deutsche Wechselordnung* (cf. Hoffmann, p. 179). By English law bills may be made payable to bearer, but not so by German law: and again, the law of England does not require the specification of any date or of the place of issue or of payment. German, Scandinavian, and Swiss law make the use of the word "bill" [or an equivalent, Imp. Ct. at Colmar, 14th June 1881, J. ix. p. 332] absolutely essential to the validity of the document: by French, Belgian, English, and American law it is not indispensable. (See Weiss, *ut cit.*)

²⁸ Cf. Fiore, Esperson, Weiss, etc.

²⁹ See the general provision in the preliminary article 9 of the Italian Code. That the rule "*locus regit actum*" should have no more than a permissive force is, as Esperson rightly notices, of practical advantage in commercial intercourse. A man who desires to undertake such an obligation will not always have time to inform himself as to the "*lex loci actus*."

³⁰ In this sense, see Esperson, § 17.

law of the obligant.³¹ Accordingly,³² it is a safe rule for creditors in bills always to require that the *lex loci actus* should be observed.³³ But if there is to be legislation on the subject, we might recommend this simple formula, which puts all subtleties aside, viz. :—

“It is enough for the validity of any obligation contained in a bill, in so far as form is concerned, that the law of the place where the declaration of obligation under the bill is given should be observed.”

But it is immaterial to the international recognition of the form of a bill to consider what the grounds are on which the legislature of any country has prescribed this or that particular form. If a system of law, as the English does, makes the want of a stamp operate as a nullity, this defect, like any other defect of form, must be respected abroad.³⁴ It is not enough to justify a disregard of any such rule that its object is purely fiscal, as we have already demonstrated on principles of much more general application. It is another matter altogether, whether the system adopted by a number of other legislatures, *e.g.* that of Germany, by which the only result of the want of a stamp is a penalty, is or is not preferable. The Congress at Antwerp in 1885 very properly held that it was.

LEGAL RELATION OF THE DIFFERENT OBLIGATIONS ON A BILL UNDERTAKEN IN DIFFERENT TERRITORIES, IN SO FAR AS FORM IS CONCERNED.

§ 303. If we test each separate obligation connected with the bill by the *lex loci actus*, it follows that an acceptance, or an indorsement,³⁵ may be validly appended in this country to a bill which by the law of this

³¹ Massé, § 572, proposes that the form prescribed by the personal law should only be accepted as sufficient, if the bill is payable at the domicile of the obligant. That certainly goes too far. See, on the other hand, Esperson, § 15. Fiore, § 345, seems generally to pay more attention to the place of payment.

³² In the case of bill obligations, issued by a trading firm or trading establishment through its manager, the law of the place of the firm or establishment must be recognised as the law that may, if the party so chooses, be used.

³³ The scheme for the regulation of questions of international law in the matter of bills and letters of exchange, published by the Institute for International Law in 1885 (*Annuaire*, vii. p. 121), provides in a way that seems to be distinct: “1. *La force de la lettre de change et du billet à ordre est déterminée par la loi du lieu de son émission. La forme des endossements, de l'acceptation et de l'aval est fixée par la loi de chacun des pays où ces actes sont faits.*”

³⁴ Weiss, p. 818; Lyon-Caen and Renault, *Dr. Civ. i.* § 1315. The latter, however, is not perfectly distinct. The practice in England is otherwise, which, however, Phillimore, § 837, describes as “very questionable.” The Bills of Exchange Act, 45 and 46 Vict. c. 61, § 72, subsec. 1a, is also to a different effect [viz. “Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.”]

³⁵ By a judgment of the Sup. Ct. at Berlin on 10th July 1860 (*Seuffert*, xiv. p. 164), it is held that execution and process as on a bill is not competent within the territory of the German statute upon promissory notes issued in the United States, and not containing the expression “Bill of Exchange.” But in connection with indorsations in this country of bills belonging to this country, see the judgments *e.g.* of the Supreme Court at Berlin of 8th February 1870, cited by Borchardt in his commentary on art. 85 of the German statute.

country would be bad from some defect of form (*e.g.* because it does not contain the words, "bill of exchange" [*wechsel*], which are required by the (German statute), if only it is valid by the law of the place where it was issued. But again, on the other hand, the acceptance or the indorsement of a bill made in this country is valid, so far as form is concerned, although the bill itself does not satisfy the forms required by the law of the place of issue, if only it does satisfy the conditions required by the law of this country.³⁶ For the acceptor binds himself unconditionally for payment of the sum in the bill, and the indorser binds himself in the event of the acceptor's failure to pay: that being so, we cannot, on the one hand, take into account the fact that the debtor may or may not have a right of recourse or of indemnity, nor can we take into account the reason why the prior obligant does not pay, and that reason may be that the principal debtor in the bill has not validly bound himself.³⁷

SUBSTANTIVE IMPORT OF THE DIFFERENT OBLIGATIONS ON BILLS. EXTENT OF THESE OBLIGATIONS. CONDITIONS OF RECOURSE (PROTEST. NOTICE OF DISHONOUR).

§ 304. In considering the substantive import of the different obligations

³⁶ D. W. O. art. 85, par. 2: "If, however, the foreign bill, or its transmissions made abroad, satisfy the requirements of our law, no plea can be taken against indorsements subsequently made upon the bill in this country on the ground that the original bill, or previous indorsements, were defective by foreign law." Judgment of the Supreme Court at Berlin, 17th June 1858 (Striethorst, 28, p. 361; Borchardt, p. 241): "A foreign bill, in conformity with foreign laws, is to be treated like a good inland bill; and all further operations upon it, such as indorsation done in this country, are to be ruled by the law of this country." See, too, the other judgments of German courts given by Borchardt.

The Bills of Exchange Act [45 and 46 Vict. c. 61, § 72, (1) (b.): "Where a bill issued out of the United Kingdom conforms, as regards requisites in form, to the law of the United Kingdom it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

³⁷ The rules laid down with reference to assignation will apply so as to regulate the liabilities of the obligant in a bill to pay upon an indorsement that has been made abroad, and conversely, his release by paying upon such an indorsement. Thus the obligant must pay if the indorsement is valid by the law of the place to which it, as a separate legal transaction, is subject; and in such a case we have no concern with the law of the place of payment (*cf.* Borchardt on art. 85 of the German statute, and Imperial Court of Commerce, 11th May 1872, Dec. vi. p. 125). But the debtor is also discharged if he pays in *bona fide* upon an indorsement which would transmit to the indorsee the right to the bill according to the law that regulates his (the debtor's) obligations under the bill. *Cf.* too, Story, §§ 316*a* 353*c*. If a bill is issued and is payable in a country in which, as is the case in England and Germany, blank indorsements are good, but the bill is afterwards blank indorsed in some other country in which a blank indorsement does not operate as an indorsement, the person to whom the bill is directly transferred by that blank indorsement cannot sue the acceptor or the drawer: but a person who can plead a subsequent blank indorsement valid by the *lex loci actus*, can so sue, for the person who has *bona fide* acquired the bill by this subsequent indorsement, is creditor in it, and there may have been quite a valid assignation of the bill in spite of the intervention of the invalid indorsement in blank (*see* Fiore, § 349). Different indorsations made in the same form may have the effect of a mere assignation in the one case, but of a real indorsation in the other.

on a bill, we may for simplicity's sake assume the case to be, as it generally is, one in which the place in which the obligation is undertaken is also the domicile of the obligant. We shall, before concluding, deal with the case of these being two different places.

Although the older jurists³⁸ held the view that the obligations on a bill are subject to the law of the place of performance, *i.e.* the place of payment provided in the bill, we may now regard this view as abandoned. The prevailing theory now is that the law of the place at which each obligation is undertaken will regulate it.³⁹

The law of the place of payment will regulate no more than the particular fashion in which payment is to be made, just as in other contracts the usage and therefore the law of the place of payment must always *ex necessitate rei* have this effect. It is obvious that no man of business can be compelled to pay outside his ordinary local business hours or upon a local holiday. It is part of the same rule that one cannot compel payment forthwith, if that be contrary to the law of the place of payment, but must allow the ordinary days of grace which are recognised there.⁴⁰ In the same way we must hold that, if a particular day in the calendar is appointed for payment, that day must be ascertained by the calendar which is recognised at the place of payment,⁴¹ and that where there are different coinages, going by the same name, those which are current at the place of payment are those that are intended, in the absence of express provision to the contrary.⁴² In so far as the question of coinage is concerned, our

³⁸ Pothier, *Traité du contrat de change*, § 155. Cf. Norsa, p. 30. Brocher, ii. § 253 (p. 315), pronounces in favour of the law of the place of payment. One argument against this is that when the bill is issued the obligation of the acceptor is still indeterminate.

³⁹ Fiore, § 346; Esperson, § 21; Asser-Rivier, § 105; Wharton, §§ 447 *et seq.* Westlake, §§ 230, 231, seems to express himself in favour of the place of payment. [But see the English Statute, § 72 (2).] Hingst, Rev. xiv. p. 414, with reference to the practice in the Netherlands; Norsa, Rev. viii. p. 464 (practice in Italy); Judgments at Leipsic in 1876 (J. v. p. 617); and Clunet, *ibid.* Ct. of. Cass. at Turin, 7th Mar. 1883 (J. xii. p. 457). One who issues a bill drawn to his own order is responsible according to the law of the place of issue, although he may have indorsed it in the territory of some other law. Ct. of the Emp. (i.) 4th Dec. 1886; Bolze, iv. § 16, p. 5, Lyon-Caen et Renault. *Dr. c. i.* § 1317; Foote.

⁴⁰ Pohls, p. 17; Massé, § 628; Esperson, § 52 (p. 90); Phillimore, § 857. Thus the law of the place of payment determines whether, if the day of payment falls on a holiday, the preceding or the subsequent day is to be held to be the day of payment. See *Code de Comm.* § 134, and on the other hand the German statute, § 92.

⁴¹ Bills of Exchange Act, § 72. (5.) "Where a bill is drawn in one country, and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

⁴² See Massé, § 610. If at the place of payment there is no legal or customary currency such as is specified, then in doubt the currency of the drawer's domicile is held to be intended. If there is no special provision made for payment in coinage of a particular denomination (*e.g.* sovereigns), the debtor can always discharge his obligation if he pays the value of the foreign coinage in his own currency. But, if there is such a special provision, the creditor can, according to the sound view, demand payment in that currency, although it be foreign. He may have a special interest to do so, *e.g.* if he is on a journey, and the acceptor on the other hand should consider before he accepts whether he is in a position to furnish that kind of money. No difference is made on this rule by a law giving a forced currency to paper money

conclusion is the result of the history of the law of bills, for the holder of the bill was originally a person who desired to be supplied with the money which was in circulation at the place of payment. As regards the calendar, we must start with this consideration, that the person who issues the bill imposes its conditions, and these he must express in the way in which they will be most easily understood at the place of payment. That is effected by fixing the day of payment according to the calendar that is in use at the place of payment.⁴³ The matter stands otherwise if the day of payment is fixed at the expiration of a particular period from the date of the bill. The date is the day on which the bill is truly completed, not the day, which is described by the same title in another calendar, but is, of course, a different day altogether.⁴⁴

§ 305. For the rest, we must remember that the person who draws the bill is its author. His law must therefore be the primary rule in determining the extent and the conditions of the obligation. Just as he may make express provision, that, *e.g.* a bill drawn on sight must be presented for payment within a certain time, he may effect the same thing by the simple fact of drawing it in accordance with his own law.⁴⁵ The acceptor cannot in any case assume the obligation which has been formulated by the drawer to any greater extent or under any other conditions than those which are already prescribed for it by the law of the drawer himself. But it is just as impossible to hold that the drawer, the principal obligant,

or bank notes within any particular country, unless it expressly limits the freedom of contract in this matter (so Esperson, p. 104, and Italian practice, J. ix. p. 284. To the opposite effect Borchardt). Even in the event of such a limitation on the freedom of contract it is not held to apply, unless something more is said, to foreign currency or to bill drawn in another country, which speak of a foreign currency. [Thus it was held by the Trib. comm. de Marseilles, 7th Nov. 1871, that the holder of a bill payable in France was bound to accept payment in notes of the Bank of France, having at the time a forced currency, and that although the bill bore that payment is to be in gold, there being no separate and special agreement to that effect.]

⁴³ German practice hitherto has followed this rule. See Borchardt on art. 34 of the German statute.

⁴⁴ See art. 34 of the German statute.

⁴⁵ The provision of the 31st article of the German statute, viz. "A bill drawn on sight is due on presentation. To avoid the loss of the right of summary recourse against the indorsees and the drawer, a bill of this kind must be presented according to any directions that the bill itself may contain, and in the absence of such directions within two years after its issue," is applicable only to inland bills, and not to bills drawn on this country from some place abroad. Cf. Thöl, *Protokolle*, pp. 44-47, and Esperson, § 27. The law of France makes provision for the converse case as well (see *Code de Comm.* § 160, law of 3rd May 1862). The limitation of the German law, however, seems to be more sound. A conflict may arise where two systems of law, that of the drawer and that of the place of payment, both make provisions to meet the case of bills drawn from this country on some place abroad, and those drawn on this country from abroad. Such a conflict finds its solution in this—that the drawer can only appeal to his own law, as can also the indorser, who lives in the country to which the drawer belongs; whereas an indorser who lives in the country where payment is to be made can always claim the shorter of the two periods provided by the two systems of law; and an indorser who lives in a third country, again, can only plead the law of the place of issue, unless his own system of law gives him more favourable terms.

desired to bind himself to any greater extent or on any other conditions than those which are known to his own law.⁴⁶ The acceptor can always, therefore, plead either the law of the drawer or his own law to show that the conditions necessary to his being bound are not present. But he cannot plead that the obligation of the drawer is not good; for although the drawer formulates generally the extent and the conditions of the obligation, the shape into which he has thrown the obligation is not adopted by the other obligants on the bill on the footing only that the drawer has validly bound himself. On the other hand, the important matter for the person, to whom the drawer hands the bill, is not the obligation of the drawee—(and indeed most systems of law do not require any antecedent presentation for acceptance, except in the case of bills payable at a certain date after sight)—but the fact of payment. Thus considerations which entitle the acceptor to discharge are not, apart from the fact of payment itself, available for the discharge of the drawer also, in so far as the drawer by delivery of the bill has guaranteed payment of it.

§ 306. Those who take part in the further circulation of the bill transfer⁴⁷ (a) the claim against the acceptor, to the extent to which this exists by his own law and by that of the drawer: (b) the cautionary obligation of the drawer which we have described: and (c) every person taking part in the circulation adds a further cautionary obligation in terms of his own law,⁴⁸ but in terms of that law only. (The effects of indorsation after the bill is due, and the effects of indorsation upon dishonoured bills, are in the same way to be determined by the law of the place where each such obligation is incurred, as Pöhls has well remarked.) Such indorsement has always the effect of an assignation, but, it may be, only of an assignation of a claim under the bill against the acceptor (see German statute, art. 16); and if the indorsation, *e.g.* as being a blank indorsation, should happen not to bind the indorser by the usual bill obligations, according to the law of the country where the indorsation takes place, still it is not permissible for the acceptor or the drawer, as the case may be, to

⁴⁶ Fiore, § 348 *ad fin.* seems inclined to allow the law of the acceptor to form the exclusive rule. Against this, see the last proposition of Thesis ii. of the Institute of International Law: "*Les effets et la validité de la lettre de change et du billet à ordre des endossements de l'acceptation, de l'aval se jugent d'après les lois de chacun de ces pays ou ces différents actes sont faits, sans préjudice des règles relatives à la capacité, des signataires des titres. Toutefois, les effets des actes postérieurs à la création du titre ne peuvent jamais être plus étendus que ceux qui dérivent de l'émission du titre lui même.*" (Annuaire, viii. p. 121.)

⁴⁷ If, by the law of the place where the paper is issued, it is transferable by indorsation, it can be validly so transferred in a country, by the laws of which it would not be so indorsable. See Phillimore, § 850, and the decisions reported there.

⁴⁸ The historical origin of the indorser's right of recourse corresponds with what has been said: "The cedent, who at first, when a bill was handed on, accompanied it with an ordinary order, subsequently was in the habit of adding to that an order guaranteed by his own obligation—*i.e.* a new bill with all its forms, probably upon an *eik* to the original bill, and then again subsequently transferred merely the order contained in the first bill, with the guarantee of his own obligation, which made it unnecessary to repeat all the forms of a bill, since a part of these could be held as tacitly repeated." Hoffmann, p. 52.

appeal to any such invalidity in a question with the indorsee, or any one who follows him; the claims against these persons, the acceptor and the drawer, follow their own laws. A further result of this principle is that the conditions of recourse against each debtor on the bill are to be determined by his own law, and thus, as a general rule, by the law of the place where each obligation is undertaken. This is in truth the theory which now prevails,⁴⁹ and it must by logical necessity be extended to questions of the necessity of taking a protest on the bill (*e.g.* against particular contingent obligants).⁵⁰ The same law must determine the question whether several obligants can be sued at once, whether recourse can be had only according to the order of the indorsations, or may be followed out in any order,⁵¹ and must also settle what is timeous notice of dishonour.⁵² There

⁴⁹ Pöhls, p. 30; Story, § 360; Pardessus, § 1497; Massé, § 630; Schäffner, p. 122; Seuffert, Comm. i. p. 253; Hoffmann, pp. 605, 606; Dft. Comm. Code for Württemberg, § 1003; Rehbein, p. 6, on art. 86 of the German statute; Thöl, *Wechselr.* 4th ed. § 16, iv.; Imp. Ct. (i.) 28th February 1882 (Dec. ix. p. 438). See Asser-Rivier, § 106; Weiss, p. 821. But yet it is not made quite clear by many authors, whether in their view it is sufficient, if the holder of the bill observes the law of the place of issue, as Fiore, § 359, thinks. Esperson, § 33, expressly declares this to be so. But this is illogical, if, with Fiore and Esperson, we are to hold that the law of each one who takes part in the circulation of a bill will determine questions as to the prescription of his right of recourse. The true view is adopted by the Supreme Court of Commerce, 1st February 1876 (Dec. xix. p. 203); and the Supreme Court of Berlin, 9th May 1857 (Striethorst, *Archiv.* xxiv. p. 294); and in a particularly precise form by Story *ut cit.*

⁵⁰ The question how far the holder must be contented with an acceptance for honour and payment for honour, is simply a question as to recourse. Pöhls (p. 24) overlooks this; he proposes that the law of the place of payment shall rule, but still—and in this he is right—he holds that the rights of the person who interposes for the honour of another must be settled by the law of the domicile of this latter person.

⁵¹ Asser-Rivier, § 107. Massé, § 623, takes another view: he thinks the law of the place where the bill is drawn must determine the competency of a joint action. Special distinctions, in which, however, I am not prepared to concur, are made by Fiore, § 358.

⁵² Theories are perhaps most divided on the subject of notification. See the various decisions in Borchardt. Many authorities are inclined, since the holder of the bill may often be unable to inform himself quickly enough as to the law which rules at the domicile of the person who is liable to recourse, to allow the law of the domicile of the person who takes recourse against him to rule. See Thesis v. § 2, of the Institute for International Law: "*Les avis à donner aux garants pour la conservation des droits de recours dans le cas de défaut d'acceptation ou de paiement et les délais pour les notifier, sont régis par la loi du lieu d'on ces avis doivent être envoyés.*" This is, however, illogical, and, if there is to be legislation on the subject, it would be better that the law of the place of issue should be declared to be regulative of this matter also. If a foreigner who claims recourse has redeemed the bill from some posterior indorsee, although he might have successfully maintained against him in accordance with foreign law that there had been no sufficient notice of dishonour, an indorser in this country may appeal to that transaction to establish that in law there is no recourse against him. Cf. Rehbein, on art. 86 of the German statute. The distinction taken by Salpius (*Zeitschrift für das gesamte Handelsr.* xix. p. 60), in reliance on the English practice, which on the subject of bills is not specially clear or logical, can scarcely be considered tenable. He thinks that the necessity of notice of dishonour should in itself be determined by the law of the person to whom the notice should be given, while the form should be regulated by the law of the place from which the notice proceeds; to the head of "form" he thinks that the period of notice belongs. This is, however, an erroneous application of the rule "*locus regit actum.*" As the point in question relates to bringing something to the knowledge of a person, in

is no need to refute over again the opposite view, by which the law of the court is to decide; this can only be justified on the principle that the *lex fori* must always be applicable unless that law itself expressly provides that some other law shall apply.⁵³ We need only notice that, since the place of the court and the domicile of the person against whom the claim is made generally coincide, this theory will in its results as a rule harmonise with our own theory.

The theory which holds that the law of the place of payment must regulate the obligations of all who are liable on the bill has more to say for itself.⁵⁴ Against the assumption of an universal subjection of all the obligants on the bill to the law of the place of payment, an assumption which we have already combatted, we must plead that the importance of the solemnities required to found a right of recourse lies in reality in this, that the person against whom recourse is to be had need only pay, if he is provided with summary evidence and immediate intimation of the fact that the contents of the bill have been demanded in vain from the principal debtor, and that, therefore, the solemnities in discussion here are of no importance with reference to the obligation against the drawee (or, as it may be in some bills, the maker), and can consequently have no connection with the law of his domicile. It may be said with some force, however, that the different obligants on a bill are in a manner tied up together,⁵⁵ and that the later obligant would not take the bill and hand it on with his guarantee on it, unless he had the right of recourse against certain specified prior obligants. This natural expectation may be deceived if this right of recourse is already excluded by the law which governs the obligation of the prior obligant, while he himself must be content to incur that liability according to the law of his obligation. Of course, this danger is materially diminished by the leading principle that as regards the form, the place,⁵⁶

the eye of the law the notice is given, not at the place where he who gives the notice is, but where he who is to receive it is. The rule "*locus regit actum*" leads to the same result as the simple proposition that notice, in so far as it is necessary, is a condition precedent of the obligation of the obligant under the bill. For this strict rule see in particular Fick, *Ueber Intern. Wechselr.* pp. 28 and 86.

⁵³ See e.g. Liebe, *Die allgem. Wechselordn. mit Erläuterungen*, p. 231. Sup. Ct. of Mainz, 5th February 1829 (*Arch. für Rheinhessen*, i. p. 431).

⁵⁴ This view, which corresponds with the practice in England, is sanctioned by the English Bills of Exchange Act, § 72 (3). "The duties of the holder, with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured." But see note AA, *infra*, p. 692.

Cf. Renaud, *Wechselrecht*, p. 72, note 5; Günther, pp. 742, 743; Heise's *Handelsrecht* (Frankfurt, A. M. 1858), p. 222. Judgment of the Supreme Court at Kiel, 5th February 1848 (Seuffert, 6, pp. 161, 162).

The French theory (art. 160 of the Code of Commerce) is quite untenable. In its present form it subjects bills payable in France, as well as bills drawn in France on a foreign country, to French law. See, against this, Lyon-Caen et Renault, *Dr. c. 1*, § 1319.

⁵⁵ See the grounds of decision in Seuffert, ii. Nos. 3 and 252, both judgments of the Supreme Court of Appeal at Dresden.

⁵⁶ By "place," of course, we mean the particular locality, *i.e.* the dwelling-house or place of business of the debtor.

and the time of making a protest, the rule "*locus regit actum*" is applicable: and that thus the form, the place, and the time of taking a protest are regulated by the law of the place in which that act must be done, *i.e.* by the law of the place of payment.⁵⁷

FORM AND PERIOD FOR TAKING A PROTEST.

§ 307. It follows from the fact that a protest upon a bill is a public instrument, and that this instrument obtains faith with the public by being executed by some official or notary under the rules of his own law exclusively, as the rule "*locus regit actum*" requires, that the form of the protest must be determined by the law of the place where it is taken. As the protest shows that payment has been demanded at the proper place from the principal obligant—that is, the acceptor, or in certain circumstances the maker, of a bill—it follows that the law of the country in which the protest must be made, determines the particular locality where it is to be made. But that law by which parties intended that payment should be regulated is the only law that can determine whether application for payment was made to the principal debtor *opportuno loco*.⁵⁸ Lastly, the period within which a protest must be taken is dependent upon the law recognised at the place where it is taken, because the real question here is one as to whether the demand is made *opportuno tempore*. For instance, a very short period for protest indirectly forces the holder of the bill to more abrupt procedure against the drawee. An extraordinarily long period of protest may, as we shall see, involve a prolongation of the guarantee of the intermediate obligants.

If the conditions of recourse against the different beneficiaries are different, the hardship remains that this or that obligant is made liable, although he may be denied to a greater or less extent recourse against prior obligants, the alternative to this hardship being that the holder of the bill should in such a case be denied recourse. The former alternative seems to be more in accordance with positive law and with the historical development of the law of bills, and it is probably predominant in practice. Still, in regarding the matter from the point of view of positive legislative

⁵⁷ Story, § 360; Pardessus, No. 1497; Schäffner, p. 122; Pöhls, p. 30. Judgment of the Supreme Court at Berlin, 12th April 1845 (Decisions, 12, p. 374), and 9th May 1857 (Seuffert, 12, p. 400), D. W. O. art. 86. "As to the form of transactions for upholding or putting in force the rights created by a bill, which may be carried out abroad, the foreign law will decide." Thöl, *Wechselr.* § 16; Wächter, *Wechselr.* § 19, note 14. The view which formerly ruled German practice to a considerable extent (following the precedents of the Prussian Supreme Court of 9th June and 23rd October 1885, Striethorst, *Archiv.* xvii. p. 263 and xviii. p. 226), that art. 86 of the German statute dealt with the question of the necessity of a protest, may now be regarded as entirely given up. Cf. Rehbein on art. 86.

⁵⁸ The right and title to demand payment from the obligant, and therefore to take a protest, are determined by this law, *i.e.* by the law of the place of protest. Imperial Court (ii.) 20th February 1885. Bolze, *Praxis*, i. § 38, p. 9.

regulation, there is much to recommend the subjection of all the obligants to a common law, but that law should be the law of the drawer, and not, as older theories put it, the law of the place of payment. Accordingly, the provision of the 4th Thesis of the Institute of International Law is:—

“Les obligations du porteur au point de vue de la présentation pour l'acceptation et pour le paiement sont fixées par la loi du pays où a été émis la lettre de change ou le billet à ordre.”

PREScriptions OF ACTIONS ON BILLS.

§ 308. Another logical result, and one that is in accordance with prevailing theories, is that the prescription of the right of action⁵⁹ against each obligant shall be determined, not by the law of the place of payment, but exclusively by the law which in other respects regulates each separate obligation;⁶⁰ and thus, if we shall assume that the domicile of the obligant and the place where each separate obligation is undertaken are identical, the ruling law will be the law of each particular declaration of liability. Here too, of course, we stumble again upon the hardship that sometimes a posterior obligant will have to meet the bill, although he has already lost all further right of recourse against those who have preceded him by the operation of their law. This hardship will no doubt occur less frequently than in the case where different systems of law applicable to the necessity of protests and notices of dishonour give different deliverances on the subject. To avoid these hardships, Thesis vii. of the Institute of International Law, after providing in subsec. 1:—

“Les délais pour l'exercice du droit de recours contre les endorseurs ou les autres garants et contre le tireur, ou par l'action directe contre l'accepteur, sont fixés par la loi du pays où a été fait l'acte d'où résulte l'action exercée,”
proceeds to provide in subsec. 2:—

Toutefois, à l'égard des endorseurs et des autres garants, ces délais ne peuvent jamais dépasser celui qui est établi pour l'exercice de l'action en recours contre le tireur.”

Thus an indorser, against whom a claim of recourse is made, may take

⁵⁹ Of course, those authorities, who subject all cases of prescription to the *lex fori*, apply that rule to the present case also. See, on the other hand, in particular, the judgment of the Supreme Court of Appeal at Lübeck, 26th February 1861 (Seuffert, xiv. § 108).

⁶⁰ Renaud, *Wechselr.* § 8, note 29; O. Wächter, *Wechselr. des deutschen Reichs*, § 9, note 25; Supreme Court at Stuttgart, 1st July 1852 (Seuffert, vi. No. 1); Supreme Court of Appeal at Lübeck 31st January 1857 (Seuffert, xiii. § 5); again, 26th February 1861 (Seuffert, xiv. § 108); Nürnberg, 30th December 1868 (Borchardt, p. 842); Imperial Court (iii.) 17th January 1882 (Seuffert, xxxviii. § 53 and Dec. Imperial Court (vi.) § 5, p. 25). “Prescription of bills is, like prescriptions generally, not a matter of the law of process, but a substantive ground for discharge of the obligation. The consequence is that it is to be regulated by the local law which governs the obligation generally.” The court draws from this proposition the inference, based on Savigny's theory of performance, which in our view is very debatable, that in the case of a domiciled bill the law of prescription in a question with the acceptor is to be supplied by the law of the place of payment.

the objection that the action, which ought properly to be open to him against all prior obligants, has become useless or incompetent against the drawer, by reason of prescription. But that is only a half measure, and illogical in its logicity: for it will frequently be the case that the motive for acquiring and for passing on the bill will be found⁶¹ to be the credit of some prior indorser, *e.g.* a bank, rather than the credit of the drawer, who may be quite unknown to the obligant farther on in the circle. Perhaps the better course would be to refuse all right of recourse on the objection of the person who is called to account, if the holder is not in a position to bring a similar action against all the prior obligants, but to apply this rule only in cases in which some blame can be imputed to him in the matter.

INTEREST IN RESPECT OF DELAY. RE-EXCHANGE. RE-DRAFTS OR CROSS-BILLS.

§ 309. By logical necessity it follows that the law of the place of payment should alone be held to regulate⁶² the rate of interest for delay, which the holder of the bill can demand from the acceptor and from all those who have guaranteed the payment. That the law of the place of payment must decide, follows from the consideration that it is at this place that the creditor is being kept out of his money (see *supra*, § 264). The opposite theory⁶³ adopted, for instance, by Fiore, § 353, rests on the consideration that each of the obligants concludes a bargain for himself which is to be implemented by him at his domicile, leaving out of view the fact that this bargain is simply a guarantee for the due performance of another obligation, viz. that of the drawee. It would better support this view to urge that the holder of a bill, by drawing a cross-bill or re-draft on the prior obligant, can at once supply himself with the money at the place of payment, or the place at which he himself, as liable in course, makes his payment. For, in this case, the true question would be a question of exchange as on bills drawn from the place in which the person claiming recourse is, upon the place in which the person liable in

⁶¹ See Fiore, § 360; Norsa, Rev. viii. pp. 466, 467. One cannot agree with Esperson, § 35 *ad fin.* that the right of action against a guarantor of the bill is subject to the law which regulates prescription in so far as the principal debtor is concerned: all the less can this be the case that in truth a completely independent obligation is undertaken by the new signature. Thöl, *Handelsrecht*, ii. § 144.

⁶² So Pardessus, § 1560; Esperson, § 42 (p. 75).

⁶³ Cf. Borchardt (art. 50 of the German statute according to a decree of the Commercial Court of Bremen in 1851). "The foreign debtor who, by his failure to take up the bill drawn upon his domicile, has allowed it to be protested, but who has not indorsed the bill further, in seeking recourse against the drawer domiciled in Germany can only avail himself of the rules established in art. 50 as to the cost of so doing: he cannot claim costs under the rules recognised at his own domicile." German statute, art. 52: "According to the provisions of arts. 50 and 51 (1) and (3), it is not incompetent, in a claim of recourse upon a foreign country, to compute the costs at any higher scale that may be permissible by the foreign law."

recourse is to be found. Such a determination on the question of interest, including too the expenses of brokerage or commission, as these are ascertained by the law of the person liable in recourse, makes the matter much simpler for the court in which the matter comes up for decision. It will be found to be quite natural that, in defiance of strict logic, the German statute, for instance, should propose to regulate the law on this matter, for all persons liable in recourse, who are found within its own territory, but should not interfere with questions of recourse against foreign localities.

The law of each obligant must determine whether or not it is competent to accumulate re-exchanges against him. It would, however, be going too far to hold that one of the subsidiary obligants *e.g.* must have intended to subject himself to this enlargement of his responsibility, which in certain circumstances may be serious, because the drawer is subject to it according to his law.

EXTRA-TERRITORIAL EFFECT OF LETTERS OF GRACE (*Moratorien*). THE FRENCH LAWS AND DECREES DURING THE WAR OF 1870-71.

§ 310. What are we to say of the obligation of foreign debtors in bills, when the law of the place of payment gives a period of grace (*moratorium*), with immediate operation upon current bills, to such debtors, and in particular to acceptors, the bills in which they are concerned being issued and in the circle?

This question gave rise to a considerable number of interesting writings,⁶⁴ on the occasion of the enactment by the French Government, during the war of 1870-71, of letters and decrees of grace applicable to commercial and negotiable securities and paper. These enactments either gave the debtors in bills a longer period for payment, or (for opinions differ on the effect of them) delayed the date of protestation, so that a protest could not be taken before the specified periods had run out. If we suppose, in accordance with an authoritative judgment of the Supreme Commercial Court of the German Bund, of 21st February 1871,⁶⁵ that these periods thus provided by French law are periods for payment, still there can be no doubt that they had no power to prolong the endurance of the liability of subsidiary obligants, drawers, or indorsers, who were not subject to the law of France.

That decision, which is perfectly sound, proceeds thus: "The bill provides that it shall fall due at a specified time. The obligation is that

⁶⁴ See Goldschmidt's careful review of the literature of the subject in his treatise on commercial law, vol. xvii. pp. 294-309, and xviii. pp. 625-643. Specially worthy of perusal, too, are Norsa's *Sul conflitto internazionale delle leggi cambiarie*, Milan 1871, and Rev. viii. p. 470. Henir. Jaques, "*Die durch die Französische Moratorien Verfügungen hervorgerufenen Regressfragen*," Wien 1872. Fick, "*Ueber internationales Wechselr.*," Elberfeld 1872.

⁶⁵ *Entsch.* i. p. 286; also reported by Fick, p. 103.

payment shall be made at that very period. The guarantee undertaken by the other obligants is for a day certain; it binds them to see that payment is made upon the day fixed in the bill. Neither drawer nor indorser undertakes any obligation as to payment after this time. They are not responsible for possible changes in the position of the acceptor after the bill is due." A just inference is drawn from the mutual independence of each obligation in the bill as regards legal validity, to the effect that, as time granted voluntarily by some indorsers to an acceptor does not affect other indorsers, so the compulsory prorogation prescribed by the statute will not affect any one save the indorsers who are subject to that statute.⁶⁶

The question was not, of course, one as to the usual days of grace or periods for protestation, which are beyond all doubt to be ruled by the law of the place of payment.⁶⁷ The extent of the periods allowed by the French Government put them on quite another footing.⁶⁸ In the ordinary case the periods, which are to be ruled by the law of the place of payment, exist, as Jaques (p. 17) appositely remarks, merely to provide a convenient means of disposing of formal delays and impediments. The line between these cases and a postponement of the time at which a bill shall fall due obtrudes itself beyond all possibility of mistake, when the purpose is not merely to smooth away formal difficulties, but really to give the acceptor time for payment. It is merely playing with words to say that days of grace may just as well last for seven or eleven months as for two to ten days.⁶⁹ If, lastly, we say that the French measures import a prohibition

⁶⁶ See Norsa, *Conflitto*, p. 111; Jaques, p. 19. The judgment of the Commercial Court of Zürich of 22nd May 1871 (especially p. 121) stands on the same footing as that of the court of the German Bund. Munzinger, Niggeler, Ladenburg, Cambon, van Raalte, etc., have pronounced opinions substantially different from the view taken by that court; on the other hand, Kist, Rolin-Jacquemyns, Buscemi, etc., agree with it.

⁶⁷ Cf. O. Wächter, *Wechselr.* § 9, note 14.

⁶⁸ If the question had really been merely one as to days of grace, of course foreign parties to bills must have recognised, in so far as their obligation in recourse were concerned, any change of the law taking place at the spot where payment was to be made in a matter of this kind, just as they must have recognised the effect of a holiday which had been proclaimed at the place of payment for the first time, or had been introduced on account of some extraordinary event. (See in this sense the judgment of the Court of Zürich, reported by Fick, p. 118.) Fick himself takes a different view.

⁶⁹ See Fick, p. 88; Muheim, p. 175. On the other hand, Sup. Ct. of Vienna, and the Sup. Ct. of Austria (see judgments of 28th May 1872, Seuffert, xxvii. No. 168) have recognised the 86th article of the German statute, which makes the period for protest depend on the law of the place of payment, as applicable. See Goldschmidt, xviii. pp. 637, 638. If the writer on the French statute of 13th August 1870 deduced the universal validity of such a *moratorium* from no other consideration than that the case discloses an instance of "*force majeure*," which may, in accordance with public law, be pleaded before all foreign courts, that is a proposition which is not in fact correct, out of harmony with the law of bills as it exists in many States, and a proposition which cannot be deduced from public law. Cf. Asser-Rivier, § 107 (p. 212, note 4). Clunet (J. viii. p. 547) draws this further inference from the fact that by the French law of 10th March 1871 interest would be due "*depuis le jour de l'échéance inscrite au titre*," that the only point dealt with was a prolongation of the time for taking protests. But the French law, however far reaching it was, could not, besides giving the debtors time, also make them a present of the interest.

of protest, the question is reduced to this shape, viz.: Does the obligation on the bill continue to subsist, if protestation, which in other circumstances is necessary for its continued subsistence, is made impossible by a *vis major*, which is the character of the prohibition by a foreign government? The decisive consideration, in so far at least as obligations undertaken under authority of the German statute are concerned, is, in a sound view, that a protest is not so much an obligation incumbent on the creditor in the bill, but rather a condition of his right. If, then, accident or *vis major* makes it impossible for this condition to come into being, the loss falls, not upon the debtor, but upon the person whose right is qualified by this condition.⁷⁰ Of course, legislation may, by a fiction, hold that the condition has been satisfied, *i.e.* that the protest was taken in due time, and in that case the holder has his right of recourse. He has this right, however, only as against an obligant in the bill, by whose own law an obligant's obligation continues even where protests are hindered or forbidden by a *vis major*.⁷¹ he has no such right as against obligants whose own law proceeds on the opposite footing.⁷² Now, since the German statute does not depart from its requirement of a protest, even in the case of a *vis major*, the decision of the court of the German Bund can be upheld, even if we hold that the effect of the French measures or any similar measures was to forbid protests being taken; it rests, of course, on stronger ground still, if we hold that the effect of these measures was merely to refuse effect in certain respects to the protest as against the acceptor, and that in spite of them it was still possible to take protests in France against German obligants. There is no doubt that by the laws of France, Italy, England, and the United States,⁷³ the decision must be against subsidiary obligants belonging to these countries. For in these countries, where a party has omitted to protest, the excuse of *vis major* is admitted, and this is the explanation of the decisions of the higher courts in these countries, with reference to the operation of these French measures,⁷⁴ although in these decisions there comes to the front the view, which in our opinion is

⁷⁰ See Jaques, p. 12; Story, § 360; and Lyon-Caen et Renault, *Dr. c. i.* § 1320.

⁷¹ The German Sup. Ct. of Commerce recognised this in a case from Elsass, a case, therefore, falling at that date under French law, Dec. (i.) 19th September 1873, xi. p. 74.

⁷² The principle enunciated by the Sup. Ct. of Commerce at Leipsic, that no effect can be given to any consideration of a prohibition by a *vis major* in a case where formalities or periods of time have been neglected, was subsequently expressly sanctioned by legislation in art. 813 of the Swiss Code for Obligations. See on the practice in Germany, Borchardt on art. 41 of the German statute.

⁷³ See Ct. of Cass. at Turin, 20th May 1879 (J. viii. p. 543); the judgments cited by Norsa (Rev. viii. p. 473); C. de Bruxelles, 29th April 1872; Ghent, 25th May 1873 (J. i. 209 and 213); Lyon-Caen et Renault, *Dr. c. i.* § 1321. As regards English law, see Foote, p. 434.

⁷⁴ In principle the furthest deviations from the decisions of the Sup. Comm. Ct. of Germany are to be found in the judgment of the Austrian courts already cited, with whose arguments I could in no case concur, in the decision of the Sup. Ct. of Sweden of 14th May 1873 (J. i. p. 149), reversing the decision of the inferior court, and in the cases of Rouquette v. Overmann, 1875 [L.R. 10, 2 B. 525, following Hirschfeld v. Smith, 1866, L.R. 1, C.P. 340], and of the English consular judge at Constantinople on 13th June 1872 (Goldschmidt, *Zeitschr.* xviii. pp. 642, 626).

unsound, that the matter dealt with in the French measures was a mere prolongation of the period of protest in the true sense of that expression.

Norsa has presented in an excellent shape the result of this conflict upon the whole, but we must decline to go with him to the full extent to which he sets up the law of the place of issue as regulative of conflicts like this. This view is presented by Norsa himself, and by the proposal of the Institute of International Law (Thesis vi.) adopted on his motion, viz.:—

*“L'excuse tirée des cas fortuits ou de force majeure n'est admise que si elle est reconnue par la loi du lieu d'émission du titre”*⁷⁵

If that is intended to mean that an appeal to the veto by the Supreme Power is to be admitted in every case, if only the law of the place of issue allows such an appeal, then a responsibility is laid upon the indorser, who has interposed under a different law from that of the place of issue, which is not in conformity with the other principles of the international law of bills, since the leading principle is that each obligation as regards its binding force is independent of the other obligations on the bill. But, if the meaning is intended to be—and the words read literally would seem to bear this meaning—that the holder can only appeal to that veto or impediment in a question with the indorser, if the law of the place of issue, and the law of the indorser in question both allow this, then the fact is overlooked that the person who takes the bill, in acquiring it, often really has his eye on an intermediate indorsement, and a discharge is implied in favour of that person which is logically inadmissible in face of the principle of the mutual independence of the different obligations.

PROCEDURE AND EXECUTION IN THE MATTER OF BILLS.

§ 311. The competency of a special kind of procedure upon a bill is primarily dependent on whether the obligation, on which the suit arises, is to be viewed as an obligation of the nature of a bill by the law of the place where it is undertaken. It is not also necessary, in a sound view, that it should satisfy the form of an obligation by bill as that is understood by the law of the court. But, in so far as matters of proof are concerned, the *lex fori* must also be satisfied. A special form of personal diligence, as a means of doing execution upon the bill, is only permissible, if it is recognised by the law of the place where the obligation is undertaken,⁷⁶ and also by the *lex fori*, i.e. by the law of the court in which the

⁷⁵ It is, also, not quite true to say with Norsa (viii. p. 475) that the discrepancy between the judgments was rested not so much on a different view of principles, as on a different estimate of the actual circumstances and the provisions of the French legislation which was under consideration.

⁷⁶ The Appeal Court at Genoa on 23rd March 1874 (Norsa, Rev. viii. p. 438) held, that if there was no such thing as personal diligence on bills known at the place where the bill issued, it could never be used in any other country. But this cannot be said to be free from doubt.

process of execution depends.⁷⁷ For, on the one hand, in cases in which personal diligence is only competent in exceptional circumstances, and obligations on bills are regarded as involving such circumstances, that diligence is, as we see, a result of the obligation; and on the other hand, again, the forms of execution can never be carried beyond the absolute lines laid down by the *lex fori*. But as in most States personal diligence on bills is no longer competent, the question can hardly be regarded as of any practical importance.⁷⁸

OBLIGATIONS BY BILL, DATED FROM A PLACE OTHER THAN THE DOMICILE OF THE OBLIGANT.

§ 312. Up to this point we have for simplicity's sake generally assumed that the place where a bill is issued is also the domicile of the obligant. What of the law, if a man subscribes a bill at some other place? So far as form is concerned, the decision, thanks to the rule "*locus regit actum*," is, as we have seen, easy. The person who takes the bill can, in such a case, run no risk; he has rather a double security, since it is possible for him to appeal to the law of the obligant's domicile as well as to that of the place of the obligation, if the requirements of this latter law are not satisfied. But the case is different as regards the substantive effects of the

⁷⁷ A judgment of the Supreme Court at Berlin, of 11th May 1858 (Striethorst, N.F. 2nd year, vol. i. p. 91, says: "Articles 84-86 of the D.W.O. do not intend to regulate the extent of the material consequences resulting from indorsation by foreign law, but merely the formalities of the bill. The debtor must therefore submit to the ordinary laws of process as to bills which obtain at the place where the court is situated." Another judgment of the Supreme Court at Berlin, 10th July 1860 (Seuffert, 14, pp. 282, 283), says: "The special provision of the 2nd article of the D.W.O.—viz. that the debtor in a bill must answer for the fulfilment of his obligations with his person and his property—is, as the place of this article in the D.W.O. shows, a part of the doctrine and usages of the law of bills, and not merely of the rules of process. Any one indorsing a bill in our territory, or drawing one, if he does not belong to the excepted classes, makes himself liable by this declaration of his will to the diligence appropriate to bills. But if one does this in a country where it has no such personal effect, he cannot be touched by legal consequences which are only attached to the act by a law that has no application to him. It does not follow that diligence appropriate to bills is competent because summary procedure is. . . . The question, to what extent the defender—putting out of view the peculiar diligence appropriate to his legal category—can be rendered liable to ordinary diligence for debt, has nothing to do with the law of bills, and cannot, therefore, in this case be decided by American law, but is rather dependent upon the law which deals with execution generally." Personal diligence on bill obligations is now unknown in the German Empire.

⁷⁸ Decrees of discharge of bills that have been lost, or obligations to pay in spite of the fact that the person alleging himself to have right to the bill is not in a position to produce it and deliver it up, are matters that create no doubt in international relations. In questions with the acceptor, they can only come into play according to the law which regulates his obligation. See Renaud, *Wechselr.* § 100, notes 22, 23; Borchardt, art. 73. Art. 98 of the proposal by the Institute of International Law (Ann. viii. p. 118). The competency of the court and of the procedure are also settled by the law which regulates the acceptance. Art. 98 of the proposal of the Institute says, not quite correctly: "*Les formes et vérés d'action sont déterminées par la loi du lieu du paiement de la lettre de change.*"

obligation, and the conditions of recourse founded upon it. A conflict may well arise, and the holder of a bill may be misled, if we shall allow the obligant to appeal to the law of his domicile, as, for instance, if the *lex loci actus* does not require a special protest in the case of recourse against a subsidiary obligant, whereas the law of the domicile of the person against whom recourse is taken in the particular case does. Asser (§ 105) is quite decided in holding that the *lex loci actus* can alone decide; but Esperson (§ 21), in accord with the general rule given by the 9th prefatory article of the Italian Code, proposes that the general rule shall apply in this matter.⁷⁹ The obligation in a bill is undertaken, as Asser remarks, not merely with reference to one particular individual and his assignees, but with reference to any lawful holder of the bill. That is quite a just remark in the case of bills payable to order, although it does not apply to bills directed only to a particular person—which are not so familiar in practice—and it is accordingly quite just to say, with regard to the former class of bills, that it is of no consequence to what country the first holder of them may belong. But, considering that the character of an obligation by bill is essentially unilateral, no such questions need be raised. It is in our view immaterial whether the holder of a bill belongs to the same country as the drawer. Even if the acceptor belonged to another country still, in accordance with the general principles which we have already laid down, the law of the drawer's domicile must give the rule for determining the substance of his obligation. This result is by no means so unsatisfactory as it may seem to be at the first glance. Or is it to be held, if a person on a journey draws a bill at A, on behalf of his firm, established in B, with a statement that it is drawn on behalf of that firm, that the bill as regards its material effect is subject to the law of A, and not to the law of B?⁸⁰ If we leave the matter simply to be determined by the general principles of the law of obligations, which we have already laid down, those cases in which the law that is to be applied is the personal law of the obligant, and not the law of a place in which he is found by accident for a temporary purpose, will be ascertained without difficulty. Again, as we must assume, in cases of doubt, that the obligant in a bill has intended to undertake the material obligations of the *lex loci actus*, and to hold that this is the law that shall regulate his obligation, so, too, on the other hand, the trust that is necessarily reposed in the *littera scripta* of the bill demands that all posterior obligants, who know nothing of the circumstances under which the obligation is undertaken, should regard the *lex loci actus* as regulative, and should regulate their conduct, *e.g.* as regards the necessity of a protest, according to it. Thus, so soon as the

⁷⁹ *I.e.* that the decision shall be by the law of the domicile, if both parties belong to the same country.

⁸⁰ See the decision of the Court of Massachusetts to the opposite effect in Story, § 319, and Fiore, § 354. Story asks hesitatingly whether there is any distinction to be taken between the acceptance of a firm and that of an individual.

bill has been endorsed, we come in the vast majority of cases simply to the application of the *lex loci actus*, but without having found it necessary to attribute to that rule any exceptional meaning which it cannot be shown to have in positive law.⁸¹

We must, however, give a still wider effect to the principle of *bona fides*. One who acquires a bill in the circle may very well be unable to find out, in many cases, whether the place at which the bill bears to have been issued is really the place where it was issued. In favour of such a person, and in favour of all who acquired the bill from him, it must be assumed to have been so.⁸²

THE FUNDS IN THE HANDS OF THE DRAWEE.

§ 313. We remarked in our introductory observations that the obligation under the bill is to be strictly distinguished from the other obligations of a civil nature which may exist among the parties to it. This distinction is less completely carried out in the law of bills in France, and in the countries in which French law substantially prevails, than in countries where English law rules, and in those which have attached themselves to the principles of the German statute.

The French law of bills (Code de Comm. § 115) [like the law of Scotland, see p. 691] establishes a connection between the obligation constituted by the bill and the fund, which must necessarily exist in the hands of the drawee for behoof of the drawer. The bill is held to be an assignation of this fund, even before acceptance takes place. Very important practical differences between the two sets of systems are based on this distinction, which found special expression at the Congress held at Antwerp,⁸³ although it may fairly be said that the distinction is a part of the law of bankruptcy rather than of the law of bills. Up to this time this question appears not to have given rise to many disputes in international law. The rule must be that the obligation of the acceptor shall be determined exclusively by his own law, but that there can be no assignation of the cover, *i.e.* of the debt of the drawee to the drawer, unless the law of the drawer as well as that of the drawee holds the bill to be an assignation of it.⁸⁴

⁸¹ That one should be tied down to a consideration of the nationality of the other party to the bill, as is provided by § 85 of the German statute, by the Swiss law, and by various other systems (see O. Wächter, *Wechselr.* § 9, note 11), seems impracticable, and out of keeping with the truth of the facts. What is to be the result if some mistake is made as to his nationality? Again, if, for instance, two Switzers have lived for a long time abroad, and carried on business there, and the one gives a bill to the other, would it be right in such a case to apply the Swiss law of bills and to exclude the *lex loci actus*?

⁸² See Wharton, § 457.

⁸³ See *Actes du Congrès*, i. p. 369, and Speiser, *Zeitschrift für Handelsrecht*, vol. xxxii. p. 120.

⁸⁴ The case put by Speiser, at p. 124, should have been decided on this ground. The practical result of the French system is to give a kind of preference in the bankruptcy of the drawee, and at the same time to prevent the mandate given to the drawee in the bill to pay being revocable. This possibility of revocation, which may be put in force by the trustee of the drawer, who has fallen bankrupt, is certainly, as Speiser notices, a defect in the German system, which in itself is sounder.

PROOF OF FOREIGN LAW IN PROCESSES UPON BILLS.

§ 314. The general principles already laid down (pp. 104, 105) will apply to questions as to the proof of foreign law.⁸⁵ The requirement of proof that can be instantly verified,⁸⁶ liquid proof, is as imperative in establishing the fact as to the foreign law, as it is for the grounds upon which the suit or the defence is founded. But in matters connected with bills, just as in other suits, the judge may, if there is nothing to the contrary, proceed upon the assumption that the foreign law is identical with his own.⁸⁷

AN UNIFORM INTERNATIONAL LAW OF BILLS?

§ 315. The divergences of the laws regulating bills in different States are, as we see from what has already been said, apt to raise unpleasant difficulties in international dealings. The peculiar independence of the various obligations on a bill, and on the other hand their conjunction one with the other, make it difficult to find a solution of the conflicts that arise, which shall at once satisfy the practical necessities of life and the claims of justice. Indeed, in many cases such a solution is impossible, while in the law of bills above all other departments of law it is desirable that the public should have a full measure of security, and full information as to the rules that are to be observed by them, while at the same time the differences between the laws of the different countries rest upon no theories of morality, but on considerations of expediency. There is therefore in the sphere of the law of bills a specially good prospect of working out a scheme for securing substantial uniformity in the legislation of civilised States; and, after different authorities had expressed themselves to this effect, the Institute of International Law in 1885 propounded the scheme of a general system of bill law,⁸⁸ resting on a scheme of Norsa,⁸⁹ an example which was immediately followed by the Antwerp Congress.⁹⁰ It may, however, be a long time still before a general adoption of a uniform system of law on the

⁸⁵ See Pöhls, in Asher's *Rechtsfällen*, p. 37.

⁸⁶ See judgment of the Supreme Court of Appeal at Lübeck, on 31st May 1858 (*Archiv. für D. Wechselrecht*, 7, p. 374). The Supreme Court at Rostock did not require instant proof of foreign law where the document founded upon complies with the provisions of the D.W.O. (1853, Borchardt, p. 239; cf., too, Hoffmann, pp. 597, 598). The tribunal at Darmstadt, on the other hand, rightly required a summary proof where in the document the word "bill" (*wechsel*) was wanting (*Archiv. für Praktische Rechtswissenschaft von Schäffner*, 1852, part 2, p. 64). In my opinion, it is at variance with the principles of action upon bills to hold, with Hoffmann, that in such cases a contentious proof of the foreign law will be allowed as a preliminary. The document must appear to be a bill, otherwise the defender cannot be called upon to answer in the form of action appropriate to bills, or to allow any preliminary enquiry in the ordinary form. Hoffmann's view was not recognised in either of the two latter cases cited.

⁸⁷ See, Borchardt, art. 85 of the German statute.

⁸⁸ Cf. *Annuaire*, viii. p. 97.

⁸⁹ Cf. *Annuaire*, vii. p. 49.

⁹⁰ *Actes du Congrès*, p. 431.

subject takes place. It may be, too, that this union for the purposes of the law of bills will not be extended so as to cover the whole ground, but will be limited to certain important principles which are of the highest practical value.⁹¹ Again, it is always possible, as we see from the letters of grace published in France during the war of 1870-1871, that the uniform principles of the law may for a time, owing to extraordinary circumstances, be suspended in this country or in that. Still further, any legislative regulation of values in a country may produce a certain indirect influence on the law of bills, and lastly, a divergent practice may in many respects amount to a divergent law so far as practical results are concerned. For these reasons, and there may be others, in spite of the possibility of reaching an uniformity in the law of bills all over the civilised world, there will still be a certain importance in establishing the general principles on which in international questions the law of bills is to be treated.

OTHER DOCUMENTS PAYABLE TO ORDER. BARGAINS PRELIMINARY TO BILLS.

§ 316. It needs no special exposition to show that documents of any other kind payable to order are in international law to be dealt with either on the analogy of bills, or on the analogy of assignments of other debts constituted by writing, or on the analogy of bonds payable to bearer; in many cases one may have to apply the one set of rules to a certain extent, and the other set in other respects. But it is not difficult to make this application, since the rules of law are either less strict than they are in the domain of the law of bills, or bear more or less resemblance to the provisions of that law. On the other hand, there is a very large variety of paper of this description, and it is not unlikely that commerce will go on to discover more. We need not, therefore, spend any time on an enquiry into these documents. The proposals made by the Institute of International Law and the Congress of Antwerp design to place *billets à ordre* and bills, in so far as the conflict of legal systems is concerned, under the regulation of the same principles.⁹²

A bargain, the object of which is that an obligation by bill shall be incurred, *e.g.* that a bill drawn by the other party to the bargain shall be accepted, must simply be tested by the general principles of the law of obligations. In this matter the law of England has, as we think rightly, distinctly repudiated the doctrine that the transaction should be regulated solely by the law of the place of payment, in so far as this is a different place from that in which the obligation was undertaken.⁹³

⁹¹ Speiser, p. 123, expresses himself to this effect. As Speiser shows, the difficulties of a completely uniform law of bills are considerable, and it may be that the jurisprudence of this or that country might in no small degree be damaged by such a measure.

⁹² *Annuaire*, viii. p. 121; *Actes du Congrès*, pp. 431 and 438.

⁹³ Foote, pp. 443, 444.

NOTE 44 ON §§ 290-316. LAW OF BILLS.

[The laws of England and Scotland as to bills are now for the most part expressed in the enactments of 45 and 46 Vict. c. 61 (Bills of Exchange Act, 1882). The principal sections of that Act bearing on international questions are these, viz.:—

"§ 22. (1) Capacity to incur liability as a party to a bill is coextensive with capacity to contract.

"Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

"(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

"§ 53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

"(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

"§ 57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows . . . (2) in the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.

"(3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

"§ 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

"(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made:

"Provided that—

"(a) Where a bill is issued out of the United Kingdom, it is not

invalid by reason only that it is not stamped in accordance with the law of the place of issue :

"(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

"(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

"Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

"(3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

"(4) Where a bill is drawn out of, but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

"(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

It will be observed that the 72nd section does not expressly deal with the question of capacity, and it can hardly be said to be implied in the word "interpretation" in § 72 (2). If that be so, the question of capacity is left to be determined by § 22 (1), which provides that capacity to incur liability as a party to a bill shall be held to be "coextensive with capacity to contract." This seems to mean that the English and Scottish courts will not recognise any special incapacities enacted by foreign systems with reference to bill obligations only, but will hold that a person who may enter into valid contracts of other descriptions will not be protected by any exceptional measures for his benefit, allowed to him by his personal law on account of some special, *e.g.* family relation.

This will make the law that is regulative of a person's capacity generally the measure of his capacity for bill contracts also. In Scotland the tendency seems to be to take the law of the place of contract as the rule, while the law of England rather inclines to that of the domicile. The exigencies of commerce, on which so much of the law of bills proceeds, will tend to favour the law of the place of the contract. See *supra*, p. 310.

The enactments of the statute have not yet been illustrated by cases, but in so far as they conflict with the principles formerly established by decisions, the enactments must, of course, prevail. By the old law in England, the *lex loci solutionis* regulated the import and extent of the

obligation itself, the necessity or sufficiency of a demand for payment or of a protest, and the amount of interest in case of failure to pay. The validity of an indorsement to transfer the obligation in the bill was determined by the law of the place where the indorsement took place. The drawer and indorsers were regarded as sureties for the payment of the debt contained in the bill, according to the conditions and at the time fixed by the law of the place of payment.

In Scotland, on the other hand, it was held that the place of payment would determine the law that should regulate the bill, and that, for example, a foreigner drawing upon a Scot, the bill to be payable in Scotland, had entered upon a contract, the validity and import of which must be determined by the law of the place of payment—viz. Scotland, and that although no acceptance was ever given in Scotland. In the same way, if the question concerned the validity of an indorsation, the law of the place of payment was appealed to; nor was it merely the validity of the contract constituted by drawing or indorsation that was so regulated, but all that related to the nature and essence of the contract contained in the bill or indorsations thereof. The law of Scotland viewed the drawing, acceptance, and indorsation, all as dealing with one and the same contract—viz. the assignation of the fund lying in the hands of the drawee at the place of payment, and all therefore as regulated by the law of the place of payment, thus running counter to the doctrine of the text, and adopting that of Story, § 317.

Since the date of the statute a case has arisen (*re* Marseilles Extension Ry. and Land Co. 1885, L.R. 30, Ch. D. 598) which might have given rise to discussion as to the extent of the application of § 72 (1) (b), if the statute had been applicable. The bills in question were, however, older than the statute. In that case a bill was drawn in the French language in France, but in English form, referring to English currency, and upon an English acceptor, payable in England. It was endorsed in France, by an indorsement bad as a French indorsation, but valid in England. The question was, could the indorsee recover from the acceptor, who pleaded that the indorsee had no good title? The court held that the bill was an English bill from the first, and that the indorsation, being good by the law of England, was good against the acceptor. It is thought that the decision would be the same under the statute, since § 72 (b) should in fairness be read as coextensive with the main enactment in (1), and that what is true of the bill itself, should be true of the supervening contracts. This view seems to be borne out by the proviso attached to (2), with reference to the "interpretation" of the indorsement of an inland bill in a foreign country.

The effect of (2) of § 72 seems to be, so far as bill contracts made in the United Kingdom are concerned, to make the place of payment regulative of the respective obligations of drawer, indorser, acceptor and acceptor *supra* protest. This is plainly so as regards the two latter, the acceptor and the acceptor *supra* protest. As regards the drawer and indorser, they must, it is thought, within the United Kingdom either be looked upon as

guaranteeing payment in due course, according to the law of the place of performance—the interpretation which the law of England puts upon their contract—or else their liability must be regulated by that same law, the law of the place of payment, on the footing that all the supervening contracts, like the original drawing of the bill, are bound up with the assignation of the fund lying in the hands of the drawee at the place of payment. This is the law of Scotland, where it is held that the main obligation, contained in the assignation by the drawer, will be transferable all the world over with the effects which the law of the debt assigned, the *lex solutionis*, attributes to it. (See, as to the law of England, Westlake, § 230; as to the law of Scotland, Robertson v. Burdekin, 1843, Ct. of Sess. Repts. 2nd ser. vi. p. 17, and Stewart v. Gelot, 1871, Ct. of Sess. Repts. 3rd ser. ix. p. 1057.) The distinction between the law of England and Scotland, the latter of which agrees with that of France, is maintained by § 53 of the statute.

But Mr Westlake goes too far when he applies the English rule beyond the United Kingdom, and states that in his opinion the law of the place of payment will always give the rule for the whole series of bill contracts, since, as he argues, mercantile usage will always hold the obligants, other than the drawee, to be sureties for the due performance of his (the drawee's) obligation, the result being to introduce the law of the place of payment to determine the import of the contract. We have seen, on the contrary, that the author holds the law of each separate contract to determine its import, and this is probably the meaning of the English statute, the word "interpretation" being read as including the force and extent of the material obligation. All that is said in the text as to these subsidiary obligations will now, therefore, be applicable to the law of England.

Mr Westlake raises an important question on (3) of § 72. He holds that the operation of the section must be restricted to the case of the last holder, and cannot be extended to the case of an indorser who has been made liable and seeks recourse against a prior indorser, or the drawer. The notice in that case, he holds, in accordance with the case of Horne v. Rouquette (1878, L. R. 3, Q. B. D. 514), must be in conformity with the law that rules the prior indorsement or the drawing, *i.e.* the contract which the prior obligant has made with the person who seeks recourse. But, in the first place, the language of the section is not limited in the way suggested, and it seems an exaggeration to say, as Mr Westlake says, that the extension of the enactment to the cases of all holders is contrary to principle, for this is the doctrine adopted by the author, and was the doctrine of law in Scotland before the passing of the statute, since all incidents of the original contract—and the necessity of presentation, of a protest, and of notice of dishonour, as well as the sufficiency of these when made, are such incidents (Story, § 360)—were regulated in the law of Scotland by the law of the place of payment (see cases of Robertson and Stewart, quoted *supra*). The conclusion which we reach is that here again the statute has adopted the theory sanctioned in the text.

In the case of *Rouquette v. Overmann* (1875, L. R. 10, Q. B. 525), the effect of the French legislation of 1870-1871 upon the obligations of English drawers and indorsers of bills payable in France was considered, and it was held that, as the law of the place of payment was regulative of their obligations—the common law of England before the statute—their liability was extended by the force of the French laws up to the period of indulgence allowed by them. Whether this decision would now be repeated, since § 72 (2) of the statute has become law, depends on whether Mr Westlake's reading of that enactment or our reading is sound. In our opinion the statute would not have the effect of extending the obligation of a foreign drawer or indorser.

Questions of prescription, compensation, or set-off, and the like, being by the law of England and that of Scotland extrinsic to the contract contained in the bill, may subsist to different effects between the holder and the drawer, acceptor or cash indorser, according to the provisions of the *lex fori* of him against whom the holder takes recourse. This doctrine of the common law is not touched by the provisions of the statute.

We may supplement the text by citation of some authorities in foreign courts on points dealt with by the author. As regards matters of form, the *lex loci actus* is generally recognised as regulative; thus a blank endorsement, or an undated endorsement, or an endorsement that does not bear to be "for value received," is good if the law of the place where it was made does not demand these conditions, and must be recognised even in a country where they are required, the place of payment being in the latter country—has been decided by the Tribunal Civil de Marseilles (*Domestini v. Icaramanga & Cie.*, 1876, J. iv. 425); the Court of Paris (29th March 1836; *Sirey*, 1836, Q. 457; and again *Cachal v. V. Tromp*, 1884, J. xi. 183); and the Court of Bordeaux (*Morgan v. Lefargue*, 1880, J. viii. 155). The *Deutsche Wechselordnung*, § 56, as we have seen, and the Code of Commerce of Switzerland, § 437, expressly make this provision.

It may be noted that blank endorsement is recognised in England, the United States, Belgium, Germany, Portugal, Hungary, Russia, Denmark, and Austria.

The doctrine that the law which should regulate protests is that of the place of payment, receives support from decisions in France and in Russia, which reject the doctrine of the text; the Court of Paris (*Brocheton v. Aron et Cie.* 1875, J. iii. 361) has held that the validity of a protest must be determined by the *lex solutionis*; and the commercial tribunal of St Petersburg (*Gibbs v. Sewastianoff*, 1875, J. v. 297), laid down that a bill must be protested within the time and according to the forms prescribed by the law of the place of payment.

The French courts will not entertain action for the contents of a bill accepted by a foreigner and payable to a foreigner in a foreign country (*Laurie v. Lacy O'Brien*, C. de Paris, 1875, J. iii. 104); nor does the fact that the bill was drawn in Paris confer jurisdiction upon them, if it is payable abroad in foreign money, and the dispute arises between two

foreigners; they will not exercise jurisdiction although the transaction of trade, which gave the bill its origin, took place in Paris, and there is an assignation of all rights in and to the bill to a French subject (*Ottet v. Vereken*, C. de Paris, 1879, J. vi. 547). The unwillingness of French courts to permit foreigners to conduct suits before them is noticed at length *infra*.

VI. MARITIME LAW.¹

RECOGNITION OF THE GENERAL PRINCIPLES OF PRIVATE INTERNATIONAL LAW IN MARITIME LAW. AN UNIVERSAL MARITIME LAW. *Lex fori* IN MARITIME LAW.

§ 317. In the domain of maritime law, as in other branches of law, the idea is being more and more recognised that we have to do, not with principles universally recognised,² which merely took a different stamp in the laws and practice of different countries, but with rules of law which, like other legal institutes, were the product of theories rooted in national characteristics, and in no small measure resulted from the legislations of the different States, setting to work upon the subject with an unfettered discretion and in pursuit of practical advantages, the conception of which varied from time to time. The recognition of this truth is of modern origin, dating from the end of last century.

At the same time, the conditions of sea-voyages have changed. On the one hand, as ships have become larger and more costly, their individuality, the fact that they have a character which is different from other assets of moveable estate, has become more prominent; while, on the other hand, it seems impossible to hold them to be uncontrolled by any of the rules that prevail in international law for traffic in moveables. Then, again, every ship will frequently take in cargo at widely distant ports: cargo vessels often trade between the most distant and dissimilar countries, and are only advised during their voyage of their destination, the terminus of their journey.³ Thus the possibility of conflict between different

¹ Efforts for the establishment of an universal maritime law among civilised States are to some extent justified, and nowadays are making themselves distinctly felt. It is no part of our task to discuss them. But see the resolution of the Institute of Public Law (Turin 1882, Ann. vi. p. 91): "*Les matières à l'égard desquelles l'uniformité est surtout désirable, sont: les lettres de change et autres papiers négociables le contrat de transport et les principales parties du droit maritime.*" See, too, Sacerdote's report given at Munich, 1883 (Ann. vii. p. 108), and the "*projet de loi uniforme sur les assurances maritimes*, which was adopted at Brussels in 1885 (Ann. viii. p. 125).

² The older English jurisprudence is dominated by the idea that the law maritime is an uniform universal law. Cf. Phillimore, § 815. For instance, even in modern cases, the old rules as to collisions at sea, and not the new statutes, have been applied, although the vessels were of different nationalities. But see Westlake, p. 176: "If the idea [of a general maritime law] were admitted, the actual determination of such a law would encounter the difficulty which theologians have found in applying the maxim '*quod semper, quod ubique, quod ab omnibus.*'"

³ On these changes, see the clever remarks of De Courcey, especially i. p. 71, ii. p. 127.

systems of law has become much greater and much more serious. In former times the law of the judge who had to determine the case might be applied in most cases without much injustice, and in many other cases the law of the port to which the ship was bound might be adopted for all who had any interest in the matter, because it was just in the courts of that port that there was vested, in questions of average adjustment, a kind of voluntary or prorogated jurisdiction. But nowadays a strong opposition to general rules of that kind has grown up, and the strongest and undoubtedly successful opposition is against a general application of the *lex fori*. There is all the more foundation for this opposition, inasmuch as modern codes of procedure provide that their new jurisdictions—with as many arms as a polypus, which have too often been planned so as to give an unfair advantage to the native pursuer, and which overlook the natural conditions of the matter in dispute—shall be applied in maritime cases as in others. This is an error, from which no doubt the practice of England and that of the United States have up to this time kept themselves free. The German Code of Procedure, however, to take one instance, imitating the legislation of France to a certain extent, has certainly fallen into it.⁴ Smekens, in the Commercial Congress at Antwerp in 1885,⁵ declared, as the result of his long experience as president of the Court of Commerce there, that he deplored the application of the *lex fori* to real rights in and over ships, to which he had been so often driven by the law recognised up to that time; and this rule was unanimously adopted,⁶ viz. :—

“En cas de conflits des lois maritimes, il ne faut pas appliquer une règle générale, mais distinguer suivant les cas.”

Thus the methods of scientific legal observation and enquiry, which in other departments of international law are recognised as sound, and have been sanctioned by Asser, Lyon-Caen, and now by the practice of the English and American courts, are approved of for the sphere of maritime law.⁷ The old point of view is rejected, and described as beaten out of the field. It is, however, strange enough that the most recent work in German on maritime law by R. Wagner adopts the old point of view,⁸ for he proposes that the *lex fori*, in favour of which he sets up a presumption that in some measure is difficult to rebut,⁹

⁴ The German Code of Procedure contains a perfect motley of sample jurisdictions, which are a serious matter within Germany, but in international matters are useless and dangerous. As regards France, see § 14 of the Code Civil, so often criticised.

⁵ *Actes du Congrès*, p. 106.

⁶ *Actes*, p. 103.

⁷ See Foote, pp. 367, 368, of 1st Edn. “The attempt to treat English maritime law as something anomalous and distinct in itself appears illogical and unnecessary.” See also pp. 412, 413, of 2nd Edn.

⁸ Pp. 131-135.

⁹ It is true that it is not every and any judge, who may accidentally be called upon to judge in a dispute upon maritime matters, who is to apply his own law, but only such a judge as “the decision of the question should fall to as a necessary result of our theory of maritime intercourse.” The competency of courts, however, is determined, not by the law of nature, nor by

shall only in exceptional cases be excluded by any other system of law.¹⁰

It is not unusual to find this last view of the matter [the *lex fori*] defended on the ground of its practical convenience. The only claim it has to such a character, however, is that it is convenient for the courts. Alfred de Courcey (iii. p. 243) has pointed out, with incisive force, and with special reference to the differences between modern English and French maritime law, the truly monstrous results of the application of the *lex fori*, e.g. in claims for damages which are raised against owners on account of collisions at sea. It may be a matter of pure chance on which side of the channel, only a few miles broad, the action is instituted. It cannot be said of De Courcey, who is "*administrateur de la compagnie d'assurances générales*," that he necessarily pays homage to a dry and abstract theory.

the law maritime, but by the rules of process. The application of the *lex fori* is accordingly made to depend on the solution of a preliminary question, a matter on which Wagner's theory gives the judge in practice no assistance whatever. The converse, viz. that the competency of the court must be determined by the competency of the law, is more like the truth. (See the law of process.) Wagner's appeal (p. 135) to the old oath of the judges "to judge the stranger like the citizen, and the citizen like the stranger," is a mere phrase. It is just the *lex fori*, which cannot be known beforehand to the parties, and may depend upon a thousand accidents, that may lead to a legal result that is unfair and is not alike favourable to the stranger as to the citizen. See Fiore, *Dir. pubb.* ii. § 1043, against the application of the *lex fori* in maritime law. § 24 of the German Code of Procedure, viz.: "The court within whose territory a person has property, or within whose territory the article of property claimed in any action actually is, will be held to have jurisdiction to entertain an action for patrimonial claims against that person, if he has no domicile in the German Empire." Wagner tries to use this particularly inconvenient provision by associating it with the doctrines of arrestment and freedom from arrestment in the case of outward-bound ships. He looks upon freedom from arrestment, however, which is not by any means a doctrine admittedly applicable to foreign ships, as a "renunciation of the powers of sovereignty." But it is quite incorrect to put any such meaning on § 24, and freedom from arrestment is not at all the same thing as extra-territoriality. This is an instance of the capricious treatment of our doctrine by Wagner, although his work in other respects is so meritorious.

¹⁰ Wagner falls again completely into error in the modification of this theory of the application of the *lex fori*, which he makes at p. 135. The purport of it is that the parties should have the power of making a valid bargain as to the law that is to be applied, irrespective of whether they do so at an earlier or a later stage, or during the course of the process itself. This is certainly incompetent in the case of actions upon delict, e.g. actions of damages for running down, although it was allowed by the Court of Commerce of Hamburg in the case cited by Wagner himself. It is, however, a mistaken theory for all possible relations of the parties, although these are purely contractual, to the extent in point of time which Wagner assigns to it. The court cannot be forced to apply a law to circumstances which it is not suited to regulate, or to recognise some entirely unreasonable proposition of private international law (see *supra*, p. 100). One cannot see why this should not hold good in maritime law, as it does in other branches of law. Wagner confuses the bargain which he proposes to allow in the course of the action on the one hand with the case, that from ignorance, or from the carelessness of the parties or the judge, the appeal to foreign law is not taken at a sufficiently early stage in the process, and on the other hand, with the case that the parties, in making their original contract, declare, in virtue of their freedom of contract, that they will be ruled by some particular territorial law. The decision of the Appeal Court at Hamburg, reported by Busch, goes further astray in its reasoning even than the Court of Commerce.

PROPERTY IN SHIPS.

§ 318. The first question for consideration in maritime law seems to be—What law decides as to property in a ship?

This question is generally answered to the effect that the law of the nationality of the ship must rule. But, conversely, the laws of different States make a ship's nationality dependent on the ship being in whole¹¹ or in part the property of citizens of a particular State. The answer given to the question merely imports that the property in a ship can only pass in accordance with the law of the flag, which the ship as a rule flies. A ship then, which has not as yet acquired any particular nationality, by going through the necessary formalities, is for that time a moveable article, and, like any other moveable article, for the purposes of the acquisition and transference of property in her, is simply subject to the law of the place in which she happens for the time to be.

Special difficulties, however, arise, if the law of the country, whose nationality has been acquired by the ship, makes the transference of property in her, or the full operation of such a transference in questions with third parties, dependent on an entry in its own shipping register, as is the case in many systems of law.¹² If the State, in whose territory the ship happened to be at the time of the transference of the property, has the same rule of law as the State of her home port, then we may safely say that the property can only pass, or receive effect in a question with third parties by means of such an entry in the shipping register of the home port. But what is to be the result, if, by the law of the place where the ship is, property may be acquired or be made effectual without any particular form being observed? In logic, the law of the place where the ship is must prevail. For a ship is in its nature a moveable article, and although the law of the home port treats a seagoing ship (or a seagoing ship of a particular size or tonnage) in a different way from other moveables, yet, according to general principles, such a rule of law cannot claim an extra-territorial operation any more than any other rule of law that deals with moveables.¹³ An unconditional recognition of every rule of law that

¹¹ See *e.g.* German statute of 25th Oct. 1867, § 2.

¹² See Lewis' comparison of the more important statutes (*Das Deutsche Seerecht*, i. 1883, p. 27). Asser's assertion that most systems of law make the transference of property dependent on an alteration in the shipping registers may well be incorrect. See, on the other hand, Wagner, p. 139, note. [A British ship will retain her nationality until she is transferred in the form prescribed by British statutes, per Lord Shand in *Granfelt v. Lord Advocate*, 1874, Ct. of Sess. Reps. 4th ser. i. 782. See also MacLachlan, p. 25.]

¹³ A consistent course of practice in France on these lines is recognised by Lyon-Caen, J. iv. p. 482. See judgment of the French Ct. of Cass. 19th March 1872, rep. by Fiore, *Dir. pub.* ii. p. 229, and to the same effect, Ct. of Brussels, 27th Dec. 1879 (contrary, however, to the opinion of Clunet, Rev. xvi. p. 146). The theory of the law of England, too, is that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere:" per Mr Justice Pollock in *Cammell v. Sewell*, 1858, 3 H. and N. p. 617 [app. by Lord Blackburn in *H. of L. in Castrique v. Imrie*, 1870, 4 E. and J. App. 429], see Westlake, 180, 181. Even the judgment of the Court of New Orleans

prevails in the home port (*e.g.* as to sale without any formalities or the constitution of real rights in the same way), notwithstanding the fact that the vessel is lying in a foreign port, to the prejudice of all who trusted to the law of the place where the vessel actually is, would in fact be intolerable. Indeed, we must maintain that the State to which the home port belongs would have to recognise a transference of property which was not in accordance with its own laws, but was in terms of those of the port where the vessel actually was at the time, in the event of the subsequent return of the vessel to the territory of the home port.¹⁴ This is a consequence of the principles of the law of things as we have already expounded them (p. 497). Of course, if the person who has acquired the property in a foreign country, does not in the meantime cause that fact to be registered in accordance with the laws of the home port, it is possible for a third party again to acquire a right in that port in accordance with its laws, by which the right acquired abroad will be rendered ineffectual. This is a very stringent compulsitor for making a person, who proposes to acquire the property of a ship in another State, observe at the same time the requirements of the law of the home port. The laws of those States which require property to be registered, in order to make it effectual against third parties, have thus an operation which is not to be undervalued,¹⁵ even without supplementing their powers by any exceptional rule of law, which could only be achieved by international treaty, or by some special legislation on the part of the different States. It is therefore incorrect to say that a seagoing ship, if we apply to it the general rules of international law that regulate other moveables, will be dealt with, as has been said, just as a trunk or portmanteau would be.¹⁶ At least that is incorrect, if the law of the home port makes adequate provision for registration, and if there are ship's papers in existence, to prevent that *bona fide* acquisition of property which might otherwise so easily take place with unlimited effect, and to the prejudice of antecedent rights. It is also possible to add weight to this operation of registers by penal provisions against the native owner, who does not see that registration is effected within a certain fixed period.¹⁷

reported by Fiore in J. iii. p. 128, with which he finds fault, seems to be justified by the *lex rei sitæ* of the ship. The reasons which are assigned, are, no doubt, based upon an assumption of the rule of the *lex fori*.

¹⁴ Asser to the contrary effect, § 109.

¹⁵ Lyon-Caen et Renault, *Dr. c. ii.* §§ 1622, 1623; art. 195 of the Code de Comm. requires a particular written form for sale, or an *acte authentique*. The French law of 17th Vendémiaire, year ii. requires in addition an "*inscription en douane*." The former requirement is applied—but not, as these authors think, in obedience to the rule "*locus regit actum*"—to ships which are not French, but are found in French territory: the latter applies to French ships only; but, as should be added, only if in the interval the change of property abroad has not led to a change of flag.

¹⁶ So Picard, J. viii. p. 479.

¹⁷ Wagner, p. 139, proposes in some obscure way to look primarily to the place of performance in the case of the property being transferred to a foreigner. Why, he does not say: the *lex rei sitæ* is to rule only where the place of performance is doubtful (what does he mean by doubtful?). The Code of the Netherlands, art. 310, to which Wagner appeals, also speaks of the *lex rei sitæ* exclusively.

NOTE BB ON § 313. PROPERTY IN BRITISH SHIPS.

[The property in a British ship can only be validly transferred by a compliance with the statutory requisites, and that is true whether the transference takes place in Britain or abroad. The statute also makes provision for the case of a foreign ship being acquired by a British subject, and conversely, for the case of a British ship being acquired by a foreigner.

The principal sections of the statute (17 and 18 Vict. c. 104) bearing upon these topics are the 19th, 38th, 54th, 76th, 79th and 81st. The 19th section provides that all British ships must be registered as directed by the Act, under penalty of being detained, if they shall attempt to proceed to sea without registration. On the contrary, a ship built in Britain for a foreigner need not be registered, and an assignment of the right of property in her may be effected without the use of the statutory forms. (*Union Bank v. Lenanton*, 1878, L. R. 3, C. P. Div. 243.)

The 38th section provides that no person shall be entitled to be registered as owner of a ship or a share of a ship until he has made a declaration in the form of schedule B, stating *inter alia* whether she is foreign built or no. He must also state his qualification, to be owner of a British ship, for (§ 18) no one can be owner of a British ship save natural born British subjects, or naturalised subjects, or bodies corporate established under the laws of Great Britain or some British possession, and having their principal place of business there. That the provisions of the 38th section apply to the case of ships bought abroad is made evident from § 54, whereby it is enacted that if a ship becomes at any foreign port the property of persons qualified to be owners of British ships, the British consul may grant the master a provisional certificate, to serve as a certificate of registry, until the ship arrives at a British port, when this provisional certificate becomes void.

By §§ 76, 79, provision is made for an owner, who desires to sell his ship outside the United Kingdom, obtaining a certificate of sale from a registrar to go with the ship's papers, as the ship proceeds abroad.

§ 81 (10) provides that where a ship is sold to a person not qualified to be the owner of a British ship, the bill of sale, the certificate of sale, and the certificate of registry shall be produced to some registrar or consular officer, who shall forward them to the registrar of the port in which the ship is registered, in order that the registrar may close the register. (11) provides that if the directions of (10) are not followed the person acquiring the interest shall be held by British law to have acquired no title at all, and the person professing to exercise the power of transference shall be liable in a penalty.

Thus it seems to follow that a British ship retains her national character till a transfer of her is effected in British statutory form. (See *Lord Shand in Granfelt v. Lord Advocate*, 1874, Ct. of Sess. Reps. 4th ser. i. p. 782.)

The provisions of the 81st section are applicable to sales in foreign ports, for there is a reference to the consular authority of the place. The 54th section deals with the case of the purchase of a ship in a foreign port by a British subject. It will be observed that the statute postulates the execution of a bill of sale even when the transaction is in a foreign port.

That a bill of sale is necessary, whatever its particular form may be, to pass the property of a ship, would certainly be held in the case of a ship sold or bought by British owners, and it is probable that no British court would recognise a sale even of a foreign ship, by foreigners to foreigners—if such a case should occur in British courts—without a bill of sale. In *The Sisters* 1804 (5 C. Rob. Ad. 155) Lord Stowell says: "According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries; and in no degree a peculiar title-deed or conveyance known only to the law of England: it is what the maritime law expects, what the Court of Admiralty would in its ordinary practice always require." Again, in the case of *Schultz v. Robinson and Niven*, 1861, Ct. of Sess. Reps. 2nd ser. xxiv. p. 120, where a question arose as to the transference of the property of a Prussian ship, which was being detained in a Scottish port, this doctrine was approved by Lord Justice Clerk Inglis, who was of opinion that without a bill of sale the court would not entertain a plea of the transference of property in a ship.

But, subject to this requirement, it would seem that a transference, valid by the law of the place where the ship is, will be recognised in British courts as a good transference, always provided that neither party to the transference is a British subject, in which case, as we have seen, the statute claims recognition. This is on the principle that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere:" per Pollock in *Cammell v. Sewell*, 1858, 3 H. and N. 617, app. by Lord Blackburn in *Castrique v. Imrie*, 1870, 4 E. and J. App. 414. If the ship is on the high seas, the law of its flag will be the law that must be observed, for by fiction the situs of the ship is then held to be in its home port, or, if there be no such fiction, because the personal law to which the owner owes obedience is the law of the home port. (Westlake, § 150.) An application of this doctrine was made in Scotland in 1861 in the case of *Schultz* quoted *supra*. Arrestments were there laid on a Prussian ship, whose owners were all Prussians, in Scotland, in respect of debt due by a person who certainly had been, and was alleged still to be an owner *pro parte*. The objection taken to the validity of the arrestment was that this person had ceased to be owner, in proof of which a bill of sale executed by him at sea in favour of another Prussian subject was produced. It was disputed whether such a bill of sale was of any effect until registered, and the evidence of a Prussian lawyer was led, from which it appeared that by the

law of Prussia no such registration was necessary. The court, following this statement of the foreign law, held that the property had been transferred, and consequently that the arrestment was bad. The effect to be given to the law of the place where the ship is, is also indicated by decision that that law must determine whether a foreign owner has a right in equity to dispute the right of a person who has entered into a contract of sale with him, but who has not obtained a good title. *Hooper v. Gumm*, 1867, L.R. 2, Ch. App. 282.]

PROPOSALS FOR LEGISLATION. CRITICISM OF THESE.

§ 319. Would it not, however, be desirable that the law of the home port should be the only law to determine questions of property in a ship, although that is not at present recognised as the law?

The Institute of International Law,¹⁸ and the Congress at Antwerp in 1885, answered this question in the affirmative, on the motion of Lyon-Caen. The resolution of the Congress at Antwerp¹⁹ mentions, it is true, only rights of pledge and privileges over ships. It is, however, a matter of inference, that what is true of pledge in this respect, should also be applied to rights of property.

If the law of the flag is alone to be recognised, parties interested will be prevented from availing themselves of the law of the place where the ship is. That will often be a serious obstacle to the speedy sale of a ship, because the observance of the law of the home port may involve delays, while, on the other hand, the buyer may not always be able to ascertain this law with sufficient certainty at once. That there is some foundation for these and similar considerations, may be seen from the fact that when the German Commercial Code was under consideration these were the reasons for not insisting on writing as an essential,²⁰ and that again the Dutch Code, *e.g.* although by § 309 it makes the badge of property the recording of the proper documents in the public register, still makes in § 310 this prudent and sound exception, *viz.* :—

“If the ship, which belongs to inhabitants of this kingdom, happens to be abroad, and is there to be transferred to foreigners, the transference shall be carried out in conformity with the law of the place where it takes place.”

But, although it may be conceded that, in respect so many foreign consulates now exist, it will be easier to ascertain what is the law of the home port and to observe it, is it conceivable that a foreign State, which, *e.g.* adopts the principle that the shipping register cannot be pleaded by any one who is in knowledge of a transference having taken place, although

¹⁸ *Annuaire*, viii. p. 124.

¹⁹ *Actes du Congrès*, p. 105.

²⁰ See Lewis, p. 25.

it has not yet been entered in the register, should, notwithstanding this principle, refuse effect to a transference that has taken place in its own territory, so as to uphold the absolute force which is attributed to the register by the law of the home port? Besides, if an absolute force were given to the law of the flag, as is demanded by the resolutions of the Institute of International Law and the Antwerp Congress, a variety of conflicts with public maritime law would necessarily ensue, *e.g.* with the law of confiscation or seizure,²¹ and, on the other hand, difficulties would arise with the doctrines of law, which are recognised on behalf of maritime trade, and must be measured by local ideas, viz. the duties of attending to the wants of the crew, and of saving the ship and cargo for all interested, not indeed *in specie*, but by realising their value by a speedy sale. In any case, the universal application of the law of the flag postulates that this law shall in its requirements keep itself within certain limits, and that it shall not attempt to treat seagoing ships, contrary to their nature, as if they were real property, while it shall not, on the other hand, countenance an undue want of formalities. Whereas, as we have seen, it is possible to carry on the existing system fairly well—it being always kept in view, that a real right is not lost by the law of the place where the ship is, simply because it could not have been created under that law in the way in which it was created, but is only lost if it comes into collision with some stronger right which has been created under the law of the place where the ship subsequently comes to be. On the other hand, universal and unrestricted recognition of the law of the home port and no other may give rise to serious evils, unless distinct limits are laid down within which the law of the home port must be confined.²²

It is, however, a different question whether every rule which is applicable to other kinds of moveable property should, without any distinction, be applied to seagoing ships, *e.g.* whether we should apply to them that rule of French law "*possession vaut titre*," which in such a subject would be specially dangerous. That may very well be matter of dispute, if the law of the place where the ship is itself prescribes a system of registration for its own ships trading with the port, which is in direct contradiction to that rule of law which favours actual possession and acquisition without any particular forms. On this ground, and not simply because all rights in a ship are consistently to be ruled by the law of the

²¹ Or should the right of confiscation or seizure be excepted? It must be expected that just as the freedom of maritime trade increases in the interest of subjects of the most various nations, the need of having in the ship itself something that can be taken as a guarantee, will be more and more felt, and that this guarantee cannot very well be made to depend upon the law of the home port in all circumstances.

²² As, *e.g.* the law of France (see Lyon-Caen, J. iv. p. 482) does, which only gives operation to the alienation in questions with third parties when an entry is made in the register, but makes an exception in cases in which the third party is aware of the alienation having taken place without registration. English law, too, keeps equitable considerations in view, and among them the foreign law. (See Lewis, pp. 27, 28, note.)

home port (*Loi du pavillon*), many judgments, and in particular judgments of French courts, are open to attack.²³

NATIONALITY OF SEAGOING SHIPS.

§ 320. The law of that particular State to whose flag a ship makes claim, must primarily decide the question of the ship's nationality. If it is possible that the ship should belong in the circumstances to either of two countries, or to one of many, the declaration of the owners' intention must rule, and if they could not agree in the manner required, the ship must retain its original or earlier nationality. There should, besides, be a general recognition of the principle that no ship, which has once carried a flag, should be allowed to adopt another nationality²⁴ before it is definitely, or on condition of acquiring that new nationality, released from its old ties; and again, it should only be released from its old nationality on condition of acquiring another.²⁵

LAW OF PLEDGE OVER SEAGOING SHIPS.

§ 321. The rivalry of the law of the flag and that of the place where the ship is, raises questions of particular importance with regard to the validity of securities over ships. It is in this branch of the subject²⁶ that the application of the *lex rei sitæ*, the law of the place where the ship is, or where it last was, as the case may be, which French legal authorities have made, has called up the counter theory, which proposes to declare that the law of the flag shall alone furnish the rule.

In respect that the law of France, up to the date of the law of 10th

²³ While Clunet, Labbé, and Lyon-Caen (see especially J. iv. p. 482, as also Fiore, *Dir. pubb.* ii. p. 227) support the application of the law of the flag in all cases, Laurent (vii. § 385), conceding that in regard to future legislation views different from what he puts forward may be adopted, defends the French practice of applying the law of the place where the ship happens to be, from the point of view of existing law. We must reject the appeal to the maxim that ships are parts of the national territory. (So *e.g.* Brocher, ii. p. 378, and Picard in the *Actes du Congrès d'Anvers*, p. 106.) This rule holds good only for warships, and in some circumstances for occurrences that may take place on board trading vessels, or among their crews. One cannot lay down any certain rule with regard to trading vessels. Just as little would we be justified in drawing conclusions from the personality which is attributed to a ship. (So even Fiore, *Dir. pubb.* ii. § 1041.) In the first place, there are very important differences between ships and persons; and in the second place, the recognition of what is called personal law in a foreign country, is not by any means a matter inevitable by the laws of nature: there are, besides, plenty of exceptions to the rule of determination in accordance with the personal law.

²⁴ Excepting, of course, alterations of nationality in time of war by virtue of the law of capture.

²⁵ Fiore, *Dir. pubb.* ii. p. 226.

²⁶ The question whether the captain has power to pledge the ship does not belong to this part of the subject; it will be discussed hereafter.

December 1874,²⁷ knew nothing of rights of hypothec over ships, security rights, which had been duly constituted over foreign ships abroad in conformity with the laws that there prevailed, were on that account held of no effect in France.²⁸ The security of shipping must be seriously threatened by any such system. If a foreign ship ran into a French harbour, any transfer of the property in her, and even any arrestment followed by execution, necessarily destroyed the security right which had been well set up in another country in accordance with its law. But a right over a moveable object which has been well constituted abroad is not extinguished, merely because the thing afterwards reaches a place by the laws of which it could not have been constituted. It is not extinguished till it comes into collision with some definite right which is well constituted by the law of this latter place. But, by French law, the right in security constituted abroad had no operation in competition with one who could appeal to the rule "*possession vaut titre*," and no operation either against the privileged ship's creditors created by the *code de commerce*. It may be thought doubtful, however, whether it must necessarily be without effect even as against other ordinary creditors of the owner. The test would be what meaning must be put upon certain other provisions of the law of France, and whether it could be said that, because the French legislator had closed all doors to the creation of hypothecs over French ships, he would also refuse to allow hypothecs over foreign ships to be recognised even to that limited extent. We do not presume to decide the question according to the law of France; we can see, however, that an adequate measure of security would be attained, without an absolute recognition of the law of the home port, by simply paying some respect to a legal relation well constituted according to a foreign legal system.²⁹

²⁷ A Belgian statute of 21st August 1879 followed, but with some modifications, this French statute.

²⁸ See the judgment of the Court of Cassation of 19th March 1872 (J. i. p. 31); Lyon-Caen (J. ix. p. 246); and Fiore, *Dir. pub.* ii. p. 230.

²⁹ Since the law of France at the present time, while recognising generally the legality of a hypothec over ships, confines such a security to ships of a certain tonnage (20 tons and upwards), this question may be raised: Is a security right which is well constituted by the law of the flag over a vessel of less tonnage, effectual in France, in spite of the French law to the contrary? The question is not unimportant with reference *e.g.* to the law of Belgium, since that law requires only a tonnage of 10 tons. Laurent (vii. § 391) answers it in the negative, because the French law will only recognise hypothecs of the character fixed by itself. Laurent cannot, plainly, be refuted by the observation, that the determinant is simply the law of the flag and no other. All the same we must adopt the opposite view, which is Lyon-Caen's (J. ix. p. 248). French law, by adopting a *hypothèque maritime*, made a distinct difference between ships and other moveable things. We have therefore a right to assert, that it is not every rule of law that is good for other moveables, which must be applied to ships also without distinction; and since the law of France, in the case of French ships, refers questions of registration to the law of the home port, the possibility of entering foreign ships on a register must be determined by their national law; but it is the legal possibility of registration that will determine the possibility of the constitution of a hypothec. (Cf. too, Brocher, ii. p. 376.) Lyon-Caen (*ut cit.* at p. 252) has very correctly shown that § 2128 of the Code Civil is not applicable to maritime hypothecs. The nullity of an instrument to effect a

The resolutions of the Institute of International Law, and of the Congress at Antwerp in 1885, propose to stand out against this French theory, and to make the law of the flag the only law of which account is to be taken. The question, however, suggests itself, whether this principle is necessary, and whether the security of the ship's creditors, which is the desirable thing to ensure, will, in truth, be attained by an universal acceptance of the proposed regulations. The resolutions of the Institute are these (Ann. viii. p. 134), viz. :—

“La loi du pavillon doit servir à déterminer :— . . .

“(2.) Quels sont les créanciers du bâtiment qui ont ou n'ont pas droit de suite, dans le cas où il est aliéné ;

“(3.) Si le navire est susceptible ou non d'être hypothéqué ;

“(4.) Quelles sont les formalités à remplir pour la publicité des hypothèques maritimes ;

“(5.) Quelles sont les créances garanties par un privilège maritime ;

“(6.) Quels sont les rangs des privilèges sur le navire ;

“(7.) Quelles sont les formalités à remplir par le capitaine qui emprunte à la grosse en cours de voyage.”

In these propositions we find that the law of securities over ships is placed completely on an equality with that of securities over real property. So much so that by (4) the law of the place where the vessel actually is is thrown out of account even in questions as to the form of the securities, while (7) provides that even the formalities of a bond of bottomry are to be determined, not by the law of the actual situation of the ship, but by the law of the home port.

The distinction between the two classes of securities cannot, however, be ignored. Real property has a locality which is really permanent : ships can only be treated as real or immoveable property by virtue of a fiction. Thus, for instance, the master will be deprived of all power of using the forms of the country, in which his vessel for the time happens to be, to grant a security or a bond of bottomry. The result will be that he will frequently find that he cannot obtain so much credit, or can only obtain it under oppressive conditions : for as the creditor will often be in ignorance of the laws of the home port, he will be thereby rendered more suspicious of the security. But it is not merely the existence of the security rights that is to be tested by the law of the flag : their mutual relations and their relations to other real rights are to be tested in the same way. If this were not so, creditors, who had lent in accordance with the law of the home port, would not get the security they expected. These are requirements which involve this result, that even the laws of the place where the ship is, which can be described as being in theory coerci-

hypothec, which has been executed abroad, is simply an exceptional provision resting on a misunderstanding, which must be strictly interpreted and not applied except to immoveables, which, besides, at the time the code was promulgated, were the only subjects that could be affected by hypothecs.

tive, or laws of "*ordre public*," will have to give way to the law of the flag. Unless it is expressly said that these proposed rules are to take precedence even of coercitive laws and laws of "*ordre public*," the security which is aimed at will only be problematic, and at the best we shall be unable to avoid a deluge of controversy. But if it is expressly said, that even the laws of "*ordre public*" must give way here, then we are in truth requiring the State where the vessel actually is to surrender in a measure her sovereign rights, and we are practically making merchant ships extra-territorial.³⁰ The State, in whose harbours or waters a foreign ship is lying, would no longer be entitled to declare the ship itself really bound for navigation or harbour dues, or for salvage, etc.;³¹ and persons, who give salvage services, would not know what security was offered to them for payment, since they would not have time to inform themselves as to the law of the flag. Thus the interests of navigation would themselves be prejudiced if no heed at all were given to the local law. All these objections are of course equally applicable to the shorter statement of the rule adopted by the Congress of Antwerp, viz. :—

"En cas de contestations sur les privilèges, l'hypothèque ou le nantissement on suivra la loi du pavillon."

The provisions which are necessary, and which alone would be adequate, are these, viz. :—

(1.) Pledges or securities over ships shall be universally recognised if they are constituted, in so far as forms are concerned, in conformity with the law of the flag, *i.e.* the home port. No law of the port where the ship is, forbidding the vindication of a moveable article over which a security exists, shall apply to vessels, if the security which has been constituted is noticed in the vessel's papers, and could not have been overlooked except by gross carelessness on the part of the person who has acquired the vessel.

(2.) Vessels may also be given in pledge under the forms of law recognised by the port where they happen to be.³² If, however, the ship reaches the territory of some other system of law, these securities must be entered in the ship's papers as described in (1), and they cease to be operative unless, within a certain reasonable period (to be fixed by the law of the home port) after the ship has returned to that port, the creditor makes provision with the proper authorities for having the formalities required by the law of the home port satisfied.

(3.) The respective priorities of rights of pledge, and their relations to

³⁰ Lyon-Caen (J. ix. p. 253, see also *Dr. c. ii.* §§ 2513-2519) proposes that the law of the flag shall be the exclusive rule for regulating "*privileges*" and their respective priorities.

³¹ See German Code of Commerce, § 753. German courts are not likely to dispute the security right here given to German masters, who have salvaged a foreign ship in German waters, even if the law of the flag should not recognise any such right! The same remark may be made as to French courts in connection with Code Civ. § 2102, subsec. 3.

³² The Congress at Antwerp recognised the principle in so far as bonds of bottomry were concerned (*Question 18, Actes*, p. 117).

the rights of other privileged ship's creditors, are to be determined by the law of the place where they are put in force by diligence or execution.

It must be admitted that rules (1) and (2) necessarily involve a certain amount of encroachment on the substantive legislation of individual States. But this encroachment is slight and may very well be endured, while a solution of the questions as to the conflict of laws in this connection which shall satisfy the necessities of the case, is impracticable without a certain uniformity in the municipal laws concerned. This is the result of the peculiar double character of the seagoing ship, which from its value and importance may be almost ranked with real property, or, if this expression is preferred, may be assimilated to a legal person; while at the same time its actual character, the fact that it is moveable, cannot be altogether kept out of sight. (3), however, is simply a deduction from the general principles of private international law, as we shall show at greater length, when we take up the subject of bankruptcy; and we hold it altogether impossible for any State to refuse to give effect to this rule.³³ No doubt the security of the creditor who holds the right of pledge may, under the operation of that rule, be prejudiced to some extent if the ship, after a security has been constituted, should reach a territory where a different system of law from that where the security was constituted prevails. But, on the one hand, it is neither possible nor necessary that the security of a pledge over a ship should be on exactly the same footing as one over a true piece of real property; while, on the other hand, we must remember that other privileged rights are well known which serve as security for outlays on the vessel, which in their turn again indirectly benefit the creditor who holds the security. It is also familiar that Roman law, even in the case of immoveable property, to some extent gave privileged security rights, which ranked before those of earlier date. Less importance, however, may be attached to the serious consequences of such privileges in the case of ships, while on the other hand expenditure is much more often matter of absolute necessity in the case of a ship, to prevent it from being lost altogether. The *lex rei sitæ* can, however, only regulate the captain's powers, in so far as the right of pledge applies to the hull and rigging of the ship. To extend its application to something connected with the ship, which is not subject to the *lex rei sitæ*, e.g. to the sum for which the vessel is insured, is a result that can only be effected if the law of the flag allows.³⁴

³³ See judgment of the German Imp. Ct. (i.) of 18th June 1887. (Bolze, v. No. 23): "The pursuer had a pledge over an English ship: the defender pledged the ship over again, when it lay at Hamburg. German law must determine whether that constituted an encroachment on the pursuer's rights, whether, that is to say, the pursuer could prevent the defender from realising the ship." [See also a judgment of the Sup. Ct. of the German Empire (iii.), of 21st Oct. 1890 (J. xviii. p. 1248), in which the law of the flag is definitely rejected in favour of the law of the place in which the vessel is seized for execution by the rival creditors. This principle is applied in the case in question, even although the competing creditors were of the same nationality as that to which the ship, by her flag, belonged, viz. British.]

³⁴ In this connection we must agree entirely with Lyon-Caen (J. ix. p. 255). There is for instance, an important difference between the law of Belgium and that of France. The former extends the rights of privileged creditors so as to affect the insurance money.

The place where the contract is made, is, strictly speaking, a matter of no consequence: the important matter is the place in which the ship, the thing pledged, is at the time of the contract. That is the result of the general principles which regulate the law of things. If the place of the contract were not the same as the place where the ship was lying, there would be no necessity for paying any attention at all to it. The owner of the ship can easily observe the law of the home port, while the captain or the owner's correspondent will only pledge the vessel in the port where she happens at that moment to be. The Congress of Antwerp, in speaking of the "*lieu du contrat*" (see e.g. *Qu.* 10, *Actes*, p. 105), assumed the identity of the two places, i.e. the place of the contract and the actual situation of the ship, a state of affairs which is generally the case.³⁵

SECURITY RIGHTS WHEN THERE IS A CHANGE OF FLAG.

§ 322. In the Antwerp Congress this question, too, was raised, although it was not answered by a vote³⁶—What shall become of antecedent security rights, if the ship changes her flag? It is plain that there is not the slightest reason for holding that, as her nationality is changed, rights which have been well constituted should at once be lost. Nor can this be the result of the fact that the forms for creating a right of pledge according to the law of the subsequent nationality are different, or that—if we are dealing with direct statutory hypothecs—the law of the flag that is subsequently acquired would not sanction them.³⁷ The rule, however, which may very well be a rule of law in many countries, that rights which are not entered in the registry of the home port go for nothing in questions

³⁵ Laurent (vii. § 392) has asserted that, even according to the existing French statute, securities constituted over ships in another country will be void in France, as a consequence of his theory that the requirement, that a document shall be made public, is a "*statut réel*," i.e. a coercitive enactment. For, as a French court has held (C. d'Aix, 22nd Nov. 1876), publication in a foreign country is not publication in France. The French Ct. of Cassation (25th Nov. 1879, J. vii. p. 583) has, however, pronounced against this over-rigorous doctrine of law, and an excellent refutation of it is to be found in a judgment of the Sup. Ct. of App. at Oldenburg of 18th May 1861 (Seuffert, xvii. § iii.). Native creditors are warned by the ship's foreign flag that the want of entries in the registers of this country which are applicable only to native ships can give them no absolute guarantee against the existence of earlier security rights. The absence of such registration of the earlier rights, unless that registration is prescribed by the law of the home port also, gives the new creditor no preferential right, and there is nothing left to regulate the case except the general rule that real rights, which are once validly constituted, are not lost by the fact that the thing, the subject of the security, passes into a territory by the laws of which it would not, in the circumstances, have been constituted.

³⁶ *Actes*, p. 108.

³⁷ So Lyon-Caen (J. ix. p. 244, note 24). Wagner, p. 140, note 24, takes a different view. The same must be true of the French *droits de suite*, which are simply incomplete statutory rights of pledge. Lyon-Caen, however, proposes that these *droits de suite* should *ipso jure* come into play for antecedent creditors, so soon as the ship acquires the French flag. I cannot discover any ground for that.

with third parties, may have this result.³⁸ In the latter case, however, the obligation of the officials to enter security rights, the existence of which they can with certainty ascertain from the ship's papers or their register, must of course be recognised. If this duty is not satisfied, it is no doubt possible for prior rights in security, which have been well constituted, to be lost. That case, however, is just the same as the case which may also occur, viz. that, where a strict system of registration of hypothecs over real property exists, some hypothecs should be lost through the carelessness of the officials, *e.g.* in opening a new volume.

CAPACITY OF A SHIP TO BE MADE THE SUBJECT OF A SECURITY.

§ 323. As we set out by assuming that seagoing ships are in their nature moveable subjects, and that we shall not be entitled, in their case, to diverge from the rules that regulate other moveable subjects, except on the ground of some inevitable necessity, we have not as yet given any special answer to the question, what law decides the capacity of a ship to be burdened with a security right? From what we have said, the answer follows directly. The law of the place where the ship for the time is decides this question: but the security right, which has thus been constituted, may very easily again become inoperative, if the ship should reach the territory of another law, in which this security right comes into conflict with the rights of others (see *supra*, note 29). Again, in so far as security rights are made dependent on entry in a register, and such a register is only kept in the home port of the ship, security rights can only be constituted by way of registration, if the ship is by the law of the flag capable of being subjected to such a security right. The new theory³⁹ proposes in a radical fashion to apply solely the law of the flag. But in so doing it casts the safeguards of local commerce to the winds. It can, however, hardly be supposed that the different States on closer examination will adopt a rule of the kind. Would they allow the real security which they might have on account of any damage caused by a ship, or the legality of a real arrestment, which in its civil effects is hardly distinguishable from a right in security, to be dependent on the good pleasure of the law of the home port of the vessel?

NOTE CC ON §§ 321-323. SECURITIES OVER BRITISH SHIPS.

[Mortgages over British ships are regulated by 17 and 18 Vict. c. 104, §§ 76-80. It is provided that a registered owner, who wishes to mortgage

³⁸ Wagner in this sense very properly distinguishes between maritime rights in security and other rights in security. He holds that the *lex fori* will give the exclusive rule for the former, whereas it is rather the *lex rei sitæ* that must regulate them. Of course, the court that will determine the case will, as a general rule, be the court in whose territory the ship actually is at the date of the decision.

³⁹ Lyon-Caen, J. ix. p. 248.

his ship at any place out of the country in which the port of registry is situated, may apply to the registrar, who shall give him a certificate of mortgage. No such certificate is to be granted so as to authorise any mortgage in the United Kingdom or in any British possession, or by any person not named in the certificate. Every mortgage made under authority of this certificate shall be endorsed on it by a registrar or British consular officer, and they shall rank according to the date of their indorsation. The discharge of any mortgage may be also indorsed on the certificate. These provisions seem to provide ample protection for mortgagees of British ships in foreign ports.

Bottomry bonds, whether in the strict sense, *i.e.* hypothecations of the ship, or hypothecations of the cargo, are also ruled by the law of the flag according to English law. MacLachlan, p. 63, Westlake, § 219, Lloyd *v.* Guibert, 1865 (L. R. 1, Q. B. 115). If a person ships goods on a foreign ship, he commits himself to the powers of the master as these exist by the law of the flag. A bottomry bond executed in a Portuguese port, by the master of an Italian ship over the cargo, before the Italian consul, and without any communication with the English owners of cargo, was held good in the English courts, although by English law it would have been bad, as it was good by the law of Italy. Gaetano and Maria, 1882, L. R. 1, P. D. 137. On this subject, see further *infra*, § 325, on powers of master.]

JOINT OWNERSHIP IN A VESSEL.

§ 324. If the vessel is the property of several persons, then the law of the existing nationality determines the rights of the several co-owners, particularly their right to sell their shares, or to alter their ship's flag.⁴⁰ The question is one simply as to the import of the right of property which these individuals have, and so long as that does not come into conflict with the rights of any third party, which happen to rest upon the law of the place where the ship is, or with the *jus publicum* of another State, it must continue to be operative. It may also be said, in support of this view, that the individuals who acquired shares in the ship under a particular flag, submitted themselves to the law of this flag. The Congress at Antwerp⁴¹ resolved upon this proposition, which certainly is wide enough, and perhaps is too wide in its scope, viz. :—

“La loi du pavillon régit, en tous pays, les différends relatifs au navire et à la navigation, qui se produisent entre les copropriétaires, entre les propriétaires

⁴⁰ See, *e.g.* German Code of Comm. § 470. “Every co-owner may sell his share at any time, and without the consent of the other co-owners, either entirely or in part. The co-owners have no statutory right of preemption. But the consent of all the co-owners is required to validate the sale of a share, in consequence of which the ship would lose its right to fly the German flag. The laws of the different German States, which declare such an alienation incompetent, are not affected by this enactment.”

⁴¹ *Actes*, p. 111, Question 15. To the same effect Wagner, p. 139.

*et le capitaine; entre les propriétaires ou le capitaine et les gens de l'équipage.*⁴²

[A British ship, to have that character, must belong wholly to persons entitled to hold such a ship, viz. British subjects or British corporations (17 and 18 Vict. c. 104, § 18). All changes in the ownership must be endorsed on the certificate of registry (§ 45). By §§ 62 *et seq.* when an interest in a British ship has by death or marriage passed to a person who is not qualified to be the owner of a British ship, the person to whom the interest has so passed may apply to the court to order a sale of the property so transmitted within a limited time. Power is given to the court (§ 65) to prohibit for a time any dealing with a ship or shares of a ship. This power may be exercised on the application of any interested person.]

POWER OF THE CAPTAIN TO SELL THE SHIP OR TO GRANT BONDS OVER IT.

§ 325. The question as to what law will determine the power of the captain to sell the ship, or to grant bonds over it, is particularly difficult, and at the same time, is a question of the highest practical importance. We must proceed upon the principles of mandate and agency, for, undoubtedly, the captain is the mandatary of the owner. The law, therefore, which is primarily applicable, is the law of the place where the owner carries on his shipping business, *i.e.* the law of the home port or of the flag.⁴³ The captain has all the powers which this law gives him irrespective of whether the law of the place where the ship at the time is lying does or does not give him more restricted powers. But are his powers limited to those conferred by the law of the home port?

If we simply apply the principles of an ordinary mandate, we answer this question affirmatively; the Congress at Antwerp⁴⁴ passed a resolution to the same effect, viz. :—

“Les pouvoirs du capitaine pour pourvoir aux besoins du navire, le vendre, l'hypothéquer, contracter un emprunt à la grosse sont déterminés par la loi du pavillon, sauf pour lui, à se conformer, quant à la forme de ces actes, soit à cette loi, soit à celle du lieu du contrat.”

The captain has, however, a certain repute and a certain credit, which are due to the ship of which he is in command; these are to be measured by the usages, and by the law of the place where the ship for the time is. The captain has, accordingly, in addition to the powers we have specified, the powers, not of the *lex loci actus*, but of the law of the place where the ship is lying. But because he enjoys these powers only in respect of the ship, his powers are limited to dealing with her, and do not extend so far

⁴² On the last part of this proposition, see below.

⁴³ See Wharton, § 441; Foote, p. 398. The domicile of the owner is immaterial, Foote p. 409.

⁴⁴ *Actes du Congrès*, p. 117. To the same effect, see Asser, § 110.

as to enable him to make the owner personally liable over and above.^{45 46} Any restrictions, therefore, imposed upon the ship by the law of the flag, can only be treated, in so far as any disposal of the ship herself is concerned, as special stipulations or agreements⁴⁷ for limitation of the statutory power given by the law of the place where the ship is.⁴⁸

Of course, the ship's flag calls the attention of third parties to the law of the home port of the captain. But, upon the whole, there still are cases of necessity, which are somewhat differently defined according to local ideas, in which the captain will have the power, without special authority, to bind the owner. Thus, to frighten third parties from bargaining with the captain, by holding out to them the possible application of a foreign law, which will be prejudicial to them, may be very disadvantageous to the owner himself, in a case of pressing necessity. But, by the provision of the German Code quoted in note 47, it is only the party contracting in *bona fide* who would be protected even in such cases. The man who was aware of the limitations imposed by the law of the foreign flag, of a more stringent character, would not be protected. Of course, the *lex loci actus* does not touch any question of the responsibility of the captain to the owner.

If, however, it is proposed that the law of the place where the ship is⁴⁹ should not be taken into account at all,⁵⁰ on the one hand we should give persons, who have made advances to the master in terms of a law that is

⁴⁵ This distinction between personal responsibility of the owner and the power of the master to dispose of the ship seems to be familiar to the law of England. Cf. Westlake-Holtzendorff, § 141, and Foote, p. 336. What is true of the sale of a ship must also be true of any obligations, so far as they may result in the forced sale of the ship. The decision of the Supreme Ct. of Comm. of 5th March 1877 (Dec. xxii. No. 21, p. 98), which apparently lays down the general proposition that the liability of the owner for acts of the captain is regulated by the law of the flag, is very easily reconciled with what we have said in the text. The pursuers demanded that the German owner should be made liable even to the extent of his "*fortune de terre*," because this was the rule of liability by the law of the place where the captain had made the transaction in question. This demand the court rejected for the best of reasons. Wagner, p. 137, declares in favour of the application of the *lex fori*.

⁴⁶ The right of abandonment is always to be tested by the law of the flag. Judgment of the Queen's Bench of 27th Nov. 1865 [Lloyd v. Guibert, L.R. 1, Q.B. 115] cited by Westlake, Rev. vi. p. 394.

⁴⁷ See German Comm. Code, § 500: "The owner who has restricted the statutory powers of the master, can only plead that these restrictions have been exceeded, in questions with third parties, by showing that these third parties were aware of the restrictions."

⁴⁸ MacLachlan, *Merchant Shipping*, pp. 169-180, holds, without any distinction at all, that the law of the flag must be the only rule, since (1) we have here to deal with a public legal relation, and not with an authority given simply by contract; the captain is a "public agent;" (2) the provisions of maritime law would be meaningless, if they were not to be recognised beyond their own country; (3) every contracting party has notice of the law that will rule his case, by the flag which the ship flies; (4) the principles of private international law have no application to maritime law. I think that these arguments in part go too far, and in part fail to meet what is laid down in the text.

⁴⁹ There can be no reference to the law of the place where the contract is made, if this should happen to be different from the place where the ship is.

⁵⁰ It is obvious that the law of the home port may set itself above these principles, which we have dwelt upon in the text with an equitable consideration of the rights of third parties contracting, and may require them unconditionally to obey the law of the flag, e.g. in so far

foreign to them, occasion to make use of any rights of seizure or arrest that they may have, to the serious prejudice of the owner and those who are interested in the cargo. The existence of such rights of arrestment the law of England and that of North America are, for instance, inclined to test by the *lex rei sitæ*, even in connection with the personal liability which is at the bottom of such claims. On the other hand, we should at once fall into conflict with the principles which must be recognised in questions of salvage. For it will often be impossible to ascertain, in such cases, whether a bargain has really been concluded or not, and it is practically absurd to treat cases, in which assistance has been given *ex contractu*, on an entirely different footing from cases in which it has been given without any contract.⁵¹

[By the law of England and Scotland, the power of the master to sell or bond a ship is to be determined by the law of his flag. (MacLachlan, p. 180; Westlake, § 219; Lloyd *v.* Guibert, 1865, L. R. 1, Q. B. 115; and Gaetano and Maria, 1882, L. R. 7, P. D. 137. In the former case it is said "reason and convenience are certainly in favour of holding that the authority of the master to bind his owners should be fixed and uniform according to the law of his flag, which is known to both, rather than that it should vary according to the law of the port in which the ship may happen for the time to be." This doctrine does not depend, however, on any "law maritime," a position which is now entirely exploded, but is the result of the best consideration of British jurists for the interests of all concerned. It is, in short, the international doctrine as held by British courts, *i.e.* British law, with no claim to recognition beyond a British *forum*, except what its expediency and nationality can win for it. The title conferred by an Admiralty Court of proper jurisdiction must be recognised by British courts. See Dr Lushington in the Segredo, 1853 (Spinks Eccl. and Ad. p. 36.)]

LIABILITY OF THE OWNER FOR DELICTS AND *quasi*-DELICTS OF THE MASTER.

§ 326. Still less is it possible that the liability of the owner for delicts and *quasi*-delicts of the master should be measured exclusively by the law

as the form of the bond of bottomry is concerned (see §§ 312 and 234 of the Code de Comm. for instance). Then, if the bond has to be sued upon in the country of the home port, the courts of that country must follow the instructions of their own law. But it is possible that the bond should be founded on in an action in the court where it was granted, *e.g.* by means of an arrestment of the ship. Is this State, or any third State, to be absolutely bound by any provisions which the law of the home port may see fit to enact? Our object must be to make as little as possible depend on the accident of the place in which the action is brought. Many authors decide the question simply in the way the courts of their own country would decide it, and think only of the case of ships of their own being sued upon bonds in these courts. Mr Justice Byles [and Dr Lushington] as cited by MacLachlan (p. 171) argue that, unless the court decided exclusively on the law of England, English shipowners would be prejudiced. It seems very questionable to me whether this argument is worth much.

⁵¹ Phillimore (§ 823) in the interest of *bona fides*, goes so far as to say that where money is borrowed for some necessary purpose of the ship, the *lex loci* is sufficient even if it be the case that the lender were acquainted with the restricted powers of the captain.

of the home port. That is in direct antagonism to the public safety and to the equality of all before the law, both of which things the State must study to maintain within its own territory. A seagoing ship is an engine often of great power, and capable of doing great damage to person and property outside itself. If this or that foreign State sees fit to discharge the owner of all liability for reparation, and to refer the injured party to the master, who is often unable to make good the loss, should we, in whose country the owner is liable, be forced to concede such a privilege to foreign ships and foreign owners? Of course, we cannot go so far as to hold the foreign owner personally liable without any restriction, because in his person the owner is not subject to the foreign law of the place where the delict was committed. But it is quite consistent with a rigorous observance of the due limits of the competency of the jurisdiction of different States that the ship should be liable, if the law of the place where the damage was done declares either that the owner is liable without limit, or liable up to the value of his ship. But again, on the other hand, there is no necessity for enlarging the liability of the owner beyond what the law of the place where the damage has been done allows, even if the law of the home port sanctions the larger scale. The law, which allows the more extensive liability, does so in the interest of public security, not for the purpose of fining the owner. If, then, the law which undertakes locally to ensure the safety of the public, contents itself with a slighter liability, we may hold that there should not be an additional liability in accordance with the law of the flag.⁵² In the results at which we arrive we see a reflection of the provisions, which are being more and more adopted in the legal systems of individual States, with some differences no doubt in detail, without regard to private international law. The ship herself makes the owner liable only, however, to the amount of her own value. The freight which has been earned is, however, in such questions an accessory of the ship in so far as the law of the place where the damage is done pronounces it to be so, and in so far as the freight is secured by a right of retention or by impledgment, or as an outstanding claim of debt is subject to the law of the place where the damage is done, or to any other law similarly expressed. We shall consider hereafter what the result should be, if the damage is done on the high seas.

The view which is most extensively held at the present time, but which

⁵² Any statute, therefore, which introduces a liability confined to the value of the ship, proceeds entirely in conformity with the principles of private international law, if it extends that liability to the vessels of foreign nations, in so far as the event that raises liability has taken place within the territorial waters of the State. See the English Merchant Shipping Amendment Act 1862 (25 and 26 Vict. c. 63, § 54): "The owners of any ship, whether British or foreign." Originally this implied an indulgence for foreign vessels: before its date it was not the statute law, but the common law maritime, that was applied to them, and it was held that this implied an unlimited liability. But by English law the liability of the owner does not at present extend to the full value of the ship (see Wagner, p. 137). Asser, § 110 *ad fin.* finds in the English enactment we have quoted a conflict between the positive law of the statute and international law, as the latter is to be deduced from general principles.

cannot surely be fully reconciled with the necessities of public safety in each locality, holds that even in claims upon delict the liability of the owner should be determined by the law of the owner's home port exclusively. To this effect Lyon-Caen (J. ix. p. 258), Abbot (p. 256), MacLachlan (p. 175), Lewis (pp. 48, 49), on § 451 of the German Code of Commerce, and the Supreme Commercial Court of Germany, have all expressed themselves.⁵³ There must necessarily, however, be some doubt cast upon the effect which judgments on this question, pronounced in suits brought in the *forum domicilii* of the owner, and not in that of the *delicti commissi*, should have on our conclusions. The considerations which may be advanced on behalf of the *lex loci actus* are in such a case apt to fall into the background.⁵⁴ On the other hand, the distinction between the unlimited liability of the owner, and his liability as limited by the value of the ship, has not as yet been taken with sufficient sharpness in any judgment.⁵⁵ Wagner, of course, in this case also declares in favour of the *lex fori*.

CLAIMS ARISING OUT OF COLLISIONS. COLLISIONS IN HARBOURS AND TERRITORIAL WATERS.

§ 327. Claims raised on account of collisions⁵⁶ between ships,⁵⁷ which have arisen so frequently of late (*Anseglung*, *Zusammenstoss*, *Abordage*), are claims *ex delicto* or *quasi ex delicto*, or claims which arise out of the general guarantee or safeguard, which the law desires to afford to persons and property. There can, therefore, be no reasonable doubt that, if the collision occurred in any harbour, or in waters subject to any definite sovereign

⁵³ Judgment of 21st Sep. 1878 (Dec. xxiv. § 26, p. 83): "In so far as the owner is sued on such grounds by third persons, the action must be founded on some obligation created by statute, and not upon any contract or delict, and the owner may require that he shall be judged by the law of his own country in this matter, the only law to which he has subjected himself in carrying on his business."

⁵⁴ See Story, § 286*b*, who very prudently expresses himself thus even in reference to contract debts: "But it is far from being certain that foreign courts, and especially the courts of the country where the advances or supplies were furnished, would adopt the same rules, if the lender or supplier had acted with good faith, and in ignorance of the want of authority of the master." See, too, Brodie's excellent remarks cited by Story. [Brodie on Stair, ii. pp. 955, 956.]

⁵⁵ The judgment of the German Imp. Ct. (i.) of 12th July 1886 (reported by Seuffert, xlii. § 88, and in J. xiv. p. 339) rests upon a non-recognition of this distinction. It proceeds on the view that the provisions of §§ 451 and 736 of the German Comm. Code, as to the liability of the German owner for third persons not regulated by any contract, should be applied by the German judge, without taking into account whether the ship, at the time of the event which caused the damage, was actually within the territory of some law which has provisions of a different tenor. This judgment, however, is right in holding that the *lex loci* must determine questions as to the obligations to take a pilot with powers of navigating the ship.

⁵⁶ This (*zusammenstoss*) is the technical expression used in § 736 of the German Code of Commerce.

⁵⁷ See below, under "extra-territoriality," for the peculiarly difficult case where the ship that does the damage is a ship of war of some foreign State.

power, the law of the place where the damage was done, and no other law, must be applied, and this is beyond question the view which now prevails.^{58 59} The Congress at Antwerp, too, in 1885 (*Actes*, p. 145, *Quest.* 60), expressed itself thus, viz.:—

“L'abordage dans les ports, fleuves et autres eaux intérieures, est réglé par la loi du lieu où il se produit :”

and the Institute of International Law, following Sacerdote's proposals, in 1888 reached the same result. Special presumptions, which the law not unfrequently sets up as to the fault of the crew of one ship or the other, *e.g.* where the one is in motion and the other at anchor, or where the one is a steamer and the other a sailing vessel,⁶⁰ are in these matters to be treated as part of the substantive law of the case, and are, like the other points, to be decided by the *lex loci actus*, not by the *lex fori*.⁶¹

It is, however, precisely in this connection that it becomes plain that, in order to lead to any practical result, the liability by the *lex loci actus* must, to the extent of the value of the ship, attach to the owner as well as to the master. If the master only is responsible by the *lex loci actus*,⁶² the practical operation of this law will, in most cases, in view of the large sums of damages involved in such cases, be a complete mockery.

This rule must in particular be applied to the solution of the question

⁵⁸ Cf. Abbot on Shipping, p. 579 of 12th ed. Collisions between ships of foreign nationality on the English coast are in practice decided in accordance with the law of England; in the case of collisions in a foreign territory, damages will only be awarded by an English court if the foreign law and the law of England concur in holding that there is an obligation to pay damages. This is in accordance with the ordinary English rule as to delicts (Abbot, p. 580). Foote's explanation on this point (pp. 482, 483) is less satisfactory. He throws aside the *lex fori*, and proposes that, as a matter of principle, the general law maritime should rule, and then he allows the English legislature the power of modifying this law maritime according to its pleasure, and so as to bind English courts absolutely. I cannot discover in what this proposal differs from an application of the *lex fori*. See, too, Lyon-Caen (J. ix. p. 598); Asser-Rivier, § 112; Trib. Comm. Marseilles, 10th June 1869; C. Montpellier, 31st March 1873, J. i. p. 28; Judgment of English Court of Admir. 26th November 1867, The Halley, L.R. 2, Ad. and Ecc. p. 3 reported by Külm in his *Zeitschrift für das ges. Handelsr.* xii. pp. 425-430. The German Imp. Ct. (i.) 30th May 1883 (Dec. xxi. § 24) applies the law of Germany to all collisions occurring in German waters, and emphasises the *lex loci actus*. In the judgment of 12th July 1886 (xix. § 2) the same division of the court gave more prominence to the coercitive character of such rules of law, and preferred therefore the *lex fori*.

⁵⁹ The two judgments of the English Ct. of Admiralty, reported in J. xv. p. 114, of dates 26th July 1886, and on appeal 15th February 1887 [*Augusta v. Chilian*, 5, Law Times Reps. p. 326], determine the question whether the ship had a compulsory pilot on board, whose advice the captain was obliged to follow, according to the *lex loci actus*, while the question whether on that account the owner of the English ship, which did the damage, was liable in damages to the other ship, also an English ship, was in their view to be determined by the law of England.

⁶⁰ On these presumptions see Lewis, *Seerecht*, ii. p. 136, note.

⁶¹ To the same effect on both points judgment of the Sup. Ct. of Comm. of 21st September 1878 (Dec. xxiv. § 26, p. 83).

⁶² The amount of an insurance policy, however, can never be claimed by reason merely of the provisions of the law that is recognised at the place of the collision, if the vessel against which the claim is made is herself, either at the time of the collision or subsequently, damaged. See *supra*, note 34.

which is so differently answered in different maritime laws,⁶³ viz whether the owner is free of liability if the negligence is the negligence of a compulsory pilot, whom the master is, by the *lex loci actus*, compelled to take.⁶⁴ But, conversely, the liability of the owner, which in other matters is determined by the law of the flag, disappears if the *lex loci actus* throws no liability on him.⁶⁵

NOTE DD ON § 327. COLLISIONS.

[By the Merchant Shipping Act of 1862 (25 and 26 Vic. c. 63), § 54, it is provided that no shipowner, be he British or foreign, shall be liable beyond a certain amount per ton of his ship's tonnage for damage caused by the improper navigation of his vessel; unless there be actual fault or privity on the owner's part, a case which is not likely to occur. This is applicable wherever the *locus* of the damage may have been. By § 57 of the same Act it is provided that, when foreign ships are within British jurisdiction, the regulations for preventing collisions prescribed by the Act shall apply to them, and in any cases arising in any British court of justice concerning matters happening within British jurisdiction, foreign ships shall, so far as regards such regulations, be treated as if they were British ships.

In the case of collisions in foreign territorial waters, the law of England will not give damages unless both the foreign and the English law concur in holding damages to be due (Abbot as cited in note 58; Westlake, § 197; The Halley, 1868, L. R. 2, C. P. 193). In this case it is, however, observed that the English court will enquire into the state of the foreign law, "as one of the facts upon which the existence of the tort, or the right to damages, may depend."

This principle is illustrated by a series of cases. By the law of England, as expressed in § 388 of the Merchant Shipping Act of 1854 (17 and 18 Vic. c. 104), no owner nor master of any ship is to be "answerable to any person whatever for any loss" occasioned by the fault of a qualified pilot within the district where the employment of such a pilot is compulsory. Now the employment of a pilot on entering the port of Havre is by French law compulsory: a collision occurred there between two English ships, and an action of damages was raised in the English courts. The

⁶³ See German Comm. Code, § 740, which discharges the owner, if, while the ship is under the care of a compulsory pilot, the crew of the ship have done their duty. The law of France and the practice in England are otherwise. Cf. Külms, *Zeitschr. für Handelsr.* xii. p. 421.

⁶⁴ According to the judgment of the Sup. Ct. of Comm. of the Empire, of 21st September 1878, the law of the flag should generally be applied. Wagner is for the *lex fori* on this point also (p. 137). The practice in England is to apply the *lex fori*, but to restrict its operation. The obligation of reparation, which must exist by the *lex loci actus* as well, will not be applied by the English courts to any greater extent than the law of England allows (cf. Westlake, Rev. vi. pp. 394, 395). This is quite in accordance with the treatment which the English courts bestow on claims *ex delictis* arising in international law generally. Abbot, p. 580.

⁶⁵ The Moxham, 1876 (L. R. 1, Prob. Div. 43 and 107, J. iii. p. 381); Fiore, *Dir. pubb.* ii. § 1047.

defendants pleaded the compulsory pilotage. The court, however,—after being informed by skilled evidence that the functions of a pilot in French waters were not the same as in England; that, whereas in England the pilot supersedes the master in the control of the conduct of the ship, and must not be interfered with, “except under most extraordinary circumstances,” by the master, in France by French law he does not supersede the master, but acts as his adviser only,—refused to give effect to the plea of non-liability, even although, as matter of fact, the master had given up the charge of the vessel to the pilot. The court ascertained what the relation of master and pilot was by French law, and having ascertained that fact, they applied the law of England, *Augusta v. Chilian* 1887 (5, Law Times Reps. p. 326). The same rule had been followed in the case of the *Guy Mannering*, 1882 (L. R. 7, P. D. 52 and 132), where the *locus* of the collision was the Suez Canal, the rules of which as to the import of compulsory pilotage are similar to those in force in France, and in the case of the *Agnes Otto*, 1887 (L.R. 12, P.D. 56), the *locus* of the collision in that case being the Danube.

Carrying out the principle enunciated in the case of the *Halley*, the English courts will not give damages against a foreign ship under compulsory pilotage in the full sense, whatever the law of the foreigner's flag may lay down on the matter. Westlake, § 204, and cases there cited.]

COLLISIONS ON THE HIGH SEAS.

§ 328. But what are we to say of collisions on the high seas? The ordinary rules as to delicts and *quasi*-delicts are not applicable in such cases, because there is no distinct territory subject to some sovereign power, in which the act, resulting in damage, has been done. One can well understand that in this case recourse has frequently been had to the *lex fori*, as a way out of the difficulty.⁶⁶ But to apply the *lex fori* is to make this important obligation to give reparation dependent on the one hand on chance, or, on the other, on the caprice of the pursuer. It involves therefore a plain injustice, and accordingly Lyon-Caen (*J. ix. p. 600*) declares the common law of all nations, which knows no obligation for reparation except on account of the *culpa* of some individual, to be applicable, and alone applicable, to all collisions on the high seas. We cannot,

⁶⁶ See Asser-Rivier, 113, and the French judgments given by Lyon-Caen (*J. ix. p. 601*). Wagner (*p. 14*) is of course of this view. To the same effect, too, the grounds of judgment in the decision of the German Imp. Ct. (i.) of 12th July 1886 (Seuffert, xlii. § 88), already referred to. See, on the other hand, the editor's note in *J. xiv. p. 442*. A judgment of the Sup. Ct. of App. at Lübeck of 30th Jan. 1849, *Bremer Samml.* vol. ii. pt. 2, p. 8, held that § 10, subsec. 1, of the Hanseatic maritime code, according to which, in the case of an accidental collision, both ships take equal shares of the loss, was applicable to a collision between two foreign vessels. See *C. de Paris*, 16th Feb. 1882 (*J. x. p. 145*). See, on the other hand, Clunet (*J. x. p. 148*): “*Comment soutenir en droit que par cela seul qu'un tribunal est compétent pour connaître d'une affaire c'est la loi territoriale qui doit être appliquée.*”

however, in modern times, think of appealing, in the matter of private law, to any such universal law, particularly in maritime affairs. We shall be more likely to attain a sound result by the following reasoning. Since no law can lay obligations on foreign persons who are not within its territory, we cannot require more from any one who is sued than what his own law, the law of his domicile, imposes on him; and again, because a law which apportions damage that is purely accidental must rest solely on equitable considerations, which would not be satisfied if native ships were unfairly prejudiced, no larger reparation can be demanded than the law of the pursuer's domicile would give in similar cases to the owner against whom the claim in question is being made. The Antwerp Congress of 1885 (*quest.* 60, *Actes du Congrès*, p. 145) pronounced precisely to this effect, viz. :—

“L'abordage en pleine mer, entre deux navires de même nationalité, est réglé par la loi nationale.

“Si les navires sont de nationalité différente, chacun est obligé dans la limite de la loi de son pavillon et ne peut recevoir plus que cette loi lui attribue.”

In practice an inclination to adopt the principle has already manifested itself in some cases,⁶⁷ and it has been most recently approved by the Institute of International Law in 1888.^{68 69}

⁶⁷ For this solution of the point, see Lewis, *Zeitschr. für Handelsr.* vol. xxxii. pp. 98, 99. Grassi, *Archivio giuridico*, vol. xxxix. pts. 1-3, pp. 211 *et seq.*

⁶⁸ See Trib. Comm. Brest, 22nd Jan. 1887, and the confirmatory judgment of the Court at Rennes, 21st Dec. 1887 (*J.* xv. p. 80). These apply the law of the “*navire abordeur*.”

⁶⁹ A judgment of the Sup. Ct. at Berlin, of 25th October 1859 (*rep.* by Seuffert, xiv. § 197), in conformity with the view adopted in the text, takes as the primary rule the law of the home port of the ship against which the claim is made. The court thought that it was right also to have regard to the law of the place where the suit was depending, but it is to be noticed that, in the case on hand, the suit was proceeding in the country to which the home port of the injured vessel belonged.

See Story, § 423*g*. He hesitates, however, between our view of reciprocity and the *lex fori*. Although the judgment cited by him in his note 3 to § 423 seems to favour the latter rule in the reasons given for the decision, it is not by any means conclusive, because in the particular case the *forum* and the domicile of the defender were identical, and, according to the law of the *forum*, the defender was not required to make good the damage that had been caused. On the other hand, the judgment of the Court of Rouen, cited by Story in § 423*g*, note 3, seems to favour the view taken in the text. A French ship was run down by an English ship on the high seas. The court refused the pursuer's demands. Story, however, does not give the grounds of judgment, and I have not been able to find them.

See Wharton, § 472*a*, on the English decisions. The Supreme Court of Portugal, in an interesting judgment of 21st June 1880 (*J.* viii. p. 177), applied the law of Portugal to a case where a Portuguese ship had been injured within sight of the Portuguese coast. Lyon-Caen and L. Renault (*Dr. c.* § 2027) very soundly refute the reasoning which is used to advocate the application of the *lex fori* with special reference to French law, and in particular point to the hardships which may arise from the *lex fori*, since this law may be quite unknown to the very persons who have suffered loss. They declare in favour of the law of the flag of the injured ship. But this is quite arbitrary; the law which is binding on the injured person, may have no obligatory force for him who does the injury. On equitable grounds, however, we may justify ourselves in holding that if the formalities required by the law of the injured ship are satisfied, that is enough.

Again, can the right to prosecute a claim for reparation be tied up by the necessity of observing certain formalities and certain specified periods of time?⁷⁰ Is the principle which we have suggested to hold good in these matters also? It is plain that by logical sequence, where damage has been done in a harbour or in waters belonging to some particular sovereign power, the law of the place where the damage was done must be applied. No considerations of practical inconvenience can be urged against this conclusion, since in such cases the injured party can easily acquaint himself with the provisions of the *lex loci actus*, and satisfy their requirements.⁷¹

But, as regards damage done on the high seas, it would be necessary to observe the law of the person who is under the obligation to make reparation, since these formalities and periods of time are plainly introduced in his interest; he, at least, could make no complaint. But then it is just these statutory provisions that the injured party may often find it highly difficult to observe. He will often be unable to learn what they are in time, if, *e.g.* the collision has taken place at night, or in a fog, and if the vessel that did the damage has made off quickly. It may even sometimes happen that it is impossible at once to ascertain what the nationality of the ship that did the injury is.

Labbé,⁷² accordingly, takes the view that the period for making claims in such cases must, in accordance with natural justice, be determined by the circumstances of the particular case. But, as Lyon-Caen rightly points out, it might be difficult to obtain practical recognition of this view, consistently with the strict positive enactments of the various municipal systems of law. Again, on a sound view of the matter, the rule "*locus regit actum*" can only be used to this extent, that the form of claim which the injured party must make is a valid form, if it is in conformity with the laws of the place where it is made. The rule "*locus regit actum*" cannot be extended to the question of the period within which the claim has to be made. The Congress at Antwerp, recognising the principle by which the law of the place where the damage was done will regulate the period and the form of the claim, if the damage was

⁷⁰ See Code de comm. §§ 435, 436. § 435 provides: "*Sont non recevables . . . toutes les actions en indemnité pour dommages causés par l'abordage dans un lieu où le capitaine a pu agir, s'il n'a point fait de réclamation.*" § 436: "*Ces protestations et réclamations sont nulles, si elles ne sont faites et signifiées dans les vingt-quatre heures et si dans le mois de leur date, elles ne sont pas suivies d'une demande en justice.*" The Codice di comm. Italiano, §§ 665 and 923, prescribes different, and longer periods.

⁷¹ French courts have frequently, even in cases in which the injury was done in the territorial waters of some power, applied the French law as to the period within which claims must be made and actions brought, where the actions were directed against French owners. Cf. C. de Montpellier, 31st May 1873 (J. i. p. 29), and C. d'Aix, 12th July 1871 (J. i. p. 26); Trib. Comm. Seine, 3rd Sep. 1883 (J. xi. p. 280). To the opposite effect, and pointing out the injustice that lies in that procedure, are Lyon-Caen (J. ix. p. 604), and Clunet (J. xi. p. 282). The injured party is often unable to ascertain beforehand what the powers of the court are.

⁷² See Lyon-Caen, J. ix. p. 604.

done in territorial waters, a river or a harbour, adopted almost unanimously this proposition :—

*“ Si l'abordage a eu lieu en mer, le capitaine conserve ses droits en réclamant dans les formes et délais prescrits par la loi de son pavillon, par celle du navire abordeur, ou par celle du premier port de relâche.”*⁷³

It was not, however, overlooked that in adopting this rule there was a departure from strict principle. The proposition as one *de lege ferenda* is one that may be approved of. If we take our stand on positive law, or adhere to strict logic, we can never hold that the law of the injured party should be applied.⁷⁴ On the other hand, in so far as a real prescription of actions is concerned,⁷⁵ although the period prescribed in § 436 of the French *Code de Commerce* is not to be regarded as a prescriptive period, there is no reason for departing from the rule which we reached by deduction, viz. that we can only admit an obligation to make reparation, if it exists both by the law of the ship that does the damage and of that which suffers it.⁷⁶

CLAIMS FOR SALVAGE.

§ 329. Claims for salvage of ship and cargo are undoubtedly *quasi-contractual*. Accordingly the *lex loci actus* will be applied, if there is any such law in the case, *i.e.* if the salvage or assistance has been performed or given within the territory of a civilised State. The same law, too, in respect it is the *lex rei sita*, will determine questions as to any real right or rights of retention that may be claimed over wreckage and salvaged goods.^{77 78}

On the other hand, very serious legal difficulties are presented by the case of salvage on the high seas, or within a territory that has no

⁷³ *Actes*, i. p. 146. According to the resolutions of the Institute of International Law (Lausanne 1888), the law of the claimant was to rule. But the claimant may make his claim either in the court which has jurisdiction according to the rules of his own law, or in the court to which the law of the other party attributes jurisdiction.

⁷⁴ We should rather hold that the law of the first port that could be reached should rule. Lewis takes a different view: he thinks that the law of the injured person must take the leading place. Grassi is contented to let the law of either party rule.

⁷⁵ See German Code of Comm. § 906. (The period of prescription is two years.) The Italian Commercial Code, § 923, has a period of a year, running from the day the claim is made.

⁷⁶ *I.e.* The injured party loses his right of action by the operation of his own law of prescription, and also by that of the party who did the injury.

⁷⁷ See, on this subject, the discussion of cases in mercantile law in Asher's *Monatsschrift* (Hamburg, pt. i. 1836, p. 146), and the account there given of George I.'s proceedings in 1824 against the wreckers at Bremen, and the regulations as to wreckage in the Duchy of Oldenburg in 1775. Also Asser-Rivier, § 114. Resolution of the Congress of Antwerp (*Actes*, i. p. 151, *question 62*): “*L'assistance maritime dans les ports, fleuves et autres eaux intérieures est rémunérée d'après la loi du lieu où elle se produit.*” Ct. of Cass. Turin, 19th Aug. 1885 (*J. xiv. p. 241*); Towage in territorial waters.

⁷⁸ The law of England (see MacLachlan, p. 621, and statute 24 Vict. c. 10, § 9) subjects foreign ships in British waters to the provisions of the Merchant Shipping Act, 1864.

system of law that can be recognised by a civilised State as binding on its subjects. The consideration that no law but the law of the home port can lay any obligations upon the ship and the owner for the voyage on the high seas, would dispose us to apply the law of the salved vessel, or of the vessel whose cargo has been salved.⁷⁹ On the other hand, it has been argued that the purely voluntary act of salvage must be ruled by the law of the salvor, while the ship which was salved was in a situation of danger, and, if there were no law to regulate the matter, would have to pay whatever price the salvor asked.⁸⁰ The salvor, it is said, must know on what recompense he may calculate, and thus the general interest will be best consulted by applying the law of the flag of the salvor.⁸¹ It was this argument from expediency which chiefly moved the Congress at Antwerp to adopt a resolution that—

*L'assistance en mer est rémunérée d'après la loi de l'assistant.*⁸²

The legal ground, however, on which we must proceed, which leads to the same result, is the fact that when a ship is in distress the fiction that she is a part of the country, the flag of which she flies, is no longer completely applicable to her.⁸³ A ship in distress, that can no longer manage itself, is dependent rather on the salving ship, in so far at least as the operation of salvage is concerned. Thus we can, on legal considerations, as well as on considerations of expediency, defend the application of the law of the salvor's flag. That does not, however, prevent special provisions of the law of the home port of the ship that is salved, which are particularly favourable to the ship or the persons who take part in the salvage, from being applied, if the law of the home port specially provides that this shall be done. For we cannot doubt the competency

⁷⁹ See the opinions of Saintelette, Engel, Vrancken, and Lyon-Caen at the Antwerp Congress (*Actes*, i. pp. 147-150).

⁸⁰ So Spée (Registrar of the Ct. of Comm. at Antwerp), *Actes*, i. p. 147.

⁸¹ All who are on board ship are subject to the law of the flag. See, *infra*, our discussion on the territory of the State, § 505.

⁸² See Clunet's discussion in the *Actes du Congrès*, i. pp. 149, 150: "*En pur droit, l'une et l'autre solutions se justifient. Il est évident que, dans le contrat, il faut rechercher l'intention des parties. Or, si nous recherchons l'intention de la partie obligée, il est évident qu'elle a entendu se référer à sa loi nationale et n'a consenti à être assistée—car souvent il faut se défendre contre les assistants trop empressés—qu'aux conditions de sa loi nationale. Néanmoins une raison l'impose en faveur de la loi de l'assistant; c'est elle indiquée par M. Spée; il faut encourager l'assistance. Sir John Gorst [H.M. Sol. Gen. for England], p. 151: "Il faut au moins que celui qui se dévoue ne soit pas privé, par une législation étrangère parcimonieuse, de la juste rémunération. Vous encouragerez l'assistance et vous sauverez beaucoup de vies humaines en admettant que, en cas de conflit des lois, c'est celle de l'assistant qui prévaut."*

⁸³ See the interesting judgment of the court at Rennes, 17th April 1883 (J. xi. p. 512, *pracs.* p. 514). The question there was as to a wreck found on the high seas.

Demangeat, J. xii. p. 143, puts the application of the law of the salvor on the assumption of a *negotiorum gestio*, since the ship that is salved is really altogether passive in the matter. That does not seem to me to be conclusive. If we are not to give effect to the considerations stated in the text, we cannot assert that the law of the salvor will rule a *negotiorum gestio*, particularly if we proceed on the principle that the law of the place where the thing is done is decisive in cases of *negotiorum gestio*.

of that law to impose such obligations on its own ships, for the encouragement of salvors. Thus, from the point of view of international law, no objection can be taken to the competency of the English statute of 1861 [24 Vict. c. 10, § 9], which sanctions a payment for the salvage of persons who are on board British ships, wherever the salvage may have been performed.^{84 85}

To apply the law of the salvor seems no doubt to carry with it this disadvantage, to which attention was called at the proceedings of the Congress at Antwerp, that if ships of different nationalities take part in the salvage, different principles would have to be applied to the same act of salvage. It would not, however, in that case be inequitable to apply the law of that ship on which the great burden of the assistance which was rendered fell, and in doubt the law of that ship that was the first to bring assistance. The amount of the salvage will in any case be determined on equitable principles. If, however, the work of salvage began in one territory and was completed in another, or if it began on the high seas and was completed in the seas adjoining some particular territory—which latter is the ordinary case—the only law we can then consider is the law that regulates the first part of the assistance given.⁸⁶ If, lastly, the salvor should take action at the request of some one—*e.g.* of the consul of the State to which the ship in distress belonged—then the law under which the request was made would govern the case, and no other law could do so. For contracts for salvage are lawful, and we must allow the ship to be represented by her consul, in so far as the exclusive application of the law of the coast is concerned. By holding fast to this principle of representation, questions which arise may often be simplified, particularly

⁸⁴ See MacLachlan, p. 621; Asser-Rivier, § 114 *ad fin.* The rule holds good within English waters for the salvage of persons who are on board foreign ships. We might, following out this, be tempted in certain circumstances to reverse the rule which we laid down for cases of collisions, and to say that the person who has performed the salvage may choose between his own law and that of the salvaged ship, according as the one or the other is more favourable to him. But, if we were to have regard in that way to two different systems of legislation, we should find ourselves involved in another set of difficulties, since, as a general rule, the amount of salvage is first ascertained by a special order from the proper officials, in which it is impossible to apply the same sharp principles as can be applied in the case of collisions.

⁸⁵ Wagner (p. 142) is also in favour of the *lex fori* "because the shore is for this purpose, *i.e.* the purpose of salvage, divided into districts, under the care of special officers—in Germany the *Strandämter*—and because these officers and the courts in whose districts they are stationed are subject to a *forum speciale* for questions of salvage, with a privative jurisdiction." The force of this reasoning is merely subjective. The Merchant Shipping Amendment Act of 1862 [25 and 26 Vict. c. 63] is directly against the application of the *lex fori* (see Asser-Rivier, § 114, note, pp. 222, 223). It provides (§ 59) that by an order in council the English provisions as to payment of salvage for saving life may be applied in the cases of persons saved from foreign ships, if the Government, whose flag those ships fly, is willing that salvage should be awarded for lives so saved, when the ships in question are beyond British jurisdiction.

⁸⁶ See the decision of the Court at Rennes, cited in note 83: also the C. de Cass. 6th May 1884 (J. xi. p. 517), Demangeat's report at p. 516, and Demangeat's own remarks (J. xii. p. 143). If the law of the port to which the vessel was brought were to rule—and the judgment of the Court at Rennes was pronounced in a case of that kind—the captain of the salvaging vessel might very easily be tempted to be arbitrary in his conduct.

as consular treaties often concede a certain right of interference to the consuls of the country to which ships in distress belong.^{87 88} If the law of the ship that gives the assistance is applied, and especially if it is applied in the way we have indicated, this result, besides, will generally follow, that in most cases the officials, in estimating the amount to be paid for salvage, will have to apply their own law. That simplifies the whole matter, without making the owners of the salvaged ship and of the cargo so much dependent on accident and caprice as would be the case, if the principle were that the *lex fori* should rule. If the *lex fori* gave the rule, the captain of the salvaging ship would be tempted to bring his ship to that port, the laws of which were most favourable to him. If an appeal is made, before a maritime court or official, to a foreign law, the person taking the appeal to that law in his own interest must, as in other cases, prove his assertions. In doubt these courts or officials will be guided by the law of their own country, while again, as more and more consular officials are appointed, it will not be very difficult to obtain information as to the laws of other countries.

CONTRACTS OF AFFREIGHTMENT.

§ 330. The general rules of the law of obligations, and all that we said in that connection about land carriage, are applicable to contracts of carriage by sea. In such cases, the principal thing to observe is the law of the country in whose business language the documents signed by the parties are expressed,⁸⁹ and it is particularly unsound to attempt to take as our exclusive guide in this matter the law of the place of destination.⁹⁰

⁸⁷ Asser, § 115 (p. 225), at least holds it to be desirable to insert some such provision in consular treaties.

⁸⁸ See e.g. Asser-Rivier on such treaties, § 115. The extent of power committed to consuls is of course different in different instances. The French treaties cited by Asser-Rivier allow consuls a very important part in the conduct of the work of salvage: the treaties concluded by the German Empire, on the other hand, give their consuls a mere right to report and to watch the proceedings. Cf. treaty with Spain of 22nd February 1870, § 18: "All measures for salvage must be taken in accordance with the laws of the country. Consular servants in either country may only intervene to superintend measures for repair and re-provisioning of the vessel, or, if need be, for the sale of a vessel that has been thrown upon the coast." See, too, treaty with Brazil, 10th January 1882, § 44, and with Greece, 26th Nov. 1881, § 14.

⁸⁹ See the judgments of the German courts cited by Wagner, p. 136, note 19: in particular the judgment of the Imperial Ct. of Germany (i.) of 16th April 1881 (Dec. iv. § 27, p. 87).

⁹⁰ So, too, Asser-Rivier, § 111; Wagner, p. 141; and judgment of the Sup. Ct. of App. at Lübeck of 26th March 1861 and 30th June 1870 (Seuffert, xv. §§ 183 and 24 and 268). These latter judgments deal with the question whether the freight was earned, or lost, as the case might be, by the law of the port of destination. But see judgment of Imp. Ct. (i.) of 21st March 1883 (Dec. ix. § 8, p. 51) against too sweeping an application of the law of the port of destination: see also Foote, pp. 454, 455, and the decisions of the English courts there reported. The liability of the owner on a charter-party concluded by the master in a foreign port was decided, in the case reported by Foote at pp. 372, 373 (*Lloyd v. Guibert*, 1864, 33 L.J.N.S. Q.B. 241), to be determined not by the law of the place of performance, but by that of the

[The form of a charter-party will be regulated by the law of the place where it was made (*Lamy v. Gentles & Co.* Trib. Comm. de Caen, 1883, J. xi. p. 282). The case of *Lloyd v. Guibert* cited below, note 90, makes the law of the flag, and not that of the place of performance, the rule for determining the effect of the charter-party. This will *multo magis* be so if the contracting parties had the law of the flag in view on entering into their contract (*Missouri S.S. Co.* 1888, L. R. 42, Ch. D. p. 321).

The Scottish courts would no doubt follow these recent English decisions, if the point were distinctly tabled for their decision, but I find that in the case of the *Immanuel*, 1887 (Ct of Sess. Reps. 4th ser. xv. p. 152), Lord Justice Clerk Moncrieff says that a bill of lading must be judged by the law of the place of performance: while Lord Young, in the same case, repudiates the law of the flag as interpretative of the bill of lading, and prefers to judge it by the law of Scotland, since it is an instrument "written in our language and expressed in our forms." His lordship disputes the right of an owner—in this case a Dane—to send out his ship "to trade with all the world," framing his contract in the English language, and in English technical expressions, and then to appeal to the law of his flag. These views were, however, only *obiter*, for the point determined in the case was whether the statement in a bill of lading was conclusive evidence as to the quantity of cargo received. This was held to be a question of evidence to be ruled by the law of the *forum*, not by that of the flag or of the *locus contractus*.

Whether a master should have refused to deliver goods without production of the bill of lading, is a question as to the *modus* of performing his contract which must be ruled by the law of the place of performance. *Stettin*, 1889 (L.R. 14, P.D. 142).]

AVERAGE.

§ 331. Strictly considered, all provisions for apportioning among all concerned loss occasioned by measures adopted in perils by sea, all provisions for average loss,⁹¹ are simply part of the law of carriage. One can easily understand that on this point the ordinary practice in maritime law, established by usage, has been to apply the law of the port of

flag; and accordingly the English court applied the law of France, and not that of England. The obligations arising from a bill of lading were held, in a judgment of the German Ct. of App. of 30th May 1879 (Dec. xxv. p. 195), and in one of the German Imp. Ct. (i.) of 5th December 1887 (Dec. xx. p. 57, § 13), to be ruled by the law of the port of destination. But that is specially inconvenient for modern commerce, in which the port of destination is altered by telegrams despatched after the vessel has started. The captain could not, if that were the rule, know timeously what his obligations are, and he may have a different set of obligations with regard to each person interested in the cargo, if the ship calls at several ports. The case is different as regards the transference of real rights over the cargo by means of a bill of lading; see *supra*, §§ 225, 228.

⁹¹ See R. Ulrich's work on average. (*Grosse Havarie, die Gesetze und Ordnungen der wichtigsten Staaten über Havarie Grosse*, Berlin 1884.)

destination.⁹² The first thing that contributed to this result was that, in the Middle Ages, goods were generally consigned to factories, which were subject to the same law, in the matters which we are now considering, as was the person who sent the goods. Subsequently, again, it was found expedient to adopt the principle of taking the law of the port of destination and not that of the port of despatch as regulative, out of consideration for the average adjusters, who would thus be able to do their work according to the law of the port of destination, with which they were familiar. If the ship in the course of her voyage took goods on board from different ports, this plan secured a common law applicable to all interested, which would not have been the case if the law of the place where the goods came on board had been adopted.⁹³

We could hardly, however, on logical grounds—unless we are to consider the convenience of the average adjusters of decisive importance—justify a proposal to set the port into which a ship is driven on the same footing as the port to which she is bound, with a due regard to certainty in the application of the law.⁹⁴ And in modern times, since it frequently happens that the port of destination is first made known to the ship during the voyage by telegram at some port of call, when a floating cargo is sold; and since goods are taken on board at different ports, where the ship puts in, to be forwarded to different destinations,⁹⁵ it has been justly

⁹² See discussion and decisions of the Court of Hamburg in Asher, *Rechtsfälle*, i. p. 204; Asser-Rivier, § 117, C. de Bourdeaux, 21st January 1875 (J. ii. p. 351); English Ct. of Comm. Pleas, *Mavro v. Ocean Marine Ass. Co.* 1875, L.R. 10, C.P. 414 (J. iii. p. 188); German Sup. Ct. of App. 24th September 1872 (Dec. vii. p. 168); 23rd December 1872 (Dec. viii. p. 239); see Sachs, Rev. vi. p. 243; also decision of 13th November 1878 (Dec. 25, p. 1); Wharton, § 443, and the cases which he cites; Westlake-Holtzendorff, § 209; Judgment of the Sup. Ct. of Norway, 25th March 1886, J. xv. p. 151, and French jurisprudence as indicated by the decisions there cited; Ulrich, p. 397, on English law, and p. 451, on that of the United States. In the judgment by the German Sup. Ct. of Comm. of 23rd December 1872 referred to, it is said that while the German Commercial Code did not declare the law of the port of destination to be regulative, the only reason for not doing so was the fear that such a general rule would, contrary to the wishes of the parties, exclude the application of German law: that there was no doubt that the law of the place of adjustment of the average would be applied as a general rule. (See Protocols of the Commission for consideration of the German Comm. Code.)

⁹³ Of course, the most radical way of giving assistance to all interested would be by laying down some uniform law of average for the whole civilised world. But the "York and Antwerp rules," which were put into shape in 1864 and 1877 [and in 1890] by an international congress, and the Association for the reform and codification of the law of nations, have not found by any means general approval (see on this subject Foote, p. 422 *et seq.*), and the question of the international validity of municipal laws has again come to the front as against the question of an uniform law on the subject.

⁹⁴ See the discussion by Asher, referred to in the beginning of note 92. Voigt-Seeböhm (*Deutsche Versicherungs Recht*, 1887, p. 528) is of a different opinion.

⁹⁵ In the discussion by Asher, at p. 218, it is said of a case like this: "Each part of the voyage has its separate destination, and each of the different bundles of common interests which exists during the course of the voyage, must be ruled by the law of the next destination. The person, then, who is interested in the cargo that is bound for the last destination will be subject in succession to several systems of law. Although this seems startling for the moment, the difficulty disappears when we remember that the persons interested in the cargo have

maintained that to apply the law of the port of destination is to make everything depend on accident and caprice, and gives occasion for injustices and anomalies of various kinds. Lyon-Caen accordingly proposes to regulate the matter of average by the law of the ship's flag,⁹⁶ and the Institute of International Law has adopted this proposal.⁹⁷ Lyon-Caen supports his proposal, on the one hand, by noting that in the general case the average loss takes place on the high seas, and then the law of the ship's flag suggests itself, and again by urging that to have regard to the law of the flag, which is ascertained beforehand, may very reasonably be supposed to be in accordance with the intention of parties. But the Congress at Antwerp was of a different opinion.⁹⁸ They thought the proposal first of all too strong an innovation, counter to long usage, which would bring confusion and danger with it.⁹⁹ Again, besides the protest of the average adjusters who were present, the argument was also pressed that merchants frequently employed ships, the law of whose flag in questions of average it would take years to ascertain (*e.g.* Chinese vessels); whereas, in the majority of cases, the place of destination was certain, while it was the consignee, and not the consigner, who was interested in the fate of the cargo. Lastly, it was said, a necessity might arise in the course of the voyage for transferring the cargo to other ships, and to different ships of different nationalities. What law would be applicable in such a case, if the law of the flag was to be the law sanctioned by principle? The Congress in the end, in direct contradiction to Lyon-Caen's proposal, and after rejecting an intermediate proposal, adopted this simple rule, against the opinion, no doubt, of prominent members (*Quest.* 36), viz. :—

“Le règlement des avaries se fait d'après la loi du port ou le chargement se délivre.”

This declares the law of the place where the ship is actually discharged,¹⁰⁰ be that in consequence of a mere accident, to be the rule, and not the law of the port of destination. This solution,¹⁰¹ which certainly suits the convenience of the average adjusters and insurance agents, but just as certainly does not suit the convenience of traders, and of the insurers themselves, is utterly unlawyerlike, because it simply commits the issue to the decision of pure chance.¹⁰² To arrive at a true solution, we

rights against each other, as well as against the owner.” We may accept this solution, if the ports of call, and the ports in which goods are taken on board, are exactly known beforehand. But, in any case, the result will be great expense and complication.

⁹⁶ J. ix. p. 593.

⁹⁷ *Annuaire*, viii. p. 124.

⁹⁸ *Actes du Congrès*, i. p. 118. The committee of the Congress, with the assent of Smekens and Spée, pronounced for the law of the flag.

⁹⁹ See Vrancken (Dean of Faculty of Advocates at Antwerp).

¹⁰⁰ Ulrich proposed (*Actes*, i. p. 123): “*Le règlement des avaries se fait d'après la loi ou le navire et cargaison se séparent.*”

¹⁰¹ Supported by Wagner, p. 142, note 34, in conformity with his general principle of inferring the rule of the local law from the competency or jurisdiction of the local officials.

¹⁰² What is the law if this port has no definite maritime law, a case which may occur? The grounds of judgment in *Lloyd v. Guibert* (*supra*, note 90) call attention to the possibility of the ship being discharged “in half-savage places.”

must place in the front rank the intention of the parties, whether that be actually expressed or implied, but still declared in some way or other.¹⁰³ In any case, there is nothing to prevent the parties from placing themselves under some particular law for the purpose of settling questions of average. If there are definite points on which we can base any further assumptions, this much we can assert, that if one person, or several persons domiciled in the same territory, charter a ship, they declare that they will be ruled by the law of the port of destination. This we can support by past usage and by the other reasons urged at the Congress. This, too, we may assert, that, if these persons reserve to themselves the right to declare the port of destination while the ship is on her voyage, and not sooner, the law of this port may, in doubt, be accepted as the rule. On the other hand, there can be no doubt that various reasons recommend the law of the ship's nationality where the ship takes up piece goods for various destinations, or is chartered, it may be, for various destinations.¹⁰⁴ More modern English jurisprudence, of which Foote (p. 392 *et seq.*) gives interesting notes, has already approved of these reasons—a fact which is well worth consideration—and is more and more inclined to declare in favour of the law of the flag. Scientific lawyers cannot, however, settle anything more *in abstracto*, since the real determinant is the intention of parties, and usage does not support the application of the law of the flag. All that can be done is to call the attention of the parties and the legislative powers of different countries to the advantages which, in certain cases at least, will result from the application of the law of the ship's nationality.¹⁰⁵ [The British law on this subject is that the port of discharge shall, in the absence of agreement, give the rule. See MacLachlan, pp. 690, 691, and *infra*, p. 732, note 115.]

MARINE INSURANCE IN A CASE OF AVERAGE.

§ 332. The law which regulates the matter of average will also indirectly give the rule¹⁰⁶ for ascertaining the extent of the damage which the insurer has to make good to the insured.¹⁰⁷ The marine insurance does not, therefore, get rid of the question as to the application of the

¹⁰³ See, in this sense, Foote, p. 418.

¹⁰⁴ In the same way, if the ship is only chartered in part, and the master or owner is only left with the power of taking in goods for other destinations. Jacobs, the president of the maritime law section of the Congress at Antwerp, proposed (*Actes*, i. p. 125): "*Le règlement des avaries se fait d'après la loi du pavillon, lorsque le navire n'a pas au moment du départ, une destination déterminée.*"

¹⁰⁵ In modern consular treaties it is not uncommon to commit the regulation of average to consular agents, in case the only parties concerned are subjects of the State which the consul represents. See Asser-Rivier, § 120, note 1, and *e.g.* consular treaty between the German Empire and Brazil of 1882, § 43, and between Germany and Greece in 1882, § 13: "Unless owners, freighters, and insurers have stipulated to the contrary."

¹⁰⁶ So Voigt in the *Archiv. für Handelsrecht* 1858), pt. i. p. 211, and *infra*, § 335. See, too, judgment of the App. Ct. at the Hague, 11th February 1878 (*J. vi.* p. 311); Trib. Comm. of Nantes (*J. xv.* p. 85) of 7th August 1886.

¹⁰⁷ Doubts may occur even on this point. See *e.g.* the Dutch decisions reported by Hingst. Rev. xiv. pp. 417, 418. But it would be illogical (as Asser, §§ 116, 117, holds) to hold the law

local law, but rather applies the local law to other persons. With a view to marine insurance, proposals have been made very recently for a substantially uniform code on the matter of average. Rules of this kind were first set up in 1860 by the English Association for the Promotion of Social Science, and they have been revised by the Association [German] for the Reform and Codification of the Law of Nations (York and Antwerp rules). [These rules were revised by this Association at their meeting in Liverpool in August 1890, *J.* xix. p. 124.] The Congress at Antwerp laid down a number of propositions as to average, the adoption of which was recommended¹⁰⁸

LIABILITY OF THE OWNER ON THE MASTER'S CONTRACTS.

§ 333. We have already noticed that it would be wrong to measure the powers of the master as regards securities over the ship solely by the law of the flag, and just as wrong only to hold the owner responsible, in cases of collision, according to that law, where the collisions occur in waters that belong to some definite territorial power. Accordingly, we cannot unreservedly assent to the proposition adopted by the Congress at Antwerp (*Actes*, i. p. 129), whereby it was declared that that law, and it alone, would regulate the responsibility of the owner for all acts of the master and crew, of whatever kind. In cases of claims on delict, and those which arise *quasi ex delicto*, the public and coercitive character of the local rules of law involved necessarily demands, as we have noticed, that the owner should be liable up to the value¹⁰⁹ of the vessel, if the *lex loci actus* sets up such a liability.¹¹⁰ In the case of contracts, the person who does not know positively that the captain has only a limited authority must at least be protected up to this value. And, even if a contracting party does know that the law of the flag gives the captain more restricted powers, he should receive this amount of protection, in so far as he does not know that the captain was intended to be confined within these limits. For the owner is quite likely to find it for his own interest to enlarge the powers of the captain so as to meet the rules of liability prescribed by what happens to be the *lex loci actus* on each occasion, while it will often be intolerable¹¹¹ to

of the place of adjustment to rule the question of average, but the law of the place where the policy of insurance was made to decide the question whether the insurer is liable for certain average losses. See, too, Westlake, § 220; Wharton, § 444. The latter, however, does not express himself so distinctly.

¹⁰⁸ See Asser-Rivier, § 118, note. Asser does not think it desirable to have a universal uniform law of average, apart from the law of freight. The objects aimed at both by the Association for the Reform and Codification of Public Law, and by the Congress at Antwerp, are really more comprehensive.

¹⁰⁹ We can agree in the result of a judgment of the Supreme German Ct. of App. of 5th March 1877 (Dec. xxii. pp. 88, 98; Seuffert, xxxiii. § 98); liability in this case was negatived only so far as it exceeded the value of the ship (*fortune de mer*). The reasons for the judgment no doubt go further.

¹¹⁰ Cf. *Actes*, i. p. 419, *Qu.* 31, p. 223.

¹¹¹ On this subject see Hindenburg and Platon's important communication to the Antwerp Congress (*Actes*, i. p. 127). The House of Representatives of the United States had at that

require that a third party making contracts which require much despatch, such as contracts of this kind are, shall ascertain precisely what acts of agency the master is empowered by the law of the flag to do, and what he cannot do.^{112 113} Of course, on the high seas the law of the flag of the master who comes under an obligation is alone applicable, apart from cases of salvage and contracts for salvage, as already noticed.

RIGHTS AND DUTIES OF THE MASTER AND CREW AGAINST THE OWNER.

§ 334. The law of the flag, on the other hand, must necessarily decide as to the rights and duties of the master and crew in questions with the owner.¹¹⁴ That is a result necessarily following from the connection between obligations of that character with the discipline of the ship, which must be maintained with uniformity, respect being, of course, always paid to the criminal law of the locality, unless it makes exceptions in the case of foreign ships.

CONTRACTS FOR INSURANCE AGAINST PERILS OF THE SEA.

§ 335. The rules which regulate other departments of the law of contracts must be recognised in general in the law of marine insurance. If the insurer is drawn into a contribution to general average, without having been able successfully to resist a claim for contribution, the insurer must recognise the adjustment of the contributions even although it has been carried through under a law of which he knows nothing.¹¹⁵ Besides

time approved a bill declaring that all clauses by means of which owners attempt to save themselves for responsibility for negligence on the part of the master, to be null. This law was to be applied to all ships which should carry cargo to the United States.

¹¹² The liability of the owner for negligent or defective performance of a contract on the part of the master is, of course, to be determined by the law which regulates the contract generally.

¹¹³ An unlimited personal liability on the part of the owner on contracts concluded by the master can only ensue, in so far as the law of the flag sanctions it.

¹¹⁴ So even Wagner, p. 138.

¹¹⁵ That is at least the clause in general use in English practice. "Liable for average as *per* foreign statement" implies not merely that the insurer is bound by the calculations of the average adjuster, but also by the law under which the adjustment was made. ["Under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port, if and when made, as conclusive between them both in the principle and details as to the loss which the underwriters are to undertake in respect of general average," *per* Bovill, L.C.S. in *Harris v. Scaramanga*, 1872, L. R. 7, C. P. 481. It was held in two other cases that "the foreign statement" was intended to cover questions as to the proper principle of valuation to be applied, and to meet all disputes as to whether the loss was a general average loss, as well as to decide mere questions of calculation. A plea that the loss, included by the foreign average stater as a general average loss in accordance with his own law, was not one by the law of England, will be repelled by an English court. *Hendrick*, 1874, L. R. 9, C. P. 460. *Mavro*, 1875, L. R. 10, C. P. 414. Lord Shand expresses an opinion in *Robinow and Marjoribanks* (1876, Ct. of Sess. Repts. 4th ser. iii. 1134) that an insurer of cargo will be liable, in the principle of these cases, on the basis

that, traders generally lay, as is well known, special weight upon the language and the technical expressions on which the contract of insurance is framed. Accordingly, the Congress at Antwerp almost unanimously approved this proposition, viz.:—

*“A l'exception du règlement des avaries communes pour lesquelles les assureurs sont censés accepter la loi qui régit les assurés, les contestations relatives au contrat d'assurance maritime doivent pour les cas non prévus par la police, être tranchées d'après la loi, les conditions et les usages du pays auquel les parties ont emprunté cette police.”*¹¹⁶

This rule can, however, only hold good in so far as the parties undoubtedly possess freedom to contract. What is to be the rule in the case of coercitive laws, and particularly of laws which declare certain insurances invalid? There is no want of such cases in the law of maritime insurance, and we can also find a great variety of statutory provisions as regards the details of the various limitations put upon the right to insure. Limitations of this kind are intended partly to secure that policies shall not degenerate into wagers: to some extent they exist in the interest of the actual safety of the vessel and her cargo,¹¹⁷ and lastly, their object may be to protect the insurer against fraud. In so far as the first and the last of these classes are concerned, the policy is invalid, if the law of the insurer pronounces it to be so. But, again, all courts must throw out actions which the *lex fori* compels them to regard as *contra bonos mores*. As regards the second of the classes described, the law of the flag must rule. The limitation in such cases has the features of a rule of preventive police, and police precautions on the high seas are the affair of the flag. Thus the captain of a German ship cannot validly insure his wages even with an English insurer: it is certain that he cannot do so as against any peril that may happen on the high seas, and as I think just as little against a peril which may occur in a port, or in the seas adjacent to any country where such insurances are sanctioned. The law of that country has certainly no interest to infringe the rules provided by the home port of the ship, in the view of a more thorough protective policy. But the wages of a Belgian crew may be well insured with an insurance company in Hamburg. If the State of Belgium is of opinion that its sailors and captains will do their duty just as well although their wages are insured, the German State has no reason for exercising any additional police supervision over them by applying § 784 of the German Code of Commerce.

One of the provisions, the object of which is the protection of the

of the value of the cargo as stated by the foreign adjuster, and not on the basis of the shipping value, the amount to be recovered not exceeding the sum insured. See also MacLachlan, p. 691.] See Foote, p. 456.

¹¹⁶ *Actes*, i. p. 129 (*Question 52*).

¹¹⁷ Thus, for instance, the provision that the wages of the master and crew may not be insured. German Code of Comm. § 784. The law of England allows the captain's wages to be insured. That of Belgium allows the crew's wages to be. See Louis, ii. p. 264.

insurer, is, *e.g.* § 786 of the German Code of Commerce, which requires notice, if the insurance is on foreign account. In such cases, according to general rules, the law of the insurer's domicile must regulate the obligation to pay the sum contained in the policy, unless in some exceptional cases *bona fides* should require the application of the law of the place where the contract was made.¹¹⁸

Double insurance is, in the law of England and in that of the United States, treated on a different footing from that which is accorded to it in the maritime laws of Germany and France. In these latter countries the second insurance is invalid.

We have already discussed this case in § 267. It only remains to notice that the result at which we there arrived is specially approved for maritime law by Voigt (*Das Deutsche Seeversicherungsrecht*, 1884, p. 89) and by Lewis (ii. pp. 286, 287). In the absence of any agreement to the contrary, the obligation of the German insurer is ruled by the law of Germany. He is, therefore, by virtue of § 792 of the German Commercial Code, under no obligation, if there has been a prior insurance with an English insurer to the full value.

[In a question which arose in the Scots courts under a contract of marine insurance, the *locus contractus* was Glasgow, the owners were domiciled in Scotland, and the *forum* was in Scotland. The ship herself, however, was registered in Nova Scotia. The point to be determined was whether the standard of seaworthiness required by the contract was to be sought in the laws and customs recognised in Glasgow or in Nova Scotia. It was held that the contract must be read with reference to Glasgow, *Cook v. Greenock Insurance Co.*, 1843, Ct. of Sess. Rep. 2nd ser. v. 1379. See *supra*, p. 663.]

From the principles which we laid down in § 255, it follows that maritime law must, like other branches of law, refuse to recognise an insurance against the consequences of a transgression of foreign fiscal regulations. The question, however, whether an insurance against the risk of confiscation on account of contraband of war is ineffectual, is matter of doubt. The Congress at Antwerp (*Actes*, i. p. 259) left this question undiscussed, because it touched on public law (*droit public*). But here we must distinguish. There would be no room to doubt the invalidity of the contract of insurance, in so far as the State itself to which the ship belongs, or the State from which the goods are being exported, has forbidden this traffic with the belligerent State. But, if this is not the case, we can only say that the person who carries contraband goods, is doing an act of bold partisanship for one of the belligerents, a thing which is neither immoral nor absolutely illegal,¹¹⁹ although of course

¹¹⁸ The insurer, however, who is domiciled in the German Empire, cannot in every case sue a foreign insured for the premium in terms of the closing part of § 786. ("The insurer, whose contract is, by the terms of this article, not binding upon him, has a right to claim the full premium, even although he pleads that the contract is not binding on him.")

¹¹⁹ On this matter see the excellent remarks with which Geffken, in his notes on Heffter's *Europaisches Volkerr.* § 148 (7th ed. p. 312), meets the exaggerated claims of belligerents.

the opposite belligerent may meet it with the resources of war, and in particular with a claim of confiscation. Such insurances are therefore to be held good, and so also are policies against the consequences of running a blockade. Of course, they cannot be pleaded in the courts of the State to whose prejudice the conveyance of the contraband goods or the running of the blockade was undertaken.

FREEDOM OF SHIPS FROM ARRESTMENT. POLICE REGULATIONS.
COMPETENCY OF CONSULS.

§ 336. Whether the law as to the freedom of ships that are ready for their voyage from liability to arrestment¹²⁰ is to be extended to ships of another nationality,¹²¹ is of course dependent on the law of the place where the ship happens for the time to be,¹²² and so, too, is the question whether the freedom of seamen's wages from arrestment may be applied to the case of foreign seamen.¹²³ In doubt this privilege should be conceded to foreign ships also. It exists, of course, in the interests of the freighters.

Police regulations, dealing with seaworthiness¹²⁴ and the sanitary conditions of ships, are applicable, in accordance with the law of the flag, to ships, even when they are in foreign ports. On the other hand, regulations of that kind may also be extended to foreign ships, which are intended to take in cargo, or, in particular, passengers in the ports of this country. But that is not quite self-evident: in doubt it is rather held that the certificate issued at the home port is to be taken as establishing the seaworthiness of the vessel.¹²⁵

¹²⁰ See German Code of Comm. § 446, and Wagner, p. 133; *Code de Comm.* § 215.

¹²¹ See judgment of the Court of Aix, of 28th November 1883 (J. xi. p. 297), by which the *beneficium* of the § 215 of the *Code de Comm.* is communicated to foreign ships, and not only to trading ships, but also to vessels which simply serve the pleasures of individuals (pleasure-yachts). See Clunet (J. xi. p. 298).

¹²² Lyon-Caen, J. ix. pp. 245, 246, proposes the freedom of foreign ships from arrest should only be recognised in so far as the law of the flag allows it. The general opinion, however, is against him: in particular, Demangeat takes a different view.

¹²³ Negated by Trib. Civ. Havre, 17th April 1886 (J. xiv. p. 68), in accordance with the law of France.

¹²⁴ See Lyon-Caen (J. ix. p. 490).

¹²⁵ See Trib. de Comm. Havre, 24th August 1875 (J. iii. p. 458). The inspection (*visite*) of the ship provided by § 225 of the *Code de Comm.* is not by French law extended to foreign ships. On the other hand, some provisions of the "Plimssoll Act" [39 & 40 Vict. c. 80] are expressly extended to foreign ships [*e.g.* § 13, by which the powers of detaining a ship that is improperly or excessively loaded are made applicable to foreign ships that have taken on board all or any of their cargo at a port in the United Kingdom]. See Lyon-Caen, *ut cit. sup.* The inspection of the seaworthiness of ships, provided by § 47 of the German *Seemannsordnung* of 1872, which has a special object in view, will be applied to foreign ships. None but French ships are, on a sound view of the matter (see Lyon-Caen, *ut cit.* p. 494, Lyon-Caen et Renault, *Dr. c. ii.* § 1838), subject to the provisions of the Code as to *Rapport de mer*. The question is one of a sort of disciplinary control of the captain in the interest of the owner and of those who have right to the cargo, which, if applied to foreign ships, could only be maintained sporadically, and would therefore miss its mark. Accordingly, the ship's log must be laid before the consul of the country to which the ship belongs, if the law of that country prescribes it. See decision of the App. Ct. of Naples, of 7th May 1887 (J. xv. p. 147, and the editor's note).

The personal rights and duties of those who belong to the crew will undoubtedly be ruled by the law of the flag. This is recognised even by those who propose to apply the *lex fori* exclusively in almost every other part of maritime law.¹²⁶ The decision of questions of this kind is frequently committed to the consul. But, of course, the point must first be settled whether or not the person in question really belongs to the crew.

[It was held in the case of the *Livietta*, 1883 (L. R. 8, P. D. 209), that the law of the ship's flag must regulate the right of a foreign Government to recover, in preference to other creditors, the amount which it had advanced to enable shipwrecked sailors to return to their own country. The claim was determined on the analogy of the preference given to the seamen themselves for wages, and the foreign Government was preferred upon the proceeds of a sale by order of the court, to solicitors who had acted for the parties interested in the ship, in the proceedings which led up to the sale.]

¹²⁶ Wagner, p. 138.

Tenth Book.

IMMATERIAL RIGHTS. COPYRIGHT, ETC.

I. RIGHT OF THE AUTHOR IN LITERARY, MUSICAL, AND ARTISTIC WORKS.

INTRODUCTION. DISTINCTION BETWEEN INTELLECTUAL (*geistig*) PROPERTY AND OTHER KINDS OF PROPERTY.

§ 337. A production which really belongs to the sphere of intellectual effort, be it a scientific, artistic, or poetical work, has an undeniable tendency to become common property. It is, of course, directly produced by the individual, but ultimately it is connected by countless roots, with the common activity of society at large,¹ in a way that cannot be accurately calculated. Again, its effort always is to suggest something new to the community of mankind, to send down new shoots, and bring forth new fruits. Every one who has produced an intellectual work which he prizes, feels in himself an impulse to communicate it to others. That the author of a really intellectual work should be restrained from giving it to his fellows by a consideration of the profit which the exclusive and solitary enjoyment of it can promise him, is not a natural, but rather an artificial idea. It is quite otherwise with true property, with rights in corporeal things or with legal claims, which disclose a prospect of acquiring or enjoying rights of property. In this latter case, enjoyment by many must always diminish the enjoyment of the individual, and that although the property is not an exclusive property, but is limited to any extent you please by the pre-eminent rights of the community, or may even be analyzed into a common right of property in the nation. But where we have a work that is purely intellectual, the enjoyment of the many does nothing to impair the enjoyment of the individual. It is here that we find the origin of the distinction between corporeal or physical property, on the one hand, and intellectual property on the other; it does not lie in any

¹ This much may no doubt be said of property in corporeal things.

exclusiveness of right, such as is asserted for the former, or in its indefinite duration.²

THE RIGHT OF AN AUTHOR LIES ESSENTIALLY IN HIS RIGHT OF PROHIBITION
AGAINST THE PUBLIC.

§ 338. In spite of this tendency to a common enjoyment of these intellectual works, we feel a desire to do justice to the men to whom we directly owe their production. The individual author seems to have a better right of property in his work than any one else can have, and the author of a leading work of the kind feels it to be an injustice, a wrong, if he is left without any special share in it for himself. Granted, then, that this special share should not consist merely in honour and glory—and even these may suffer under certain circumstances by the unrestricted use by others of the work: granted, on the other hand, that the special share is not to take the shape of a reward that is to be arbitrarily fixed for the particular case, an expedient which would give the author, in return for his connection with his work, a substitute artificial, inadequate, and suitable only for exceptional cases;—we are then reduced to this, that we must place some restrictions on the general freedom for the benefit of the author. The general public is forbidden to use his work in a particular way, that he may alone be able to use it in that way. The community is limited in the use of their powers of labour, and of some of the assets of their property, for behoof of the individual. For instance, the printer, who has not received, either directly or indirectly, from the author of a literary work the proper license, is prohibited from using his types, paper, and machines, for the reproduction of copies of any particular work. An author's right or intellectual property is therefore substantially a right of interdict or prohibition,³ a limitation of the general freedom for the author's behoof. It makes no difference that we look upon this restriction of the general freedom as something natural and self-evident, or have at least begun to do so. Nor does it make any difference that behind this general limitation of freedom, the freedom of the author, who alone enjoys that privilege, viz. that he may use his work in the particular way, takes upon itself all the characteristic features of a right of property, may be the subject of succession or sale, and—the most important of all—may acquire a considerable value in the market. For the inventor or author, by reason of this very limitation of the general freedom,⁴ receives a monopoly for certain produc-

² See to this effect Darras, *Du droit des auteurs*, p. 35: "*Un droit de propriété suppose une jouissance privative; le droit des auteurs suppose une jouissance commune.*"

³ This right of prohibition has also a more ideal, or, as Darras (§ 34) expresses himself, a more moral point of view: that this should be so is quite consistent with what is said in the text, and indeed follows from it. No one shall falsely set his own name to the intellectual work of another, or give another's work a direction its author did not intend it to take, e.g. no one without the author's consent shall publish an intellectual work.

⁴ This must not be misunderstood. The public conscience, which to a certain extent has been developed in these matters in modern times since the discovery of printing, demands that the general freedom shall be so restricted; and so general is this demand, and so fully admitted, that one is scarcely now conscious of the restriction.

tions and resultant effects, which owe their origin to the intellectual work which he originally produced.

It is not necessary for us to examine more closely the familiar and interesting question as to the nature of an author's rights.⁵ What we have said is beyond dispute. It is enough to enable us to treat authors' rights in their international aspects, if we say this much more, viz. that this right of authors was as a matter of history primarily developed, by a concession of the right of interdict and the monopoly, of which we have spoken, by means of a *privilegium*.⁶

THE PRINCIPLE FOR THE INTERNATIONAL TREATMENT OF AUTHORS' RIGHTS
WHICH FOLLOWS FROM THEIR CHARACTER AS RIGHTS OF PROHIBITION.
GENERAL RESULTS OF THIS PRINCIPLE.

§ 339. From this character of a right of prohibition,⁷ set up as against the general freedom, which exists in other concerns of life, we may deduce this leading principle, dominating the whole subject as an international problem, viz.:—

The author or inventor, or generally any one who claims what is called an immaterial right,⁸ either in his own person, or by succession to some predecessor, can only do so under the conditions and to the effects which are enacted by the law of the country in which the act which encroaches upon his right of prohibition is done. In other words; since the protection of authors' rights or intellectual property is in practice evidenced in every country by the fact that any one who trespasses upon it, thereby commits a delict for which he can be punished, the international treatment of rights of this kind is regulated by the rules which determine the law of delicts, that is, by the rules of criminal law. It may, then, in a certain sense, be said that the principle of territoriality rules here, as it does in criminal law.

One special result of this is that the existence of any rights of this description cannot be exclusively determined by the law of the country to

⁵ For the different theories see e.g. Stobbe's *D. Privatr.* vol. iii. p. 1; Beseler, § 210; Kohler, *Das Autorrecht*, in v. Ihering's "*Jahrbuch für die dogmatik des heutigen römischen und deutschen Privatrechts*," vol. xviii. p. 129. Picard (J. x. p. 565) describes authors' rights as "*Droit intellectuel*." Despaget regards it as a right of property, and subject therefore to the *Statut réel*. The results, however, are practically the same.

⁶ See Renouard, *Traité des droits d'auteurs* (1838), i. pp. 5-225, on the interesting history of these privileges in France. On these privileges followed a body of law, which long ago recognised the ideas of modern legislation to no small extent, although only after much hesitation.

⁷ This right of prohibition constitutes the only real kernel for a philosophic doctrine of which we can lay hold. See on this subject Mandry, "*Das Urheberrecht*" (1867), p. 31; and the same author, in his work "*Der Civilrechtliche Inhalt der Reichsgesetze, systematisch zusammengestellt*," 3rd edn. 1885, p. 493.

Laurent, iii. § 326, points out that there are many very real distinctions between intellectual and corporeal property.

⁸ On this technical expression see Stobbe, *ut cit.*

which the author belongs by extraction or by domicile, or by that of the country in which the work in question is first produced or the discovery made, or published, or placed under State protection (*e.g.* by taking out a patent). Such rights can only be recognised in so far as this is possible according to the law of the country in which the invasion of the right in question is alleged to have taken place.⁹ These rights are therefore in quite a different position from property rights, rights in corporeal things.

We must further enquire whether this last law is to be the exclusive rule for testing such rights. Nothing that has yet been said excludes the possibility that an immaterial right will only be recognised in the State in which some claim is made upon it to the extent to which it is recognised in the State in which the literary production is first published, or the invention first applied: that, therefore, rights of this kind can only exist in so far as they are in accordance with both of these systems of law. We shall reserve this question for further consideration. In the meantime, we shall direct our attention to the results which ensue from the dependence of literary and artistic property on the law of the place where an infringement is said to have taken place.

The law of the country in which the infringement of the author's rights takes place will determine (in the sense that we cannot hold that any infringement has taken place at all, if what is pleaded as an infringement is repudiated by this law)—

First, The extent¹⁰ of the author's right, the question, therefore, whether and under what conditions the author enjoys a protection against the publication of translations not authorised by himself,¹¹ against dramatic or musical performances¹² of his work, against reprints of articles in journals and newspapers, against modifications of his original work—adaptations, as they are called—against reprints of extracts, isolated extracts in books of “selections,” etc., etc., against the employment of architectural plans, against the reproduction of works of art.¹³

Secondly, It will also determine the question whether in any particular

⁹ See Phillimore, § 579. As a general rule this will be the *lex fori*.

¹⁰ V. Martens, p. 157 (§ 41), takes a different view. He thinks that the extent of the author's right to protection is to be determined by the law of the place of the original publication.

¹¹ The exclusive right of bringing out a translation must be distinguished from the copyright of the new translator. French law treats an unauthorised translation as a “*Contrefaçon*.” See Pouillet, §§ 533, 534, and what we have to say on the convention of Berne on this subject in § 346, p. 750. The preparation of a translation must in this view be regarded as a copying. See Pouillet, § 537.

¹² Thus the Federal Court at Chicago, on 14th May 1885 (J. xii. p. 476), rightly decided that the publication of a dramatic work in the German Empire took away the right of the author to stop unauthorised performances even in the United States. This is the effect produced by the publication of the work by printing according to the laws of America, although the German law is otherwise. The American assignee of the German authors was cast in his suit.

¹³ The question, too, whether the title of a work is protected in itself, is part of this subject.

case we have to do with an exception from the general rules of intellectual property,¹⁴ whether, for instance, speeches delivered in public or lectures are entitled to protection.

Thirdly, It will also decide questions as to the extinction of the author's right, or any questions that may arise as to his liability to lose his rights,¹⁵ which some laws lay down with a view to the acquisition of them by the State, or, it may be, by other persons, who, after the lapse of a certain time, desire to make reproductions of the original work.

Fourthly, It will regulate the measure of damages which can be claimed by the aggrieved party, the public penalty, if any, which may follow,¹⁶ and to what extent a prosecution for the offence must be an official prosecution, or may take place on the motion of the aggrieved party.

On these questions both legal literature and the decisions of the courts are in substantial agreement. That they should be answered as we have answered them is also to be inferred from the argument which is so often applied by popular consent, that we cannot give a foreign author or a foreign publication more extensive rights than we give to our own.

THE RIGHT OF AUTHORSHIP IS A PRIVATE RIGHT FROM THE AUTHOR'S POINT OF VIEW. RESULTS OF THIS PROPOSITION: CONTRACTS CONNECTED WITH THIS RIGHT: SUCCESSION IN IT.

§ 340. But again, if we consider authors' rights not as a right of prohibition against the public, but as a personal, and in particular as a transferable right of property, the general principles of private international law, which regulate the transference of rights and the assumption of duties or obligations, must be applied. In accordance with this theory,

¹⁴ For example, some publications, *e.g.* official publications, may be reprinted to any extent. One might be tempted to submit these exceptions exclusively to the law of the place of publication, if we were to start with the idea that the question here was one as to an implied consent by the author to the unrestricted publication of his work. But the author cannot determine the fate of such publications according to his own pleasure, and, if we were to accept that rule, we should be laying on the subjects of other countries the duty of acquainting themselves accurately with the laws of foreign countries, an unjust and impracticable course to take.

¹⁵ One cannot appeal to the divergent rule of law recognised at the place of the first publication, where no forfeiture of that kind is known, as is rightly pointed out by Darras (p. 404). Of course, the forfeiture can have no effect in any country other than that in which it takes place. Copies which are prepared in consequence of it cannot be exposed for sale in another country. See Darras, § 322, on various statutory provisions as to forfeitures of this kind. Thus, by the law of Italy of 1882, if the author is dead, and forty years have passed since the original publication, any one is entitled to publish a new edition, under certain conditions, and, in particular, on payment of a fee.

¹⁶ In so far as claims for damages and penalties are concurrent (*e.g.* in the case of the reparation often recognised as involved in the German Statute of 1870, § 18, subsec. 4), we can never go beyond the limit approved by the *lex fori*, as we showed at p. 636.

Claims of damages, however, can hardly ever be advanced in any country other than that in which the right of prohibition has been invaded.

from that point of view the decisive law must be the law of the citizenship or of the domicile, as the case may be, enjoyed by the parties, or the law of the place where the bargain which regulates the matter was concluded or is to be fulfilled.

Thus the rule "*locus regit actum*" must be applied to the form of contracts for publication. But if no special form is required by the law of the place where the work is used, if, *e.g.* the law of the place where a dramatic representation is given, requires no special form of contract, the person who makes use of the work is entitled to appeal to his *bona fides*, even although the contract by which the right of representation has been given is, in point of form, not binding upon the author. If we were to lay down the principle that a bargain is always good in point of form, if it is conform to the law of the place where it is to be carried out, the person making use of the work would be protected, if he could appeal to the law of the place in which he proposed so to use it.¹⁷

We must, too, in judging of the substantial provisions of any contract for publication, or connected with a work of art which has been produced by some one who wishes to part with it, follow the general rules. If a contract of that kind is made from two different places by letter or by telegram, we must in doubt determine all questions by that system of law which is the more unfavourable to the claims of both parties to exclusive and prohibitory rights, and the same rule will hold good as regards any copies that may be made in a third territory.¹⁸ This is material for the case that the legal systems of the countries in question make different provisions as to the right of one who has bought a work of art to make copies from it.¹⁹ As regards the interpretation of doubtful expressions, Darras lays down a rule, which is not unfair, that in doubt the decision must be against the party who laid the completed draft of the bargain for signature before the other, and in the same way against the party in whose own language the document is written.

The acquisition of a copyright by succession follows the general rules of the law of succession, and, as it is inconceivable that the *lex rei sitæ* should have anything to say in the matter, there can be no hesitation in saying that the personal law of the deceased must be applied.²⁰ Lastly, the rights of several persons who have taken part in the same work must be tested by the law which regulates the contract for their co-operation, and not by the law which may happen to be the law of the place in which

¹⁷ To the same effect Darras, § 340.

¹⁸ This latter limitation is a consequence of the fact that the right of the publisher, the person who has acquired his right from the author, becomes in its turn, as against the author, a right of interdict or prohibition.

¹⁹ See *e.g.* the German Statute of 9th Jan. 1876, § 8, and, on the other side, Pouillet, § 364, on the doubts of the French law. What we have laid down in the text must be applied to the question, to which different answers are given in different statutes (see Darras, § 326), whether and after what period an author who has published his work in a serial or magazine can publish it in some other form.

²⁰ See Lyon-Caen, *Rev.* xvi. p. 446; Darras, § 472.

one of them brings out the joint work.²¹ The thing to be discovered here is the import of the implied intentions of the parties, or a positive law that shall supplement the expression of their intentions.

WHAT ACTS FALL UNDER THE PRIVILEGE OF PROHIBITION CONCEDED BY THE STATE?

§ 341. It will frequently be of importance to determine how far the State can subject to its prohibitory enactments, and prosecute before its own courts, acts which may be deemed to be infringements of some copyright, which exists or is recognised in its own territory, or to be injurious to that right, although these acts have been, in whole or in part, committed within some other territory.

The general rules of international jurisdiction in criminal matters must be allowed to regulate this point. Thus the State may extend its rights of prohibition so as to cover what is done by its own subjects in another country, whereas the acts of foreigners in a foreign country are beyond its jurisdiction. But even that exercise of jurisdiction over acts of its own subjects abroad, if stated absolutely, is at variance with general usage, putting out of sight the exceptional cases of political or official offences.²² The limitation that an act, which is innocent at the place where it is done, cannot be visited with punishment by the State in which the person who does it has his home, must be understood.²³ The prohibitory laws of a man's own country only control him when he is abroad, in so far as these laws are recognised at the place where his act is done, according to the law that is there in operation for the control of all alike. If, then, the *lex loci actus* does not protect the work with which we have to do, or does not protect it in some particular direction, *e.g.* does not

²¹ See Darras, §§ 325 and 339, on the difference between different statutes on the question how far one author can publish a work against the will of a fellow-author, or cause a public performance of it to be given.

²² See, *e.g.* the German Criminal Code, § 4 (2). Resolutions of the institute for public law in 1888, § 8, as to criminal jurisdiction, Ann. vii. p. 157. I cannot recognise as conclusive Kohler's argument, and the distinction he takes between "*facere*" and "*non facere*" in a foreign country (*Zeitschr. f. d. Civilproc.* x. p. 449).

²³ See my former edition, § 142. Resolutions of the conference at Munich, § 3 (Ann. vii. p. 156). Kohler, *Patent*. p. 111. According to the opinion of eminent commentators on the German statute of 1870, as to copyright in literary works, pictures, musical compositions, and dramatic productions, that statute will punish any reproductions by Germans in a foreign country of works protected by German law, without considering whether the foreign law protects the German work, *i.e.* in other words, without considering whether the *lex loci delicti commissi* punishes the act in the particular case. (See Endemann, pp. 18, 19; Dambach, *Urheherr.* p. 272; Wächter, *Antorr.* p. 186.) But although the expressions used by the statute are quite general (§§ 18, 22, and 25), we cannot deduce any such rule with sufficient precision (see Endemann); the general principles of the German Criminal Code must be rather assumed to hold good in this connection. But these authorities themselves start with this assumption, in so far as they recognise that the foreigner who makes copies in a foreign country is not subject to the German statute, in spite of the absolute language used by the statute itself.

protect it against unauthorised dramatic representations, a native of this country, where that protection is given, may avail himself of the freedom which the *lex loci actus* accords to him. Any further restrictions, imposed upon a man who is beyond the territory of his own State, by the laws of that State would have little practical effect. It would do our native authors little good, since the great body of foreigners resident in their own and other countries, and not in ours, are not bound to pay any heed to the rights of the author in the particular case, whereas we should embarrass our countrymen resident abroad in their competition with foreigners; *e.g.* a theatrical manager of this country, resident abroad, would have to pay to one of our authors dues for performing his pieces, while the foreign manager would not require to pay anything.

Since, then, on a sound view of the matter, an act is allowable all the world over, if it is so at the place where it is intended to have its real substantial operation, preparations in this country for a reproduction in a foreign country will be lawful in themselves. But of course the State may expressly provide that such preparatory measures shall infer punishment; and though it might be maintained, on abstract logical grounds, that it is not the unlicensed multiplication of the work, but the unlicensed distribution of copies or reprints that injures the author, it will be a good practical measure to make the first step liable to punishment. In such a case, there will be no reference to the place where the copies are intended to be distributed. Undoubtedly abuses might arise under the cover of such professed intentions; intentions, too, which would be liable to alteration. But a prohibition like this is not a matter of necessary inference, and it does not necessarily follow that, because unlicensed multiplications or copyings are forbidden, the traffic in them is also forbidden.

EFFECT OF THE LAW OF THE STATE WHERE THE WORK HAD ITS ORIGIN UPON THE RECOGNITION OF THE RIGHTS OF THE AUTHOR IN SOME OTHER STATE.

§ 342. In our view, and so far as the subject is a subject of legal philosophy, the prohibitive right, or right of interdict, is the primary right which belongs to the author, while his personal or property right is the secondary element, although the converse order may be the proper order for a system which keeps chiefly in view the practical object to be attained. The result of our view would be that as a matter of principle the only question for consideration, in determining whether a work should enjoy protection, would be the law of the place where the multiplication or copying was intended to take place, or had taken place. It would be immaterial whether such a protection was given in any other country, and in particular at the place where the work first appeared. This principle of protection, in accordance with the native law, without heed to whether such

protection is forbidden by the law of the place where the work first appeared, has been in recent times maintained by congresses of authors and artists interested in the subject;²⁴ and besides that by Celliez, Droz, the Swiss delegate and president of the conference of Berne (see *infra*), the French delegate Ulbach at this conference,²⁵ and by Darras (§ 300).²⁶

At the present moment there is no doubt that the opposite view, which seems to be more fanciful, but is in truth not so favourable to the authors' rights, the view, namely, that these rights are primarily personal rights, is the prevailing view. The analogy of what are known as personal statutes seems to yield us this result, viz. that if a man does not enjoy a personal right in the country to which he belongs, he can make no claim to it anywhere else.²⁷ Thus the question whether a person enjoys protection as an author in the particular case will always, it seems to follow, be determined by that one of the two laws concerned which is less favourable to him. It is plain that the author can have no protection, if the law of the place where he proposes to apply for interdict refuses him this protection; nor has he any protection, if his own personal law gives him none, or has ceased to give him any. This strain of argument is, however, fallacious. The law of a man's own country is not generally recognised for his personal relations in a foreign country; it does not determine the general powers which the legal system attributes to individual persons, *i.e.* their legal capacity, or capacity of having rights, and this is the question at issue here. Again, it would follow from any such theory, that an author in whose own country copyright was unknown, or unknown in the particular circumstances, would not be able to transfer any right to a publisher in another country; for a man cannot transfer what he has not. But such a result as this is at variance with all theories; no one takes any thought of the personal law of a foreign author who gives his work to a publisher of this country.

²⁴ See Paquy, p. 143, and Darras, p. 280. The fourth resolution passed in the literary congress held in 1878 in Paris ran thus: "*Toute oeuvre littéraire, scientifique ou artistique sera traitée dans les pays autres que dans son pays d'origine suivant les mêmes lois. Il en sera de même en ce qui concerne l'exécution des oeuvres dramatiques et musicales.*"

²⁵ "*Rigoureusement aucun ouvrage intellectuel n'a de patrie.*"

²⁶ Paquy (p. 146) thinks that the proposition adopted in the text could only be adopted as part of a system which has not as yet been approved by legislation, in which the right of an author should be placed on the same footing as property rights in the strict sense. Our argument should show the unsoundness of this reasoning. It is just the fact of its being deduced from the prohibitory right (*concession de la loi*) which results in the simple application of the territorial law.

²⁷ So the majority of French authorities, *e.g.* Renault, J. v. p. 137; Fliniaux, p. 7; Paquy, p. 144; Weiss, p. 823. See, too, the Belgian statute of 22nd March 1886 (J. xiv. p. 413), § 38 *ad fin.*: "*Toutefois, s'ils (sc. les droits des étrangers) viennent à expirer plus tôt dans leur pays, ils cesseront au même moment en Belgique.*" It is matter of dispute whether the Anglo-French treaty of 1851 does not declare the law of the country in which protection is claimed to be alone regulative; Fliniaux, p. 15, maintains that it does; Renault (J. v. p. 464) and Paquy (p. 134) that it does not.

OBSERVANCE OF THE FORMALITIES REQUIRED IN THE STATE IN WHICH
THE WORK HAD ITS ORIGIN.

§ 343. The theory of the personal law did no doubt obtain a certain amount of support for a time, from the fact that, in order to obtain statutory protection for literary, musical, and artistic works, it was formerly required by most states that certain formalities should be observed; that a number of copies should be deposited with particular officials, or an entry made in a register. This was a mere survival from the old theory of privileges or concessions. The simultaneous observance of such formalities in several countries is, as we can easily understand, very oppressive for the author and for the person who holds the right of publication. Thus the most recent practice in international conventions for the protection of intellectual property has reached this position—and that all the more readily, as it was seen that such formalities in literary or artistic matters were superfluous²⁸—that it is sufficient to obtain the desired protection in country B, if the necessary conditions have been once fulfilled in the country of the first publication.²⁹ That looks like a recognition of the theory which associates with the work a personal right that shall accompany it all the world over. But in truth we are concerned in this matter with nothing more than a means of information. In concluding an international convention, the parties are, of course, as a general rule, not in a position to touch each other's municipal law. These formalities are left alone, but it is provided that at the least, so far as the existence of the authors' rights are concerned, it shall be sufficient if these formalities are satisfied at the place of publication. Thus these formalities do no harm in international relations. It was natural that the general convention of Berne should take this course, and there was all the more excuse for its doing so in respect that it was intended to apply to an indefinite number of States. No argument in favour of the recognition of the theory of a personal right can be drawn from the shape taken by art. 2, § 1, of this convention, viz.:—

“La jouissance de ces droits est subordonnée à l'accomplissement des conditions et formalités prescrites par la législation du pays d'origine.”

DIFFERENT PERIODS OF PROTECTION.

§ 344. The practical consequences of the distinction between our theory and its rival will be of special importance in the case in which the

²⁸ The case is different with samples of inventions; in such cases several persons may simultaneously fall on the same idea. But it is inconceivable that several persons should simultaneously produce the same literary, artistic, or musical work.

²⁹ See Paquet, p. 148.

period of protection in the country in which the author's right had its origin is shorter than in the country where it is said to have been infringed.

The question, however, may be asked, whether this limitation of the author's rights to the standard of the law of the country to which the work belongs, is not justified by reasons of expediency.³⁰ As a matter of fact, such reasons are often used to support it, and have determined many authorities in its favour. If the author has no longer any special profit from his work in the country of its first production, then it is said that he cannot claim any such profit in another country; and if the general distribution of good works at a cheap rate, after the monopoly conceded to their author has expired, is a growing benefit to the community, then, it is said, it is unreasonable not to secure this advantage for the community of our subjects, if the inhabitants of the country where the first publication took place are already in the enjoyment of that advantage.

This consideration of expediency has, as matter of fact, influenced the great majority of legal systems and international treaties; the most recent of these is the Convention of Berne.³¹ It has even, as it seems, determined French jurisprudence, although there is nothing said of any such limitation in the French decree of March 1852, which regulates these matters, a measure conceived in a truly magnanimous spirit.³²

But, at the same time, there is much to be said against these considerations of expediency. Logically, if the public of another country is never to have the advantage of a cheaper market at an earlier date than our fellow-countrymen, the rights of an author belonging to another country should never be protected, if they are unprotected or have ceased to be protected in any part of the civilised world. If any general convention were by law to give the law of that State, which had devised the most unfavourable terms for the author, a preference of this kind, then, on the other hand, the publishing trade will tend to that State which gives the longest period of protection. It is, however, impossible to find any solution of the question as to what shall be the result of following the principle, to which we have stated our objections, which shall be legally sound, if the work appears simultaneously in several countries. The 2nd article (3) of the Convention of Berne takes the law which gives the shortest period of protection as the rule: but this is quite arbitrary; it is simply a decision given in despair, under the necessity of coming to some decision.

³⁰ Droz (Darras, p. 534) described the rule in question as a mere measure of opportunism ("opportunität").

³¹ As to the duration of the author's rights, see the final sentence of art. 2 (2): "*... Elle (la jouissance) ne peut excéder dans les autres pays, la durée de la protection accordée dans le dit pays d'origine.*"

³² Pouillet, § 853, points this out. Celliez (see Renault, J. v. p. 461) expressed himself quite distinctly to this effect. The French delegates at the conference at Berne were also of this mind (see Darras, § 302).

EQUAL PROTECTION TO NATIVES AND FOREIGNERS. EXAMPLE OF FRENCH
LEGISLATION. RECIPROCITY.

§ 345. But are foreign works, and works which have appeared in a foreign country, to have as a matter of course claim to the same protection as our laws give to their native authors?

If we take our stand upon the character of a right of interdict, and remember at the same time that this right is an equitable and legal claim attaching to the person of each individual, we must, following the general principle of the equality of foreigners and natives before the law, answer this question unconditionally in the affirmative. If we look upon reprints of another man's work, the piracy of another's industry and exertions, as morally objectionable, we must forbid it in this country, irrespective of whether the person who is plundered is a foreigner or a native subject, and irrespective also of the fact that the law of the country in which he has his home takes a different view of the matter. "*La contrefaçon*," remarked Lherbette³³ on the occasion of the debates on the Franco-Sardinian Convention of 1844, "*est un vol. Pour punir chez nous le vol commis ou préjudice des auteurs étrangers, est-il nécessaire que les gouvernements étrangers en agissent de même avec nos auteurs? La morale ne serait donc plus un devoir, mais un marché.*"

Experience has in fact shown that the reprinting of foreign works on a large scale not only damages native authors, since their work has difficulty in competing with the printed works which are not burdened with any *honorarium* to the author, but that in the end booksellers are forced into a ruinous system of underbidding each other or to the payment of *honoraria* to foreign authors and agents, and to private agreements with competitors of their own nation, without securing themselves against further reprints by rivals in the trade.

Thus the example which we find in the legislation of France was at once generous and wisely calculated. In the opinion of Darras (§ 178),³⁴ the legislation of 1793 and the decree of 6th Feb. 1810 had already made the question of protection against reprints independent of the author's nationality and of the place where the work appeared. But the practice of the courts was against this; they gave protection only in cases in which the work was first published in France. But a decree of 28th March 1852, without the possibility of doubt, placed under the protection of the French laws against piracy all works, although they appeared in foreign countries and were due to foreign authors, and that without any question as to reciprocity. French diplomacy has not, by reason of this liberality, found any difficulty in arranging advantageous conventions, as the result has shown, although formerly her literary and artistic productions fell

³³ See J. v. p. 126.

³⁴ Protection of dramatic and musical works against unlicensed representation was not, in the opinion of the best authorities (see Darras, § 218), given by this decree.

victims in a marked degree to reprints and to piracy. The task of arranging these conventions has on the contrary been made easier. Completely unselfish testimony was thus given to the objectionable character of this piracy, and to the mischief it did to the country whose trades availed themselves of it, and most States have not been able to resist the force of this argument.³⁵ True it is that French diplomacy has not maintained quite the same liberal position as was taken up in the decree of 1852. The theory that a work should not be protected in a foreign country, or that that protection should not be continued, if protection is not given, or has expired in the country of its origin, has as a rule been formally recognised in the conventions concluded in France after the decree; and in some respects the authors and publishers of the countries with which France has concluded such conventions are more unfavourably placed than the authors and publishers of countries with which she has no such treaty.³⁶ The example of France has had an enormous influence in obtaining international protection for literary and artistic property in general; and in the end a general convention formulated at Berne was reached by a large number of European and American States,³⁷ to which (art. 18), following the precedent of the Postal Union, it is kept open for other States to give in their adherence. Of course, this convention, in order to come into operation in the different States, required to be sanctioned by their respective legislative bodies.³⁸

INTERNATIONAL CONVENTIONS.

§ 346. Conventions, and among them that of Berne, rest on the principle of reciprocity. From what we have said it follows that in itself this principle is unsound.³⁹ If the piracy of foreign intellectual productions is objectionable, then in truth the repression of the practice should not be made dependent on other countries pursuing the same course. The view is, however, generally held that by such liberality many States might lose the opportunity of concluding conventions for themselves or of adhering to a general convention. The object, however, viz. the exertion of a certain pressure on other States, might be attained otherwise than by holding that any one shall be allowed to do an act that is in itself unlawful, if the State whose subject is injured allows an objectionable act to be done to our subject. It might, *e.g.* be provided that the subjects

³⁵ The United States have up to this time refused to accede to any convention, and that concluded with Russia is very imperfect. On this last see v. Martens, § 41 *ad fin.*

³⁶ It is not beyond dispute whether the authors and publishers of countries which have concluded conventions may not still appeal to the decree of 1852, in so far as it is more in their interest. See on this controversy Pouillet, § 850; Darras, § 218.

³⁷ Russia and the United States seem still to withhold their adherence on principle.

³⁸ On 5th September 1887 the ratifications of the Governments of the German Empire, Belgium, Spain, France, England, Italy, Switzerland, Hayti, and Tunis, were exchanged at Berne (J. xiv. p. 507). See the German *Reichsgesetzblatt*, 1887, No. 40.

³⁹ By the 38th article of the Belgian Statute of 22nd March 1836 (J. xiv. p. 417) protection is given to foreign authors irrespective of reciprocity.

of such States should be required to pay an exceptionally high fee to entitle them to raise an action for redress, or that in such cases the court might give judgment for a penalty to be paid to the public treasury, but not for damages. It is much more easy to reconcile special dues for the legal protection of foreigners, or modifications of the remedies of the law in their case, with the principles of international law, than it is to justify on international principles the absolute denial of all right to foreigners, or their absolute exclusion from all remedy.⁴⁰

We may add that it will be much easier to investigate the nationality of an author, or possibly of a bookseller, in the course of a process than to do so outside the process and antecedently to it. Again, the immorality of the piracy of foreign work is brought much more sharply forward, if it is as a matter of course reprobated by the State, than if the repression of it seems merely to be the result of an international treaty.

Besides that, as a practical matter, the system of reciprocity is only applicable in the case of conventions, or in some such way as that the legislative power or the Government shall decide, and formally proclaim that reciprocity is guaranteed by this or that foreign State. Reciprocity in this sense only, that some protection or other is given to foreign authors and foreign works, may, in view of the defective legislation of the other State, or of the piracy which is carried on by translations, easily made and at little cost, be worth little or nothing. If courts are only to give protection, if, in exactly similar circumstances, the foreign court would give its protection, the result would be a very difficult investigation in every case, and serious uncertainty in the law. That foreign literary and artistic productions should be set on the same footing, it is therefore necessarily postulated, if desirable results are to be attained in practice, that the municipal laws of the different States shall be to a certain extent the same.

The Convention of Berne on this account very rightly did not restrict itself to affirming the proposition that native and foreign production should be alike protected by the law so far as the States there represented were concerned. The Convention contains also, to a certain extent, international rules of law to be applied equally to all, particularly with reference to protection against unauthorised translations, reprints of magazine articles, representations of dramatic and musico-dramatic works.

RETROSPECTIVE EFFECT OF CONVENTIONS.

§ 347. After treaties have been concluded for the protection of authors' rights, the question will not unfrequently require to be decided whether the protection now secured by the treaty will apply to works

⁴⁰ The following startling consequences flow from the principle of reciprocity. The foreign author, whose manuscript is used, if he does not belong to some State that has a convention or gives reciprocity, enjoys no protection at all against a reprint from his manuscript or against unauthorised dramatic representation, nor have the heirs of such an author, belonging to the same country, any such protection.

which have already been published. We must answer the question in the affirmative, and the Convention of Berne (art. 14), in conformity with the usual practice under treaties, gives the same answer.⁴¹ On the one hand, it is not the treaty which first creates the author's rights; its import rather is, that it is a defence for his existing rights, and, on the other hand, no one has a private right in a claim that what has hitherto been allowed by law, shall continue in the future to be allowed. But copies that have already been prepared may still be sold,⁴² and an indulgent view may fairly be taken so as to allow the blocks, prepared for printing musical works, to be used to a certain extent.⁴³ There can, however, be no notion of an indemnity being paid by the author or the publisher to the copyist or pirate.⁴⁴ If the author should, before the convention which gives him protection has come into operation, have concluded a bargain with a bookseller in the other country, if, for instance, he sent to this bookseller proof-sheets for a new edition, in return for an *honorarium*, or should the managers of a theatre, in spite of there being no legal protection for the author, have paid him an *honorarium* for the right of representation, still, the bookseller or the theatrical managers have in such a case acquired no rights for the period after legal protection has come into play; there must be a new contract between the parties with reference to the change in the law. The author had previously no right of prohibition in the other country, and could not therefore make any contract with reference to it.⁴⁵ The payments which were made up to the date when that right of prohibition was given, are either a mere matter of courtesy, or payments in return for certain actual advantages. Of course, the legislature or the treaty making powers can disregard this legal deduction. Thus, for instance, the Protocol to the Franco-German Treaty of 1883 contains in its second head the proposition that dramatic and musico-dramatic works, which have been publicly performed in the original, or in a translation before that treaty shall have come into force, shall only enjoy protection in the terms in which that was conceded by the treaties concluded previously with the individual States of Germany. Undoubtedly, this enactment was prompted by considerations of fairness to theatrical

⁴¹ See the analogous decisions of the French courts, pronounced after the French decree of 1852, in Pouillet, § 849, and Paquy, p. 118, for the practice under treaties.

⁴² The copies already printed must be marked with a stamp.

⁴³ Most treaties have detailed provisions on this point.

⁴⁴ See Darras, § 233, with reference to the effects of the French decree of 1852.

⁴⁵ See Paquy, p. 140, who expresses himself to this effect with reference to the prolongation of a period of protection introduced by the convention. According to his view, that will benefit the author, but not the publisher. See Thöl, *Theaterprocesse* (Göttingen 1886), on a similar controversy which was discussed in Germany. The matter in dispute here was the rule for protection against unlicensed representations given or enlarged by the imperial statute of 1870. Art. 9 of the Franco-Spanish Convention of 18th June 1880 provides: "*Le bénéfice des dispositions insérées au paragraphe précédent pour les ouvrages publiés sous le régime de la convention de 1853 profitera exclusivement aux auteurs de ces ouvrages ou à leurs héritiers et non pas aux cessionnaires dont la cession serait antérieure à la mise en vigueur de la présente convention.*"

managers who had made expenditure on scenery and stage-properties; these considerations are, however, of very questionable validity.

[§ 6 of the English statute, passed to carry out the provisions of the Convention of Berne, 49 and 50 Vict. c. 33, provides that its terms shall not diminish any "interest arising from or in connection with any work lawfully produced in the United Kingdom subsisting or valuable at the date of the Order in Council." This provision was held by the Court to protect the rights of a bandmaster who had bought for 5s. the right to perform a French polka before the date of the order applying the convention to French subjects. *Moul v. Groenings*, [1892], L. R. 2, Q. B. 443.]

IS THE PROTECTION GIVEN A PROTECTION FOR NATIVE AUTHORS, OR A PROTECTION FOR NATIVE PRODUCTION? (PRINCIPLE OF PERSONALITY AS AGAINST THAT OF TERRITORIALITY.)

§ 348. If the principle of the equality of the rights of foreigners and of natives before the law is not to be recognised in this branch of law, we may hold either the nationality of the author or that of the publisher, or the place of publication, to be the place the law of which should regulate questions as to the international protection of an author's rights. We have no hesitation in declaring that we are in favour of the principle of the place of publication, *i.e.* the principle of territoriality. That was originally the principle of the law of France,⁴⁶ and is that of English law,⁴⁷ and now, too, is that of the Convention of Berne. On the other hand, the German Statute of 11th June 1870 (art. 2 (3), with reference to the copyright in literary compositions, copies, musical compositions, and dramatic works, by § 61 protects all works by German authors, and also all works published by publishers who have their place of business within German territory,⁴⁸ while the law of the United States gives to its citizens or inhabitants, as authors or publishers, the sole right of multiplying copies or of putting plays on the stage.⁴⁹ An author, who causes his works to appear in a foreign country,

⁴⁶ See Renouard and Renault, J. v. p. 115.

⁴⁷ With this peculiar restriction, that a foreign author with whose country there is no convention, in order to enjoy the protection of the English law, must have been residing in some part of the British Empire at the time of publication, although his residence may only have been temporary. See Darras, §§ 281, 282.

⁴⁸ This is perhaps the result of the theory of the right as a personal right improperly separated from the basis of the right of prohibition. (Endemann, on the contrary, Comm. on § 61, describes the reference to the right of authorship "finding its keystone in the personality of the author," as an empty phrase.) By the German law, it matters not where the German is resident. "The German citizen, according to the idea of the German law, carries the German law of copyright with him all over the world." (Endemann, *ut cit.*) Undoubtedly, if a man ceases to be a German, he loses the protection of German law for works as yet unprinted. But he loses it for works which have already been published abroad, and if he again becomes a German, he recovers it. And thus the periods of protection vary, if the country to which a German emigrates has a convention with Germany for the protection of intellectual property.

⁴⁹ The German statute of 9th January 1876, with reference to copyright in works belonging to the fine arts, differs (§ 20) from the statute of 1870 in so far as works by foreign authors are

at once expatriates them, and thus renounces the special protection which the law assigns to native works only. Again, the question as to what protection a particular work enjoys, must, if possible, for practical reasons be made independent of what is often a difficult question, viz. the question as to a person's nationality. The subject is one of importance, if the period of protection is to be made dependent on the law of the country of origin, as it is by most conventions, and now, in particular, by the Berne Convention.

In determining what is the place in which a work has appeared, we must have regard not to the nationality of the publisher, but to his domicile or his place of business, if he has one;⁵⁰ an alteration in these can have no effect upon the author's right, when once it has been acquired, since they serve merely as fixed points for determining what is in truth the place of the appearance of the work. If we were to adopt any other view, the title-page of a book would be misleading,⁵¹ and it would be necessary to institute difficult enquiries as to changes of domicile. If we adopt the idea that it is the production which is protected,⁵² and the productions of course of this country, we reach simple and practical results. The conception, on the other hand, of copyright as a direct right belonging to the person of the individual, which will change as that person's nationality changes, complicates the subject with manifold difficulties.

PROTECTION OF UNPUBLISHED LITERARY WORKS.

§ 349. The principle of protecting not the producer but the thing produced seems, however, to fail in the case of unpublished works, and it may well be that that is the reason why the principle of an abstract right in the individual still finds so many adherents, and claims a place at the head of so many State treaties, and, in the Berne Convention, almost the place of honour. It looks as if we must at least admit as a subsidiary principle this principle of a personal right, which in that character would necessarily be regulated by the law of the country to which the person belongs. But in our opinion it is not necessary to do so. It only needs to be considered

protected, only if they are published by German publishers. (Cf. Wächter, *Urheherr.* p. 121.) But that will not prevent the assumption of a man of straw belonging to Germany as publisher. All that is necessary is, besides the true foreign publisher, to have a fictitious German publisher.

⁵⁰ Thus in the revised statutes of the United States, §§ 4952 and 4971 (given in translation by Darras, p. 367). There is some doubt as to the right of representing dramatic works.

⁵¹ How is it possible to assume, in the case of a work that has appeared in another country, that the author is a countryman of our own?

⁵² That may be maintained according to the German statute of 1870. Dambach (p. 272) and Endemann (*ut cit.*) are of a different opinion. There is, however, nothing to prevent us from recognising the comprehensive provision of this German statute as a recognition in part of the territorial principle.

that it is always possible, in the case of an unpublished work, that it should still be published in this country. This possibility can and will be protected by the law of this country. No doubt, by this means we reach a protection of the authors of unpublished works, without regard to their nationality or domicile. But this is not an unreasonable result. Something may be said for refusing the protection of our laws to works published in a foreign country, which refuses to protect works published in this country. On the other hand, publication for the first time, or public representation, of any work without its author's consent is an act so entirely at variance with the most universal and direct sentiments of justice, and so immoral, that the author does not in our view require the aid of modern copyright statutes, to enable him in many cases to take proceedings against it.⁵³ He could, in our view, avail himself of the Roman *actio injuriarum*, wherever the principles of this action are still recognised. To forbid him to take proceedings against such conduct (which frequently besides will be associated with the commission of a delict of another kind, such as the theft or embezzlement of a manuscript), for no other reason than that the State, to which the injured author belongs, itself—perhaps against his wish—refuses to allow redress in similar circumstances, is in truth a mere product of selfish stupidity, calculated to damage the interests of the country which favours such a course, as is generally the case in similar circumstances.⁵⁴ If we cannot persuade ourselves of the comprehensive principle of protection without respect to the author's nationality and the place of publication, we should at least allow the barriers of nationality to fall aside in the case of unpublished works. In this way we should at once simplify the juristic theory, and at the same time bring a sharper pressure to bear on other States, which still resist the conclusion of equitable and fair conventions. If the matter were thus simplified, we might leave the author's nationality out of account altogether. We can, however, by insisting on reciprocity, strike at the whole book-trade of any State that holds out against it, whereas this trade is, as things stand at present, often protected by reason of the nationality of an author who belongs to our country or to some other country, with which we have a protective treaty, particularly when the country refusing reciprocity has the same language, or at least uses the same language to a considerable extent. Accordingly, some such sentence as this must stand at the outset of § 2 of the Convention of Berne, viz.:—

“La protection légale des œuvres non publiées est indépendante de la nationalité ou du domicile de l'auteur.

“Les œuvres publiées pour la première fois dans l'un des pays de l'Union

⁵³ In our view he may take proceedings, even if it be published in his name.

⁵⁴ *E.g.* The manuscript of an author, a foreigner, who is just about to conclude a contract with a publishing house in this country, is stolen from him by a third party before the contract is finally concluded. By such an act the publisher in this country may suffer as much as the foreign author does.

jouiront dans chaque autre pays de l'Union de la même protection que les lois respectives accordent actuellement ou accorderont par la suite aux publications faites pour la première fois dans le pays."

RIGHT OF DOUBLE PUBLICATION.

§ 350. Is it competent for an author to divide the prohibitory rights which he possesses by geographical districts, so that, for instance, in one country none but the copies issued by the publishing house of A, and in another country none but those issued by B, may be put into the market?

If we deal with copyright exclusively on the analogy of a right of property, nothing seems to stand in the way of the recognition of this right of separate publications. Nevertheless, the existence of such separate rights is at variance with sound legal deductions: it is not a thing that is by any means self-evident, and its practical advantages are, to say the least, doubtful. It involves an increase in the severity of the prohibitory right of the author that is highly oppressive, since it makes it very much more difficult for the public and for booksellers to distinguish copies that are legally placed in circulation from copies that are illegal. This will be specially felt, if a claim is made, in consequence of any such right, that the copies made in country A shall not be brought into country B under pain of confiscation, and if the public are expected to exercise special caution in buying copies.⁵⁵ But we can quite easily reconcile with the convenience of the public some obligatory effect being allowed to an agreement that the author shall be entitled to sue the publisher, who deals in copies of a book or of a musical work beyond the limits of some district that has been assigned to him. A measure of that kind will satisfy all

⁵⁵ In this result Heydemann (p. 190); Dambach (p. 273); O. Wächter, *Urheherr.* p. 109. Kohler, however (*Antorr.* in v. Ihering's *Jahrbuch*, xviii. p. 402), takes a different view: he looks upon the subjective right of the author, as it is conceived by him, as divisible, like a right of property, in any way the author pleases. A judgment of the German Sup. Ct. of Comm. of 16th March 1877 (Dec. xxii. p. 37 *et. seq.*) infers the possibility of local limitations from the provision of the German statute of 1870, § 3, by which the right of the author can be assigned under limitations. The limitations here referred to are surely limitations to particular editions or to particular periods. Is it to be thought possible that even within the German Empire any local limitations that parties please can be fixed by the contract for publication? Besides, in the case there decided, the question was not one as to the operation of a territorial limitation as against third parties, but was raised among different publishers of the same work. But lastly—and this is the important matter—the result of the decision of the court is purely negative. On the actual circumstances of the case in hand, it was held that no injury had been done to the separate rights of publication, to defend which was the object of the action. The judgment could not therefore give any definite deliverance as to whether the punishment laid down by law for violation of copyright was applicable to the case of an infringement of a copyright thus geographically limited. Dambach takes a distinction between the effect of separate rights of publication as between author and publisher, and their effects in a question with the public. It can have no effect against the public, as he thinks (*Urheherr.* p. 273), under the provisions of the German statute solely, and putting special treaties out of view. The Franco-German treaty, § 11, recognises a divisible right of this kind in musical and musico-dramatic works with full effect.

the requirements of the author and of the publishing trade. The public and retail dealers will not be drawn into the matter, and will suffer nothing. But it is possible for the law and for any international convention recognised as law,⁵⁶ to give sanction to the opposite view—which is in our opinion an unsound view—and that opposite view is recognised as a matter of course in patent law, as we shall see afterwards.

The Convention of Berne makes no mention of any such right of separate publication. Orelli's opinion (p. 46) is that it was intended (?) to abolish it for the future, and, after what has been said, it cannot be maintained that its competency is a self-evident matter.

THE GENERAL CONVENTION AT BERNE IN 1885. SUBSTANCE OF IT, AND COMMENTARY ON IT. THE IMPORTANCE OF SPECIAL CONVENTIONS CONCLUDED BY INDIVIDUAL STATES IN RELATION TO IT.

§ 351. Lastly, let us consider the international protection of copyright in the shape in which its leading features were cast by the Convention at Berne.⁵⁷

(1.) In the first place, we must point out that this Convention does no more than establish a certain minimum of international rules of protection and of uniformity in the individual States. Individual States are free, under § 15, to conclude separate treaties between each other, so far as they give a wider protection and are not in contradiction of the provisions of the general convention. Of course, too, earlier treaties are to this extent preserved in full vigour. Most States, then, will have a somewhat difficult task to keep in view precisely what their legal position is. They will have to consult simultaneously the Berne Convention, their own separate treaties, and, of course, each its own municipal system. It will not unfrequently be a question whether some provision in a separate treaty is reconcilable with the Berne Convention. The particular circumstances of each case must determine the applicability of such a provision. Authors and their legal representatives will be entitled to appeal either to the Berne Convention or to the provisions of the separate treaties, according as the one or the other is the more favourable to them. They will only be prevented from taking the latter course in so far as some absolute legal proposition is laid down by the Berne Convention. That is the case, for instance—and to the disadvantage of authors—in so far as the duration of the period of protection may not last longer in any country belonging to the union, than it does in the country in which the work had its origin.

⁵⁶ See, *e.g.* the Convention between the North German Bund and Italy on 12th May 1869, art. 7; Franco-German Convention of 19th April 1883, § 15; German-Belgian Convention of 12th Dec. 1883, § 11.

⁵⁷ See in general on the convention Orelli's pamphlet. A great part of the effect of the convention will be lost, so long as the United States do not adhere to it, for there is enormous activity in piracy by the States. See the remarks of F. A. Ackermann in the *Leipsic "Börsenblatt für den deutschen Buchhandel,"* 22nd December 1884 and 25th February 1885.

(2.) Again, as we have noticed already, the Convention proceeds on the principle of reciprocity; but, of course, it does not forbid any individual State which is a member of the union from protecting an author's rights as such without reciprocity. According to the provisions of the Convention, protection of these rights is obligatory only on condition of a mutual protection being given by the States which constitute the union.

(3.) In accordance with our theory, the Convention bases the rights of the author, as a matter of principle, and in conformity with the characteristics of a right of prohibition or interdict, upon the law of the country in which these rights are to be used to stop the multiplication of the work in question, or the employment of it for profit. This proposition leads off the first article which contains any substantive enactment (§ 2). We cannot adopt Orelli's view (p. 22), which takes the law of the country of origin as the law which lies at the root of the matter. Even if the majority of the delegates who attended the Convention were of this mind, that will, in view of the language of the Convention, be of just as little importance as is the opinion of a person who brings in a bill, if it does not agree with the text of the bill as it is passed into a statute. To this we may add, that the universal rule of practice up to the date of the Convention is in direct opposition to Orelli's opinion, viz. "the extent (?) of an author's rights is determined by the local law of the place in which his work is published."

We have already seen that the provisions made by the Convention, by which the formalities, which an author must observe to obtain the protection of the law, are to be determined exclusively by the law of the country in which the work had its origin, are easily reconcilable with our theory.

(4.) The Convention, as we already noticed, holds fast to the principle that the author can claim no rights in another country, which he does not enjoy in his own country, or in the country of origin. This principle is, however, only to be recognised as regards the shorter duration of the period of protection (§ 2 (2)):⁵⁸ it does not apply to other limitations of the author's rights; too extensive and too troublesome an enquiry into the laws of foreign countries was purposely excluded. If a man then reprints in country B a work which first appeared in country A, he cannot found upon the extinction or expiration of the author's rights in A, if these are extinct, or have expired for any other reason than the mere lapse of the period of protection. Practice may show that there are not many cases in which we can separate in this way the question as to the duration of the period of protection from other questions as to the existence of the right. It will often be necessary, in order to determine what is the period of protection in the particular case, to take into account a whole series of other foreign enactments.⁵⁹ Besides, the difficulties which arise from

⁵⁸ See Belgian statute of 1886, § 33 (J. xiv. p. 417).

⁵⁹ In so far as the right of the author depends on a reservation, which by the law of the country of origin he is free to make, any waiver of this reservation would in our view fall to be regarded as a waiver which must operate in other countries as well.

setting limits upon the author's rights in accordance with the law of the country of origin, will not be appreciated till some time has elapsed. It will take a good many years before we shall have many cases in which a work is no longer protected by the laws of State A, whilst the protection of it in the territory of State B still subsists. Experience up to the present time can, therefore, give no evidence in support of the theory which we are now criticising.

At the same time, however, the attainment of the chief object, which induces the law to put a limit on the rights of an author, will be impeded. If it is argued, in support of this limitation, that the public of the country where the work is originally published should not be placed in any more favourable position as regards it, than the public in this country is, it is plain that, so far as this argument goes, it is quite immaterial whether the foreign public is to enjoy the work at a cheaper rate because of the expiration of the period of protection, or because the author's rights have lost the protection of the law for some other reason.⁶⁰ To attain the object of the limitation, the parties to the Convention, as we have already noticed, were induced to make the law of the land which gives the shortest period of protection the invariable measure, in cases in which the work appears simultaneously in the publishing houses of different countries. In the case of pictures and sculptures, it will often be necessary to institute difficult enquiries into the nationality of the author.

(5.) We recognise a substantial advance in one provision made by the Convention, viz. the enactment of a series of important rules of uniform international law, dealing with the right of translation, the right of utilising foreign leading articles (*e.g.* in books of "selections"), and also with the representation of dramatic and musico-dramatic works, and adaptations, as they are called, of these, and dealing also with the proof of copyright.

(6.) Lastly, provision is made for the establishment of a permanent office of the union for the protection of literary and artistic works at Berne.⁶¹

It would be a transgression of the limits, within which we must keep the present treatise on copyright, if we were to enter on a detailed consideration of particular conventions for the protection of copyright.⁶² These treaties or conventions are still concluded among the more important States, and will continue to be of importance in the future. We can only advert

⁶⁰ What shall we say, for instance, if, by the law of the country of origin, but not by the law of the other country, the right to sue for penalties for infringement is excluded by prescription, on the expiration of the period within which any such action must be brought? (*E.g.* German statute of 1870, § 35.) It would be lawful to distribute this reprint, which might possibly be very extensive, in the country of origin. At least, if that country were Germany, it is certain that it would be lawful. (Wächter, *Antorr.* p. 288.)

⁶¹ The object of the office is the collection of materials for the information of the different Governments.

⁶² Besides the monographs of Paquy and Darras, so often referred to, see v. Martens, ii. §§ 40-42; v. Bulmerincq, § 41, d. B.

to some special features of them, which are also typical. We observe, then, that the practice sanctioned by earlier usage, of incorporating such conventions with treaties of commerce, has been properly abandoned.⁶³ The protection of authors' rights should not be made dependent upon the necessities of trade, which change so much more quickly, or upon the varying views that are from time to time taken of these necessities. Commercial treaties are often, too, for a time thrown out of operation by a declaration of war between the parties to them. Again, the "most favoured nation" clause, which is not above suspicion even as regards commercial treaties, is entirely unsuitable for conventions about copyright.⁶⁴ These conventions, in spite of the general convention of Berne, we may suppose will still be concluded between individual States. Perhaps, indeed, in order to get rid of obscurities and to simplify the state of the law, these conventions may to a certain extent have been rendered necessary by the general convention itself.

APPENDIX. PROTECTION OF PHOTOGRAPHS.

§ 352. Photographs of a work of art, of which there is a copyright still valid, are simply reproductions of it. If a man has got a license to take photographs of such a work of art, he is to that extent the legal representative of him who has the copyright in the original, and undoubtedly enjoys the protection to which such a representative is entitled. The unlicensed reproduction of such a photograph is an infringement of the original copyright in the work from which the photograph is taken.⁶⁵

The case, however, stands otherwise with original photographs, photographs of objects in which there is no copyright at all (*e.g.* natural objects), or objects, the copyright in which has expired, or where the particular method of reproduction is not touched by the law of copyright.⁶⁶

It may be debated whether photographs of this kind are to be regarded as works of art or as industrial products. The law of Switzerland takes the former view. In the German Empire, on the other hand, starting with

⁶³ The International Congress of 1878 voted in favour of this on Renault's motion. See Paquy, p. 186. Of course, the introduction of literary and artistic works should not be hindered by excessive duties upon them.

⁶⁴ See against this clause Paquy, p. 187. Although in commercial matters the favourable treatment conceded to one State may perhaps impair the full operation of the treaty concluded with another State, there need be little fear of this being the case with regard to intellectual property so called. On the other hand, this clause does interfere with a revival of the legal relations settled by the treaty, and not unfrequently makes it difficult to obtain new concessions which are desirable, because it may be that the State which introduces it has already obtained, by means of a treaty in which it has taken no direct part, all the advantages which it considers desirable for itself.

⁶⁵ See in this sense No. 1 *ad fin.* of the International Protocol, cited below in note 68.

⁶⁶ See German statute dealing with copyright in pictorial art, § 6, No. 3, on the reproduction of works of art, which are permanently set up or exposed in streets or public places.

the idea of photography as a mere product of an industrial business (although, of course, it does approach the work of a pictorial artist), we considered it necessary to pass a special statute against unauthorised imitations or reproductions of photographs (10th Jan. 1876). As an international question, then, viewed in the light of the reciprocity, which gives shape to treaties on this subject, and apart from any special treaties dealing with photographs, the protection of photographs stands thus,⁶⁷ viz. :—

(1.) If we are dealing with a question between two States, which both alike treat photography as artistic work, then we must apply the principles of artistic property.

(2.) If we are dealing with a question between two States, which both alike treat photography as something that is not artistic work, then in both of these States the foreign photograph is without protection.

(3.) If we are dealing with a question between two States, only one of which regards photography as artistic work, then, by the provision specially introduced in the concluding protocol of the Convention of Berne, the foreign photograph is protected in this one of the two States,⁶⁸ but a photograph taken in the State which gives this protection, or by a subject of that State, is not protected in the other State. A treaty between two States, neither of which has adopted the Convention of Berne, and only one of which treats photographs as artistic work, cannot, by reason of the relations of reciprocity which regulate treaties in general, be interpreted to mean that the one State must protect the photographs belonging to the other.

It is certainly desirable, when we consider the very general use of photographs, and the considerable trouble and expense which they not unfrequently cause to the photographer and to the publisher, that there was a general convention for their protection. Such a convention, however, could only be passed upon the footing, that the conditions for protection must in every case be present in the shape required by the law of the State in which the protection is claimed. It could not be provided⁶⁹ that no formalities, except those required by the State in which they have their origin, require to be fulfilled, as it is provided in the case of literary and artistic works. Formalities in these latter cases are superfluous, as we may safely proceed upon the assumption that two different authors cannot produce substantially identical works. It is otherwise with original photographs, and for that very reason it is easier to raise pettifogging processes in connection with them. If, then, it was found impossible for all nations concerned to arrive at uniform provisions on this subject, then protection

⁶⁷ See Dambach in v. Holtzendorff's *Handb.* iii. pp. 594-597.

⁶⁸ See the paper by Numa Droz on this subject (J. xii. p. 489), and the text of the protocol cited there at p. 502, viz. : "*Il est convenu que ceux des pays de l'union ou le caractère d'œuvres artistiques n'est pas refusé aux œuvres photographiques, s'engagent à les admettre, à partir de la mise en vigueur de la Convention . . . au bénéfice de ses dispositions.*"

⁶⁹ It may seem doubtful how this stands at the present time according to the Convention of Berne, so far as those States which protect photographs as works of art are concerned.

could only be given to foreign photographs on some such conditions as those specified by § 5 of the German statute with reference to German photographs.⁷⁰ To give protection to a foreign photograph in the German Empire under conditions different from those of § 5 of the statute, would be inconsistent with the nature of the prohibitory right involved in copyright.

NOTE EE ON §§ 337-351. INTERNATIONAL COPYRIGHT IN GREAT BRITAIN.

[Since international copyright has been placed under statutory regulations in recent years, regulations which followed upon the resolutions of an International Convention, there is more of a historical than a practical interest in referring to the position of foreigners at common law, or under legislative enactments as they stood before 1886.

It would seem that at common law an author would have the same right, whether he was a British subject or not, to appeal to the law of England or Scotland for protection. This appeal to the common law would only be made in cases in which there had been no publication, for the author's exclusive rights at common law are lost after publication (per Lord St Leonards in *Jefferys v. Boosey*, 1854, 4 H. L. (815). But before publication an author has an exclusive right in his work: this right is carried so far as to be applied to letters which have been written and transmitted to the person for whose perusal they were intended. The publication of such letters may be restrained by the writer of them, either because of a right of property in them which still remains in him, as the law of England holds (*Oliver v. Oliver*, 1878, 11 C.B.N.S. 139, and *Gee v. Pritchard*, 1818, 2 Swanston, 402), or on the ground of just and expedient interference for the protection of reputation, as the law of Scotland prefers to say (see *Morrison's Dict. v. Literary Property*, App. Nos. 1 and 4, and *Bell's Pr.* § 1356). In such matters a foreigner anxious to prevent injury to his reputation in this country, or to vindicate a right of property here, will be as much entitled to do so as any British subject. The courts will be open to him for this purpose, just as they would be open to him if he desired to protect his character on any other point, or to vindicate his property in any other article.

That copyright is "a natural and civil right," and not a mere creation of statute, may be of importance for the determination of questions arising even subsequently to the statutes, which may have been unforeseen when the statutes were framed. Thus, for instance, in 1871 Lord Gifford held that in addition to the protection afforded against literary piracy by the 17th section of the Copyright Amendment Act (5 and 6 Vict. c. 45), an

⁷⁰ "Every legal copy of the original negative made by photography or mechanically must have on the copy itself or on the cardboard:—

"(a.) The name, or the firm, as the case may be, of the person who took or who published the original negative;

"(b.) The domicile of the maker or publisher;

"(c.) The year in which the legal copy first appeared;

"In the event of contravention of these provisions, no protection will be given.

action of damages might be maintained by a British publisher, who held a British copyright, against a bookseller who had sold in this country copies of the protected work, which had been printed in America. His lordship thought that the remedies of the statute, among which an action for damages was not included, were not exhaustive: the right of the author did not begin and end with the statute, but was to a certain extent defined, and its enforcement facilitated by it. (*Tennyson v. Forrester*, 1870, 43 Scot. Jur. 278; see also Copinger, p. 218.)

But until the Act of 1886, which followed on the Berne Convention, it had been doubted whether an alien, unless he was present in British territory at the time of the publication, could claim the protection of the Copyright Statutes. Lord Cairns and Lord Westbury, in *Routledge v. Low*, 1868, L. R. 3, H. of L. 100, thought that the presence of the author within British territory was immaterial, and their reasoning appears irresistible. Why should a foreigner be unable to vindicate, as well as any British subject, an asset of his property in this country, he having, by coming here for publication, secured to the British public the benefit to be derived from the advancement of learning among them? But in *Jefferys v. Boosey*, 1854, 4 H. L. (p. 815), it had been held that the foreigner's presence on British soil was necessary.

Up to the passing of the Act of 1886 (49 and 50 Vict. c. 33), however, no work that was not first published in Britain could claim the protection of the Copyright Acts. But in 1885 the Convention of Berne had been drawn up in the terms sketched by the author, and the British Parliament, in order to give its provisions validity in the United Kingdom, passed the Act of 1886, entitled the "International Copyright Act."

It will be convenient to print here *ad longum* the more important articles of that Convention. A full translation will be found in the appendix to Mr Scrutton's work on copyright, and the original text will be found in J. xii. p. 498.

Art. 2. Authors belonging to one of the countries of the union or their agents enjoy, in the other countries of the union, the rights which the laws of these countries respectively concede at the present time, or shall hereafter concede to their own subjects, in respect of their works, whether these are or are not published in one of the countries of the union.

The enjoyment of these rights is subject to the fulfilment of the conditions and formalities prescribed by the law of the country in which the work had its origin: it cannot last longer in the other countries of the union than the period for which protection is allowed to it in the said country of origin.

The country where the first publication took place, or, if this publication took place simultaneously in several countries of the union, that country among these whose law gives the shortest period of protection, is held to be the country of origin.

In the case of unpublished works, the country to which the author belongs is considered as the country in which the work had its origin.

Art. 3. The stipulations of this Convention are equally applicable to the authors of literary or artistic works published in one of the countries of the union, although the author himself belong to a country which is not a party to the Convention.

Art. 4. defines the expression "literary and artistic works." By the final protocol it was provided that the manufacture and sale of instruments, for the mechanical reproduction of musical airs which are copyright, shall not be considered as constituting an infringement of the copyright in the music.

Art. 5. Authors belonging to one of the countries of the union, or their agents, enjoy in the other countries of the union the exclusive right of making or authorising the translation of their works up to the expiration of ten years, dating from the publication of the original work, in one of the countries of the union.

In the case of works published in parts, the period of ten years count from the date of the publication of the last part of the original work.

In the case of works made up of several volumes published at intervals, such as reports or collections published by literary or learned societies or by individuals, each volume, report, or collection is held to be a separate work in computing the periods of ten years.

The 31st Dec. in the year in which the work was published is held as the date of publication, for the purpose of calculating the period of protection, in all cases for which the present article makes provision.

Art. 6. Licensed translations are protected exactly as original works are protected. In consequence, they enjoy the protection stipulated in articles 2 and 3 as regards unauthorised reproduction in the countries of the union.

It is understood that, as regards a work the right of translating which is public property, the translator cannot prevent this work from being translated by several writers.

Art. 7. Articles from newspapers, periodicals, or reviews published in one of the countries of the union, may be reproduced in their original form or as translations, unless the author or editor has expressly forbidden this. In the case of reviews, it will be sufficient that this prohibition should be made in a general way at the head of each number.

In any case, this prohibition shall not apply to articles of political discussion, or to the reproduction of news of the day or *faits divers*.

Art. 8. As regards the power of borrowing from literary or artistic works for publications intended for instruction or bearing a scientific character, or for collections of selections (*chrestomathies*), the effect of the legislation of the different countries belonging to the union, and of any arrangements that may exist or shall yet be concluded by them, is reserved entire.

Art. 9 extends the provisions of the 2nd article to musical works.

Art. 10 expressly includes among the unlicensed reproductions, which the Convention is intended to suppress, indirect appropriations of any literary or artistic work, bearing such titles as *adaptations*, *arrangements*

de musique, etc., when these are simply reproductions with unimportant changes, and without any of the features of a new original work.

In applying this article, it is understood that the tribunals of the various countries will apply the reservations expressed by their own laws.

Art. 12. Every piratical work may be seized on importation in those countries of the union in which the original work has right to legal protection.

The seizure takes place in conformity with the municipal legislation of each country.

Art. 14. The Convention applies to all works which, at its date, have not become public property in the country of their origin.

Art. 15. It is understood that the Governments of the respective countries of the union reserve power to themselves to make independent arrangements with each other, in so far as these arrangements shall give authors or their agents more extensive rights than those given to them by this union, or shall include other stipulations which shall not be contrary to this Convention.

Art. 18. Countries which have not taken part in this Convention shall be allowed to join it on their request, if they give protection in their own territories to the rights which constitute the subject of this Convention.

An additional article provides that this Convention shall not affect subsisting conventions among countries belonging to the union, if these conventions ensure authors more extensive rights than those contained in this Convention, and do not contain any conditions contrary to its provisions.

By a final protocol, it is *inter alia* provided that in applying the principle of article 14, the countries of the union shall, where they have no such stipulations in existence to regulate their relations, fix, each for itself, the conditions under which the protection is to be given.

To give effect in Great Britain to the provisions of this Convention, it was necessary that Parliament should interpose. Accordingly, the Act 1886 was passed to enable Her Majesty, by Order in Council, either under the provisions of the statutes 7 and 8 Vict. c. 12, 15 and 16 Vict. c. 12, 38 and 39 Vict. c. 12, or the present Act, to give effect to the main provisions of the Convention, and an Order in Council, to take effect on 6th December 1887, was accordingly made.

The statute of 1886 then provides (§ 2, subsec. 3) that the International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced.

§ 3. subsec. (1) provides that an Order in Council may provide for determining in which of two or more countries, within which a work has been simultaneously produced, it is to be held to have been first produced. This section seems to be contrary to one of the provisions of art. 2 of the Convention, and accordingly we find that the provisions of art. 2 are recurred to in the Order in Council, which provides: (5) "A literary or

artistic work first produced simultaneously in two or more countries of the Copyright Union shall be deemed, for the purposes of copyright, to have been first produced in that one of those countries in which the term of copyright is shortest."

§ 4 (2) provides that Her Majesty, before making an Order in Council under the Acts, shall be satisfied that the foreign country with reference to which the order is to be made, has made such provisions for the protection of the authors of works first produced in the United Kingdom as she shall think expedient.

§ 5 (1) gives the author of a book or of a dramatic piece first produced in a foreign country, to which an Order in Council applies, the same right of preventing the production and importation of any translation in and into the United Kingdom as he would have of preventing the production and importation of the original work;

(2) provided that this protection shall cease if no translation is produced under the author's license within ten years after the book, or each number of it, is published.

(3) A lawfully produced translation is protected in the same manner as if it were an original work.

By § 7 of 15 and 16 Vict. c. 12, the provisions of which are saved by the Act of 1886, any article of political discussion which has been published in any newspaper or periodical in a foreign country may, if its source is acknowledged, be re-published or translated in any newspaper or periodical in this country. Other articles so published may be re-published or translated, unless the author has signified his intention of retaining his copyright and right of translation in some conspicuous part of the newspaper or periodical. If he has done so, his article will receive the same protection as books receive, without the necessity of observing the same formalities.

By § 6 of the Act of 1886, Orders in Council are made retrospective, *i.e.* so as to protect antecedent publications, except in so far as they have been lawfully reproduced. The provision is that the Act or Orders shall not diminish any interest arising from or in connection with any work lawfully produced in the United Kingdom subsisting or valuable at the date of the Order in Council. For an interpretation of what is meant by such an "interest," see *Moul v. Groenings* [1892], L. R. 2, Q. B. 443; see *supra* 752.

By § 8, the Copyright Acts are applied to British possessions, under certain conditions: by § 9, power is given to Her Majesty to declare that any Order in Council shall not apply to any British possession.

Reference may be made to the cases cited by Copinger, pp. 342, etc., to show what view the law of England takes of musical adaptations or arrangements, and in what circumstances it protects them under the Copyright Statutes.

By § 11 of the Act of 1886, a photograph is held to be included under the head of the "literary and artistic work" protected by that statute. The protection given to these works of art in Britain depends on the provisions of 25 and 26 Vict. c. 68.

The United States have never adhered to the Convention of Berne; but by an Act of Congress dated in March 1891, to come into force in 1891, they have protected foreign copyright under certain highly peculiar and characteristic limitations.

It is enacted that all authors, etc., shall have the sole right of publishing, representing, copying, and dramatising their works, on the fulfilment of certain conditions. This right the author has for life, and his widow or children for fourteen years after his death.

The main condition of obtaining copyright is the deposit of two copies of the book, etc. or, in the case of statuary, painting, etc., a photograph of the original, with the Librarian of Congress. These copies must be printed, or that photograph reproduced from types set up, or negatives made, within the limits of the United States. While the copyright subsists it will be illegal to import into the United States any copies not made from type so set up, or negatives so made. In the case of books, English translations of which alone have been copyrighted, this prohibition applies only to these translations, and not to the originals.

§ 13 provides that this Act shall only apply to a citizen or subject of a foreign State or nation when such foreign State or nation permits to American citizens the benefit of copyright on substantially the same basis as its own citizens, or when that foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, to which agreement it is open to the United States to become a party. The existence of either of these conditions shall be determined by a proclamation of the President.

The peculiarity of the conditions of this statute needs no comment.

II. LAW OF PATENTS.¹

§ 353. In the law of patents we find the prohibitory character of the originator's right more clearly disclosed than it is in the right of the author of literary and artistic works. An invention does not, as a literary work or a work of art does, unmistakably bear an individual character in its very nature. On the contrary, one and the same invention may be made simultaneously by several persons; it may often be matter of doubt how far an invention is an independent discovery, and its novelty, too, may be disputed, *i.e.* in fact there may be doubt about its being an invention in the proper sense at all. On all these considerations, however, it is plain that the right of the author of the invention must, in order to be carried into operation, receive a special recognition in the case of each invention. This recognition, again, can only receive sufficient publicity within the sides that the right of an inventor or a patent right is of a strictly territorial limits of a State; and thus there is a *consensus* of opinion on all territorial character. From this it follows, in the first place, that a patent

¹ On the history of the law of patents in France and England, see Renouard, *Traité des brevets d'invention*, Paris 1844 (pp. 1-148).

right granted by any State can only be infringed by some act done within the borders of the territory of that State. Even the commentators on the German statute recognise this, in spite of the general expression used in the statute.² But, for instance, the preparation of anything within the German Empire, with a view to export to another country, is an act done in Germany, and falls, accordingly, under the German patent law.³ It would be possible, too, to forbid the mere transit of articles prepared in another country, which are infringements of a German patent; it may be admitted that this would be unreasonable.⁴

On the other hand, however, the nationality of the inventor is a matter of no consequence. The only question for consideration is the fact whether or not a patent has been given; and, with the view of smoothing the way for the introduction of foreign inventions into the country, the advantages of which are well understood, the different systems of patent law put the foreigner on precisely the same footing as a native citizen for acquiring a patent right.⁵ But on this point many codes, following the analogy of the treatment of literary (so-called) property, add this rule, that the duration of the patent in the country is conditional on the continued subsistence of any patent right that may have been previously taken out in another country.⁶ Although this would be a more reasonable rule in patent law than it is in the law of copyright, it cannot be recommended as one that should be sanctioned by legislation, as is pointed out by Pouillet, § 343, and by Weiss, p. 387. If we once hold that patents are helpful to the march of industry, we should not allow them to be dependent on what other countries may do. Logic would require, if we were to follow the theory which lies at the bottom of the codes which adopt this rule, that a patent should never be given, if in the country of the original discovery, *e.g.* in Holland, there is no such thing known as a patent. Again, what is to be the result if—a case to which Weiss specially draws attention—the invention has been already patented in several countries? Is that system which gives the longest duration, or the other, which gives the shortest, to rule? The codes of Italy and Belgium take the former view, whereas in

² [The ruling statute now is of date 7th April 1891; the former was 25th May 1877.] Cf. Landgraf on § 4 of the statute; Gareis on § 4, pp. 97, etc.; Kohler, *Patentrecht*, p. 112. [It is in this respect identical in the statutes of 1877 and 1891.] The legislation of the individual State must in equity take into view that *e.g.* carriages, locomotives, ships and their engines, which are only temporarily in the country, cannot well be subjected to its patent laws. See German statute, §§ 5 *ad fin.* [Identical in both statutes.]

³ Cf. Gareis *ut cit.*; Blanc, *Traité de la contrefaçon*, p. 499.

⁴ According to the German statute this is a moot point.

⁵ The 12th section of the German statute only binds the person who is domiciled abroad (and therefore the citizen of this country, who is so domiciled) to appoint a representative in Germany, if he desires to obtain a patent, or to plead rights depending on a patent. See Kohler, p. 147, and the French writers, especially Pouillet, *Brevets*, § 332.

⁶ This rule holds, *e.g.* in French law, for the *brevet d'importation*. Logic requires that in such questions attention should be paid, not only to the period for which generally the patent right has been granted in the foreign country, but also to the grounds on which, in the particular case, it may be terminated. This is laid down in a judgment of the French Court of

the United States the opposite view is adopted (see Weiss, p. 388, note). The one course, however, is perhaps just as wrong as the other.⁷

The question whether an invention, for which a patent is to be taken out, must be altogether new,⁸ or whether the grant of a patent can only be prevented by the fact that the invention is already in use within the country,⁹ is not a question of international law, but simply a question belonging to the law of each particular country. We should give the same answer to the question whether publication by a foreign patent office prevents a patent being granted in this country;¹⁰ and, lastly, we should say the same thing as to the point whether the holder of the patent must put his patent into working operation within a certain period in the country, in order to avoid forfeiture.¹¹ Questions of succession to a claim for a patent, or to a patent already granted, must be determined by the principles which regulate other questions of succession in international matters;¹² questions of assignment *inter vivos* must in like manner be determined like other questions of assignment. The State, however, which has granted the patent, may, in accordance with the principles of private international law, require certain special forms to be observed for transferences *inter vivos*.¹³ Till these are satisfied, the transference or assignment can only have effect as between the parties, *e.g.* by giving a claim for damages. If a limited transference of the inventor's right has taken place, the general principles of international law are the only matter for consideration, in so far as the question is one as to the ascertainment of the parties'

Cassation of 1864, cited by Pouillet (§ 344). Pouillet himself, in view of the unmistakable difficulties which are, as a matter of fact, involved in such a consideration of foreign law, takes a different view (§ 343). Other systems which have some provision of the sort are the Italian, the Austrian, the Belgian, and the Prussian. See R. Biedermann's summary, "*Die wichtigsten Bestimmungen der Gesetzgebungen aller Länder*," Berlin 1885. In the recent English statute of 1883 (45 and 47 Vict. c. 57), this limitation, which was imposed by the older law, is designedly omitted (see Weiss, p. 387, note).

⁷ What is the result in the law of France, if the patent granted in another country was from the first invalid? Is the subsequent French patent revoked by virtue of the declaration of invalidity pronounced abroad? Lyon-Caen and L. Renault, *Dr. c. ii.* § 3305, say no; according to this view, however, the patent given in France should expire, in order that third parties should not be misled, if the foreign patent, supposing it to have been at one time valid, had expired in that foreign country. This deliverance, so artificial and unsatisfactory, just shows the difficulties in which the French principle involves us.

⁸ The French law provides to this effect, and it is the sounder view; see Kohler, p. 42.

⁹ See the German statute, § 2. [The statute of 1891, § 2, allows a patentee who has published his invention in the official organs of a foreign country three months to take out a patent in Germany without holding such publication a bar.]

¹⁰ Cf. Kohler, pp. 42, 43. The French law on this point is, according to the prevailing opinion, very strict (see Pouillet, § 338). See recent decisions of the Court of Cassation, of 23rd June 1881 (J. ix. p. 191). It is a matter for the legal system of each country, by careful provisions in detail, to provide that the inventor, while he satisfies the provisions of the law of one country, shall not be thereby prevented from obtaining a valid patent elsewhere. See end of this paragraph.

¹¹ But, as Weiss justly points out, if the law recognises any excuse for delay, it ought to be indulgent to a foreigner, who often finds it more difficult than a native to bring his invention into use.

¹² See Gareis, *Deutsches Patentgesetz*, p. 117.

¹³ See German statute, § 19 (2), by which enrolment in the register of patents is required.

intentions; in doubt, however, the law of the land in which the assignment or license, as the case may be, is to have its operation, will rule.

The French statute of 7th January 1793, which by its 3rd article created, in the interests, as it was thought, of native industries, *brevets d'importations*, which were awarded to any one who was the first to introduce a new invention into France, regardless of whether the person who asked for the patent was or was not the inventor, or had or had not acquired the inventor's rights, was a great mistake. These patents, which did much to clog French industry by introducing patents for immature inventions, were done away with by the Act of 1844. They may serve as a proof of the errors to which we expose ourselves, if we let go our hold on well-defined conceptions of law, sanctioned by usage—in this case the conception of the right of the original author—and follow considerations of expediency, which are merely superficial, even in the sphere of law belonging to industrial matters.¹⁴

§ 354. On 20th May 1883 a general international convention for the protection of industrial property¹⁵ was concluded by Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, St Salvador, and Switzerland, and subsequently, under the power reserved to other nations of joining it, by England also.¹⁶ This convention dealt not only with patent rights, but also with the protection of industrial designs and models. Its material provisions show that the law of the territory, in which the patent right is intended to operate as a prohibitory right, ought in substance to regulate questions relating to it, and that any satisfactory agreement on this subject must not merely supply solutions for cases in which there is a conflict of different systems of law, but must to a large extent undertake to set up a body of law that shall regulate all nations alike. Art. 2 (1) gives the subjects of any State belonging to the union the same right to obtain patents within other States belonging to the union as the subjects of these States themselves have;¹⁷ and the same provision is made for the protection of designs, trade-marks, and trade names. Subsec. (2) proceeds thus, viz:—

“En conséquence, ils auront la même protection que ceux-ci (les nationaux) et le même recours légal contre toute atteinte portée à leurs droits, sous réserve de l'accomplissement des formalités et des conditions imposées aux nationaux par la législation intérieure de chaque Etat.”

Art. 5 (2) provides:—

¹⁴ See Renouard, “*Traité des brevets*,” p. 264, as to these “*brevets d'importation*.”

¹⁵ See J. xi. p. 652. The German Empire had not become a party to the convention up to October 1888.

¹⁶ Additional protocol added at Rome 11th May 1886 (J. xiii. p. 266, see Numa Droz, J. xiii. p. 257). Both convention and protocols deal with the protection of industrial designs and models, and with trade-marks, as well as with patents. See *infra*, p. 774.

¹⁷ Art. 3, taking a proper view of industrial conditions, places persons who are domiciled in States belonging to the union, or who have industrial or commercial establishments there, on the same footing as the subjects of these States.

"Toutefois le breveté restera soumis à l'obligation d'exploiter son brevet conformément aux lois du pays où il introduit les objets brevetés."

The two most important provisions of the Convention, however, are provisions for the regulation of all nations belonging to the union on like terms. In the first place, art. 4 gives a person who has registered an application for a patent, or for protection of a design or trade-mark, a right of priority as regards the other States for a period of six months in the case of patents, and three months in the case of designs and trade-marks, so that subsequent registration in any of the other States of the union before expiration of these periods shall not be invalidated through any acts accomplished in the interval, *e.g.* by registration, by publication of the invention or the working of it by a third party, or by the use of trade-marks, etc., etc. In the second place, art. 5 (1) provides: "*L'introduction par le breveté dans le pays où le brevet a été délivré d'objets fabriqués dans l'un ou l'autre des Etats de l'union n'entraînera pas la déchéance.*" Just as in the subsequent convention for protection of literary and artistic property, an international office for the union is established under the superintendence of the Government of Switzerland.¹⁸

NOTE FF ON §§ 353, 354. INTERNATIONAL LAW OF PATENTS IN
GREAT BRITAIN.

[The leading provisions of the statute of 1883 (46 and 47 Vict. c. 57) bearing upon our subject are the following. By the 4th section it is provided that any person, whether a British subject or not, may make an application for a patent. The forms A1 and A2 of application for a patent given by the Patent Rules of 1890, apply to the case of the inventor being resident abroad and having communicated to some one in this country his patent, with a view to availing himself of the privilege accorded by section 4 to foreigners, and to the case of a British subject resident abroad.

By the 43rd section of the Act it is provided that a foreign vessel shall not be prohibited by the existence of a British patent from using an invention for the purposes of her own navigation within British waters, nor shall the use of a foreign invention on board of her within these limits be prevented by such a patent, unless that invention is used for the manufacture of something which is intended to be sold in the United Kingdom, or exported from it. This section, however, it is provided, is only to apply to protect the ships of such foreign States as shall give British ships within their waters reciprocal protection for inventions similarly used there. Failing such reciprocity, there would be applied to a foreign ship using an invention, protected by a British patent within British waters, the law of *Caldwell v. Van Vlissingen*, 1851 (9 Hare, 415), where

¹⁸ The Convention by art. ii. gives foreign manufactures, exhibited at international exhibitions which are officially recognised, a temporary protection as patents, designs, models, and trade-marks.

Dutch vessels were prohibited by injunction from using within British waters propelling apparatus made after a subsisting British patent.

By the 103rd section it is provided that if the Queen makes any arrangements with any foreign State for the mutual protection of inventions, then any person who has applied for protection abroad in any such State shall be entitled to a patent under the Act, in priority to other applicants, if he applies within seven months after applying abroad. His patent is to date from the date of the application for the foreign patent, but he is not to be entitled to damages for infringements happening prior to the date of the actual acceptance of his complete specification in this country. The invention is not to be invalidated by any publication or use of the invention within the United Kingdom during these periods. The application must be made in the same manner as in an ordinary application under the Act: the form of application will therefore be that already described.

The provisions of the section are to apply only so long as the Queen in Council shall direct, and only with reference to the States which Her Majesty in the same way shall specify. As noticed in the text, Her Majesty gave her adhesion, on 17th March 1884, to the Convention of Paris, and the provisions of the statute will therefore apply in the case of the States which adhere to that convention. The general provisions of that convention are set forth in the text.

The laws of various foreign States dealing with patents are given by the Messrs Johnson in their useful treatise, "The Patentee's Manual."

By the 104th section of the statute it is made lawful for the Queen in Council to apply the provisions of the 103rd section to any British possession, if Her Majesty shall be satisfied that the legislature of that possession has made satisfactory provision for the protection of inventions.

III. LAW OF INDUSTRIAL DESIGNS AND MODELS.

§ 355. In some measure industrial designs and models stand in an intermediate position between artistic products and inventions. It will not very easily happen that different persons will simultaneously discover designs and models that are substantially identical. It might thus be possible to give them protection by means of interdict, as in the case of literary and artistic products, without further procedure. But we must set against this, on the one hand, that the trouble and the expense of the inventor are often, comparatively speaking, quite trifling, and, on the other hand, we must remember the enormous number of new designs and models that are made and disappear again from the industrial world in a short time. Our endeavour must therefore be, on the one hand, to diminish to some extent the list of protected inventions, and, on the other hand, to prescribe forms, which will give those engaged in industries the opportunity

of informing themselves whether a design or a model can claim the character of novelty.

The result is that we must require the designs or models to be entered in registers,¹ to be kept under public authority, and must adopt the principle that any one who distributes industrial products made in conformity with some design or model, before registering that design or model, thereby renounces his rights as inventor. Although this latter point might, possibly, lead us to recognise the registration which was made in the country to which the inventor belongs, or in which he is domiciled, as operative all the world over, we must remember that the interests of the public and of other manufacturers are distinctly opposed to any such general effect being given to it. No one can fairly be expected, seeing how frequently it is necessary to produce this or that article speedily, to make enquiries in distant countries, and it may be at great expense whether a design or model has been registered there. It is, besides, as we have already said, against the public interest to make the establishment of the inventor's right too simple and too cheap. A man who desires protection in several countries, should fulfil the special conditions appointed by the laws of all of these countries. That does not prevent countries, which lie close to one another, or which stand in very close commercial relations one with another, from enacting that, under certain conditions which facilitate the ascertainment of the true state of the case, registration which takes place at the inventor's domicile shall *ipso facto* be entitled to protection within the other State which is a party to the arrangement. It is not, however, a matter of course, and if it were to be set up as the rule, it would have a very wide-reaching effect on the international treatment of the law of protection for designs. In the meantime, it seems dangerous to frame a treaty on this principle, and accordingly, in all treaties now in force, so far as I am aware, there is an express clause,² by which subjects of the other contracting State are, no doubt, given the same legal protection as natives, but are required to fulfil the conditions and the forms which are prescribed by the law of the State in which they desire protection.

§ 356. All legislation conceives the protection which it gives to the inventor of designs and models to be a protection given to native industry. We have nothing to do, therefore, with the nationality of the

¹ In 1759 such protection was given in France without the necessity of complying with any such formalities; since the statute of 16th March 1806, it is necessary to deposit plans and sketches. See Blanc, p. 316.

² See, e.g. Austro-German Commercial Treaty of 16th Dec. 1878, § 20. Italo-German treaty of 4th May 1883, § 5. Convention between Belgium and the German Empire for protection of industrial designs and models, of 12th Dec. 1883, § 2. The Convention of Paris of 1883 says in § 6, but only with reference to trade-marks (see *infra*): "*Toute marque de fabrique ou de commerce régulièrement déposée dans le pays d'origine sera . . . protégée dans les autres pays de l'union.*"

inventor or with that of the manufacturer: the thing we must ensure is that protection shall be found for a trading establishment situated in this country, or for goods which are to be manufactured in this country, or at least that the inventor shall have the goods manufactured in this country. (A foreigner, *i.e.* one who has neither a domicile nor a trading establishment in Germany, according to the conception of the German statute of 1st June 1891 only enjoys the protection of the German law on condition (1) of reciprocity, (2) of registration in Germany, and (3) of naming a representative in Germany when he registers his design. He is not required to have a manufacturing establishment in the German Empire.)³ International treaties do not maintain this limitation; work, however, which is not independent, but which follows foreign designs, is apt to damage any industry. The limitation is therefore only used to compel a recognition, in treaty provisions, of the necessity of reciprocity.⁴

On general principles, again, no act, unless it is committed in this country, can be touched by the right of interdict or prohibition. It is purely a matter for the legal system of each individual State to determine, whether imitation with the intention of distribution or circulation is the thing that should be forbidden, or whether the distribution in the way of trade should in itself be forbidden. To extend the prohibition to acts of subjects of this country when abroad cannot be justified, if we keep in view that our general principles tell us that the innocence of any act is to be determined by the *lex loci actus*.⁵ Still less is there any practical advantage in the extension, because a prohibition, which in any case can have no sort of effect against foreigners in a foreign country, can do but little good to the industries of this country, and would only serve to prejudice the subjects of this country, who have manufacturing establishments abroad, in their competition with foreigners.⁶

The general principles already laid down, as to the transference of the author's rights by assignation or succession, hold good here also. We

³ See § 13 of the German statute. In the case of a person with a domicile or trading establishment in Germany, registration is all that is required.

⁴ By the Convention of Paris of 1883 (see *supra*, § 354, note 16, and J. xi. p. 652), the *status* of citizenship insisted on in art. 2, loses in truth all its meaning by art. 3, in view of the language of the municipal laws of the particular States concerned. Art. 3 runs thus: "Subjects or citizens of States not forming part of the union, who are domiciled or have industrial or commercial establishments on the territory of any of the States of the union, shall be assimilated to the subjects or citizens of the contracting States."

⁵ Dambach, p. 39, takes a different view, so far at least as the old German statute of 1876 is concerned.

⁶ How far preparatory proceedings, carried on in this country, are liable to punishment, if the real imitation of the design is intended to take place in another State in which it is lawful—*e.g.* by expiration of the period of protection—must be treated as a question for the municipal law of each State (see below). See an interesting and doubtful case decided by the *Trib. Corr.* at Paris, 16th Dec. 1885, J. xiv. p. 68, and Clunet's note upon it, p. 71.

must treat on the same footing as an assignation the case in which, in consequence of the true author holding a situation or employment in the service of another, the principal or the owner of the manufactory is regarded by the law as the true author. (See the German statute of 1st June 1891, § 7.)

The question, however, whether it is right to limit international protection in such a way as to refuse all protection in this country to a foreign manufacturer, if he has ceased to enjoy it by the foreign law, is difficult to answer. It is answered in the affirmative by the Austro-German Commercial Treaty of 16th Dec. 1878, § 20, by the Italo-German Treaty of 4th May 1883, § 5 (3), and by § 7 (2) of the German-Spanish Treaty of 12th July 1883. On the other hand, in the Belgian-German Treaty of 1883, nothing is said on the point. This last treaty simply says: "German subjects in Belgium, and Belgian subjects in Germany, shall enjoy the same protection as native citizens so far as designs and models are concerned." An earlier treaty of the German Empire, viz. the Commercial Treaty with Portugal, in 1872, is couched in the same terms. One will not, however, be wrong in saying that if the inventor has allowed his right as inventor to become public property in that country in which he first had an opportunity of claiming protection, if, in other words, he has renounced it, he cannot be allowed even in another State to claim again what he has thus renounced.

The Convention of Paris of 1883, with regard to the protection of designs, as with regard to patent law, left the matter to the judgment of the State in which those rights are to be exercised as prohibitory rights. The only rule of law which is to affect all the parties to it alike, set up by this Convention, is the establishment of the right of priority already mentioned. (See p. 769.)

[The provisions of the Patents, Designs, and Trade-marks Act of 1883 (46 & 47 Vict. c. 57) regulate the matter of copyright in designs in Britain. § 47 provides that the comptroller may register a design on application by or on behalf of any person claiming to be proprietor. The design, when registered, is to be protected for a period of five years (§ 50), but (§ 54) if a registered design is used in manufacture in any foreign country, and is not used in this country within six months of its registration here, the copyright shall cease. § 103, quoted *supra*, p. 771, is applicable to designs as well as to patents, but the application for registration must be, in the case of a design made within four months after the application in the foreign State, in place of within seven months, which is the period allowed in the case of a patent.

The 104th section is applicable to designs as well as to patents. See *supra*, p. 771.

In construing this statute, it was held in Scotland (*Potter & Co. v. Braço de Prata Printing Co. Ltd.* 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 511) that the effect of registering a design in Britain, is only to prevent the application of that design to goods in this country, and the sale of goods in

this country, to which such a design shall have been applied. The Act is held to have a strictly territorial effect, and the court point out that registration in a British register, set up under a British Act of Parliament, will not be presumed to operate all the world over, or to restrain even a British subject from using the registered design *extra territorium*. Nor does the statute make any such prohibition in express terms. This decision seems to follow closely the theory of the text.]

IV. LAW OF TRADE-MARK. PROTECTION OF TRADE-NAME.¹

INTRODUCTION. UNFAIR COMPETITION ON THE ONE SIDE, AND] LAW OF TRADE-MARK ON THE OTHER.

§ 357. The laws of France, of England, and of the United States, have for a long time regarded it as a matter of course, that the man who makes goods, and possibly the man who deals in them, by whose interposition and under whose guarantee the goods are brought into general commerce and use, can prevent others from describing their goods with his name. If a man, in order to deceive the public, avails himself without leave given of the same name or of the same trade-name as another to describe his goods, he is open to an action of damages at the instance of the person who is entitled to the name, on the ground of unfair competition (*concurrence déloyale*). Such an action will lie even although there is no false use of a name in the matter, but if there is some other kind of deceit: if, for instance, the goods are so packed as to induce the public to buy the one man's goods in place of the other's.² It may, in fact, be regarded as an unwarrantable intrusion on a man's personal rights, if something shall be given out as his work, which does not proceed from him at all; if goods which are quite different from his own, and inferior to them, are falsely attributed to his manufacturing and trading exertions, and his credit is thus impaired, if we suppose the goods to be inferior; or, in any case, the extent of his sales, if we suppose that by the excellence of his goods he has a certain prospect of orders, is diminished.³ That is true also of the deceitful employment of signs or marks, which manufacturers and traders have used, since the days of antiquity, to indicate the origin of their goods.

Since there is an inexhaustible number of such marks at any one's command, no one can ever require to use a mark already in use by some one else. It is, however, possible that there should be a *bona fide* use of the same mark, just as it is possible that several persons of the same name

¹ See on this subject Kohler's discussion, *Das Recht des Markenschutzes*. Warzburg 1885. Especially pp. 414-476.

² Cf. Blanc, *Traité de la contrefaçon*, pp. 389, 611, 612. Kohler, p. 72. In France the action is founded on § 1382 of the code.

³ Under special conditions an *actio injuriarum* according to the Roman law would lie.

and at the same place should manufacture similar goods. The possibility of the same mark being adopted by more than one person can only be avoided by placing the choice of a trade-mark under public control; in this way any one, by an inspection of public registers, can easily assure himself whether a particular mark has already been selected by some one else. By such an arrangement the mark obtains from the first, and for a certainty, an exclusive character, and it will be possible to give the right in the mark a sanction of a very substantial kind, by the imposition of penalties, an action of damages being a doubtful remedy in many cases. In this way, however, the rights of the individual (*Individualrechte*), as Kohler not inaptly calls the right to a name, arms, and a mark or sign, which appear as something that each man naturally possesses, are invested with the character of something like a *privilegium*.

Thus the rights of the individual, belonging to him by nature and for that reason operative universally, are turned to that extent into an artificial creation of the sovereign power of the State, and are operative accordingly only within its territory. The question, then, at once suggests itself—Can such a right be acquired by foreigners as well as by subjects?

THE EXCLUSIVE RIGHT TO A MARK IS AT ONCE AN ADJUNCT OF THE
PERSONAL RIGHTS OF THE INDIVIDUAL AND A RIGHT OF PROHIBITION.
PRINCIPLES FOR ITS INTERNATIONAL TREATMENT.

§ 358. We must always keep this in view, that on the one hand we are here dealing with a right belonging to the individual person, although that right may be artificially defined: this right, therefore, in so far as its origin and subsistence are concerned, seems primarily to be subject to the law upon which the rights of the person are dependent. On the other hand, we must keep in view that this right of the individual is in its practical exercise a right of prohibition that controls the public freedom. From these considerations we draw the following inferences for the international treatment of the question:—

First, Every claim in a foreign country for protection of a trade-mark assumes that the claimant has in his own country an exclusive right to it. That it should not be so is of course conceivable, just as one may have copyright, or patent right, in another country, which he has not in his own. But a trade-mark is no such independent product as a literary or artistic work or an invention. It is merely a guide, by means of something that catches the eye, to the particular person, and unless that is clearly and certainly effected in the person's own home by the mark which he has adopted, that mark loses its specific import in every other country also.

Thus (a) a mark which cannot get protection in its own country is not protected abroad, and the fact of its being registered abroad makes no difference.

(b) A mark or a name given to an industrial product, when its exclu-

sive force has expired in its own country,⁴ does not enjoy any such force in any other country.

On the other hand, it is of no consequence whether it is by the operation of some general rule of law or of some special privilege that the mark has effect in its own country.⁵

When we speak of the country to which the mark belongs, we do not mean the country of which the person who has right to the mark is a subject: we mean the country in which the seat of his business is, the country to which, in so far as his trade is concerned, he belongs. The German statute of 30th November 1874 gives all traders, whose firms are entered in the commercial register, a right to be registered, and raises no question as to their character as subjects. By § 20 the possession of a trading establishment in the German Empire is sufficient.

Secondly, On the other hand, a trade-mark which is only registered abroad, can make no claim for the special protection which is conditional upon registration in this country. Publicity abroad is not publicity in this country, and to put foreign registers generally on an equal footing with our own, would intensify the right of prohibition in a way that would be unfair to the public. The treaties on this subject, which have in late years been so numerous, provide accordingly that the subjects of one State, in order to obtain protection for their trade-marks in another, must fulfil the conditions under which the subjects of the latter State enjoy protection within their own territory. Foreign trade-marks, therefore, must undergo a second or accessory registration (according to the German law, § 20 (1) at Leipsic). It is still, however, a matter of much doubt whether foreign trade-marks must, in themselves, in order to be registered, satisfy the requirements of our law, or whether it is enough if they possess the characteristics of a trade-mark, as these are defined by the law of the country to which they themselves belong: *e.g.* it may be that by the law of the country to which the mark belongs, letters of the alphabet are recognised as capable of registration, while by the law of the other country they are not. A judgment of the old Court of Appeal at Leipsic, on 16th April 1878, which has been much criticised,⁶ answered the question by affirming the latter alternative, and this we find adopted in various treaties.⁷

⁴ Of course, the official who keeps the register cannot *ex officio* take note of this expiration. It would be desirable, as Kohler remarks (p. 445), to have international communications on such matters.

⁵ See specially Fiore (J. ix. pp. 505, 506), and the judgment of the French Court of Cassation of 23rd May 1874 cited there, Kohler, pp. 434, 435; Austro-German Comm. Treaty of 16th December 1878, § 20 (2). "Protection for trade-marks will be given to the subjects of the other contracting power only to the extent and for the time to and for which they are protected in their use of the marks in their own country." In the same way, in the treaty between the same States of 23rd May 1881, § 11 (2); Norwegian statute of 1884, § 16, No. 3; Swedish statute of 1884, § 16, No. 3.

⁶ Reported by Kohler, p. 532.

⁷ Cf. Franco-Swiss treaty of 23rd Feb. 1882, § 2. . . . "*C'est à dire que le caractère d'une marque française doit être apprécié en Suisse d'après la loi française, de même que la caractère*

in the resolutions of the Congress of Paris in 1878,⁸ and, in the enabling clause of the English statute of 1883 (46 and 47 Vict. c. 57), § 103.⁹

We find it, lastly, in the 4th article of the Convention of Paris of 20th March 1883, which rests upon the resolutions of the Congress of Paris of 1878, and was intended to form a world-wide treaty¹⁰ (see J. xi. p. 651). But a result of this kind cannot, as Kohler thinks, be deduced from any known legal theory without further consideration. If the prohibitory law of this country, of which for all practical purposes the law applicable to foreign trade-marks in this country forms a part, says to the general public, "this and that sign, or these letters of the alphabet, cannot be used as valid trade-marks, so as to found any right to prevent others from using them," it is by no means an obvious conclusion that a *jus cogens* of that description shall make an exception in favour of foreign trade-marks. Nor, again, does the fact that it would be desirable that the foreign trade-mark should be protected as it stands, whereas, if it is not taken as it stands, international protection would in many instances have to be refused,¹¹ establish the soundness of the law to which we have referred.¹² Besides, in any case, it is perhaps impossible to carry out thoroughly the principle of testing the validity of the trade-mark exclusively by the foreign law which is concerned. For if the foreign mark shall come into conflict with some open mark belonging to this country, the former must, of course, lose all its virtue, and the question whether one mark is sufficiently distinguishable from another or not, must always be decided by the judge in accordance

d'une marque Suisse doit être jugé en France d'après la loi fédérale Suisse (see König, J. x. p. 588). Italo-German Comm. Treaty of 4th May 1883, § 5 *ad fin.* "so that the character of an Italian trade-mark is to be determined by the law of Italy, and that of a German trade-mark by that of Germany."

⁸ *Congrès International de la propriété industrielle* (see J. v. p. 412). Their second resolution on "*marques de fabricat de commerce*" runs thus (J. v. p. 415): "*Toute marque déposée dans un pays doit être également admise telle quelle, au dépôt dans les pays concordataires.*" Art. 5 (1) of the Paris Convention of 1883 is to the same effect; but after the word "*dépôt*" the words "*et protégée*" are inserted.

⁹ Power is thereby given to the British Government to conclude treaties on this subject, "provided that in the case of trade-marks, any trade-mark, the registration of which has been duly applied for in the country of origin, may be registered under this Act."

¹⁰ It is, however, laid down that the use of public armorial bearings and decorations may be considered as being contrary to public order. Protocol, § 4, of the Convention of 20th March 1883.

See German statute on trade-marks, § 3 (2): "Further registration will be refused if the marks consist solely of figures, letters, or words, or if they contain public armorial bearings, or any representations that may give rise to scandal." Of course, too (see Convention of Paris, 1883, § 6 *ad fin.*), this limitation is to be understood, that registration of foreign trade-marks may be refused, if the article for which registration is asked, or the mark itself, would offend morality or public order.

¹¹ So the judgment cited by Kohler, p. 436. Such a case of refusal to register would occur, in spite of reciprocity being guaranteed in a treaty, if the one State recognised only marks consisting of letters, the other only marks consisting of figures, for inland trade.

¹² A judgment of the Imperial Court (i.), of 7th January 1881 (Dec. iii. p. 74), is to the effect that the *jus cogens* of the German trade-mark statute is applicable to foreigners.

with the law of his own country, and not of the country to which the mark belongs.¹³ The proposed rule, therefore, would always have to be taken *cum grano salis*.¹⁴ Putting all these considerations together, we find that the practical merits of this principle, although, as we have said, it was adopted by the International Congress at Paris, and is warmly defended, *e.g.* by Meili,¹⁵ become very questionable. We can understand how it is that Dambach (in *v. Holtzendorff's Handbuch*, iii. p. 600) holds it to be a very dangerous principle, and how the German Empire has not up to this time resolved to give in its adherence to the Convention. As we shall show, the end of the principle adopted by the Convention of Paris must be that the whole distinctive law of trade-mark will evaporate, and we shall be landed in results which will be entirely other than those that were expected.

Thirdly, There is a general rule of international law which holds good even as regards real rights (see *supra*, p. 497), that a right acquired in another country loses all its validity, so soon as it comes into conflict with a right subsequently acquired in this country. Now, as we are dealing here not with any right in a corporeal article which occupies a particular place, a conflict of that kind may arise from the fact that several good legal claims arise simultaneously in several different States. In such a case, the claim arising in this country can never be required to give way to that which arose abroad, if the question is raised here. The truth rather is that both claims are good, each within its own territory. From this it follows that the foreign manufacturer can have no right of registration for his trade-mark, if by registration in this country some one else has already acquired a valid right to it, and if registration gives, as by the German statute it does,¹⁶ a preferable right, even although the person who asks for registration has not been the first to use the mark. The law of this country,

¹³ Kohler (p. 440, note) agrees with this rule, which is laid down in an English decision (see *in re Farina*, 1879, 27 W.R. 456).

¹⁴ It is plain, however, that the rule of § 1 of the German statute—viz. that manufacturers, whose firm is not entered in the commercial register, cannot demand registration of their trade-marks in the German Empire—cannot be applied to foreign manufacturers. What was desired was a certain limitation, and at the same time a certain guarantee, in the class of persons whose marks should require to be registered. The matter of guarantee may safely be left to the foreign law, to the law of the country to which these persons belong, if reciprocity is ensured. The true rule rather is, that any one who can register in his own country is in a position to demand an accessory registration in another country. It is all the more absurd to imagine that the rule of our law can be unconditionally applied to foreigners, since in many countries there is no such thing as a commercial register.

¹⁵ *Des Markenstrafrecht auf grund des eidgenossischen markenschutzgesetzes*, p. 65.

¹⁶ By the invariable practice of the German Imperial Court, the German statute is interpreted to this effect, that registration has the effect of constituting the legal right to the mark. (Kohler, no doubt, takes the opposite view, p. 262.) It is otherwise by the law of France, Belgium, Italy, Switzerland, and England [at least for five years from the date of registration. Cf. 46 and 47 Vict. c. 57, § 76, which provides that registration shall be *prima facie* evidence of a person's right to the exclusive use of a trade-mark, and after five years from the date of registration shall be conclusive evidence of that right]. In these countries the case put must be decided otherwise.

again, is the only law that can decide the question in how far *mala fides* may deprive the registration of its effect in a question with the foreigner.¹⁷

A foreigner's trade-mark, in the same way, if it is identical with a mark which any one who pleases may use in this country, a mark which has fallen into the *Domaine public*, will have no claim to protection in this country.¹⁸ But, as Kohler (p. 440) rightly points out, in this matter caution must be exercised in assuming that the mark in question is an open one, for in many cases it will have been impossible for the foreigner, who has a right in the mark, effectually to resist the unfair competition of his rivals.

It is impossible to reconcile in an entirely satisfactory way the relations of foreign and native trade-marks with the means with which theories of private international law supply us. These marks demand more and more imperatively an universal recognition, at least within the circle of civilised States. That cannot be completely attained without setting up a body of law that shall to a certain extent bind all nations alike, and establishing an international registry office, the organisation of which, and its relations to the courts and the officials of the different States, would certainly be hard to regulate. The International Convention of 1883, already mentioned, to which, however, the German Empire has not as yet given in its adhesion, assigns to the international office, for which it makes provision, and which is to be situated in Switzerland, nothing more, in substance, than the function of an official who shall collect information and statistics. Provision is, however, made for positive enactment, to bind all nations, as in the case of patents and designs, that a period of from three to four months shall be allowed to every foreign trade-mark (every trade-mark registered in another country), within which it shall enjoy a right of priority in this country, and no adverse trade-mark can be effectually registered.

Fourthly, The law of this country must always be the exclusive rule for determining what protection is to be given, in the case of contraventions in this country, to a trade-mark which was first acquired in a foreign country, and afterwards registered here. In so far as the question is one of protection to be afforded by means of penalties, we need hardly examine it further. The protection which we extend to the rights of foreigners in this way is exactly the same as we give to our own subjects, without regard to how the foreigner's own country protects similar rights by means of its criminal measures. But, according to the general rules which

¹⁷ To this effect see Fiore, J. ix. p. 508, and the judgments there cited of the courts of Milan, Parma, and Casale; see also Kohler, p. 440. Kohler may well be mistaken, however, in asserting for the law of France that it gives the older foreign mark a preference even over a mark of the same description *bona fide* acquired in this country. Even a man's right to his own name can never be put so high as to give him an universal right in this sense that no one shall bear the same name anywhere else; much less can the more arbitrary right of trade-mark make any such claim. The French authors and French practice are therefore right in refusing precedence in that case to the older trade-mark. See *supra*, p. 216.

¹⁸ In this sense see judgment of the French Court of Cassation, of 13th January 1879 (J. vii. p. 193).

regulate claims *ex delictis*, the same rule must obtain as regards claims of damages. It is in such a question immaterial that the foreigner's trade-mark enjoys a less complete protection in his own country: it is also of no consequence that foreign law does not hold an act to be a contravention of the right of trade-mark, which by our law has that character.¹⁹ But if the more unusual case should occur, of a claim of damages on account of a contravention committed in another country being prosecuted in one of the courts of this country, then the pure claim of damages would have to be tested according to the *lex loci delicti commissi*.²⁰ In cases of this kind, however, as a general rule, the claim for damages and the claim for penalty will be bound up so that they cannot be absolutely dissociated, and in that case the claim, which is primarily to be tested by the *lex loci delicti commissi*, cannot be assessed at any higher figure than is allowed by the *lex fori*.²¹

Fifthly, Invasions of the right of trade-mark committed in a foreign country are only amenable to the criminal law of this country, if these invasions are, according to the law of the place where they are committed, acts that can be punished, and also if, and only if, the person guilty of them is a subject of this country.²² But it is not enough, as Kohler (p. 458) rightly points out, that the act should be punished by the law of the place where it takes place as a fraud upon the person who buys the goods. The act must be in the circumstances of the particular case, punishable as an infringement of trade-mark, without any reference to the question whether at the place where the act is done there is a system of registration of trade-marks or not.

But the law of this country must decide what acts are to count as real infringements of the right of trade-mark.²³ This much, however, we must

¹⁹ See Kohler, p. 442.

²⁰ See *supra*, p. 334.

²¹ Kohler (pp. 450, 451) asserts—appealing to the English practice in the case of delicts, and to Westlake-Holtzendorff, § 185A—generally that even pure claims of damages must be ruled exclusively by the *lex fori*, and that an act which is forbidden in this country must go free in another. His reason is that the courts of this country must assess the value of all our possessions solely according to the standard of our civilisation and culture. But such an absolute assessment as that savours of the criminal court rather than of a civil claim. The appreciation of damages is a relative matter, and one of the circumstances that must specially be taken into account is the place where the injury was done. Besides, Kohler is mistaken in his idea of English practice.

²² We cannot insist on the former condition in uncivilised countries. The general principles to be recognised are those of international criminal law. See resolutions of the Institute for Public Law, passed at the Conference at Munich in 1884, *Annuaire*, vii. p. 156.

²³ Thus, for example, we may find that "putting into circulation" (*in verkehr bringen*), which is an offence punishable by § 14 of the German statute, may consist in a man's storing in his warehouse in this country, for the simple purpose of shipping them to another country, goods manufactured and marked in another country. (See Kohler, p. 457, and the decision of the Imperial Court (iii. Criminal Div.) of 3rd April 1884, a decision which referred, no doubt, to the case of an infringement of patent.) It seems still clearer, if we read the words of § 14 of the German statute in their ordinary sense, "if a person knowingly marks goods illegally" (*Wer Waaren wissentlich widerrechtlich bezeichnet*), that they will attach to any one who, within the German Empire, illegally marks goods with the marks of a German firm,

always keep in view, viz. that any person who is to be visited with punishment by the criminal authorities of this country must, at the moment when he commits the act in question, be actually physically present in this country;²⁴ and if the act in itself does not satisfy the conditions necessary to give the courts of this country jurisdiction, it can never be punishable as an attempt to commit an illegal act, or as part and parcel of an illegal act,²⁵ if it is an act allowable by the law of the place where the leading act of the transaction is to take place; in other words, if in that place the trade-mark belonging to this country, or the trade-mark registered in the register of this country, enjoys no protection.²⁶ So, too, the question, on which there has been much debate, viz. whether the criminal law covers the case of the transmission of goods which are marked with an illegal mark, is a question of the interpretation of the criminal law of each particular country. It is only possible to give an answer to it on principle for cases where that law is doubtful: in such cases, our answer must be against the competency of punishment. To carry goods through the country in closed cases or packages is a different thing from putting them into circulation; and I cannot concur with Kohler (p. 448), who arrives at the opposite conclusion, on the ground that a man's right in his trade-mark is a right of the individual which is not limited to the territory of his own State. A man's right in a specially registered trade-mark is, as Kohler himself lays down in other passages,

with the view of subsequently selling them in some other country. In the result of the judgment of the Imperial Court (i.) of 2nd Oct. 1886 (Dec. xviii. § 7, p. 28), we must therefore concur. But the very far-reaching grounds on which it is put are highly debatable. It comes to this substantially, that because it is desirable to protect in other countries legal rights belonging to our native polity—(let us rather call them legal interests, and so avoid falling into a *petitio principii* at the outset on the point of international law)—any act committed abroad, which is prejudicial to those interests, falls under the sway of the powers of repression that are wielded by our State (or at least is liable to the civil remedy of an action of damages, unless legislation has specially provided to the contrary). Just as dangerous is the next argument (pp. 34, 35), according to which no analogies are to be drawn from other statutes of the Empire, because different parliaments (*Reichstage*) adjusted them. If this argument were sound, it would make it impossible to find any comprehensive legal doctrines in modern legal systems.

²⁴ It is, however, quite allowable to seize the goods, or destroy the marks or the fraudulent packing, as against a foreign exporter. For although it is a judge of a criminal court that pronounces the sentence of confiscation, etc., it is an act of police administration. Kohler and the French judgments he cites (p. 456) go further.

²⁵ In my opinion the agent or forwarding agent in this country, who attends to the carriage of the counterfeit goods in this country, may be punished. But, on the other hand, the agent who canvasses in this country for orders for the falsely marked goods, which are intended to be carried out in a foreign country where the mark is not protected, cannot be punished. Kohler, supported by a decision of the French Ct. of Cass. of 5th Feb. 1882, thinks that he may. This country, in the case supposed, is never brought into contact with the goods, and all that the agent has actively done is, by the law of the place in which he did it, innocent.

²⁶ See resolution of the Institute for International Law in 1884 as to the conflict of criminal legislations, § 3. The reasons assigned by the court for the judgment of the German Imp. Ct., cited by Kohler, are to the opposite effect: many criminal lawyers, too, are against it. The question cannot be fully discussed here. See my report in *Annuaire, ut cit.* p. 129.

not an universal right, but is limited by the territory. The result of the French statute (§ 19 of the statute of 23rd June 1887) is different, but that comes from the specific expressions used in the statute (see Clunet on the point, J. v. p. 91.) But the law of any country as to registered marks never does more than make the imitation of a mark registered in that country punishable by its laws.²⁷ This restriction cannot be regarded, as Kohler (p. 459) thinks, as a mere remnant of the old theory of privileges. The incorporeal right which a man has in his name, and still more the right which he has in a trade-mark, is not an absolute, universal, and exclusive right; it is founded on a right of prohibition which is framed more or less as a territorial right only. Kohler cannot help seeing that the restriction against which he struggles on principle has its practical advantages, and enables us to avoid conflicts which could not otherwise be avoided, and which could not, as we maintain, be solved. If a trade-mark is infringed in the country to which it belongs by one of our subjects, who by our law has a good right to use the mark, then, according to Kohler's theory, an insoluble difficulty would arise. But, in such a case, the territorial character of the prohibitory right, which is at the bottom of the whole law of trade-mark, must prevail, and in my view our subject, who used the mark in a foreign country, would be liable to punishment there, just as a foreigner would be liable here, if he used it in our territory.²⁸

Sixthly, On principle a foreigner must, as matter of course, be allowed to register a trade-mark;²⁹ this follows from the fact that we attribute to foreigners the same capacity for legal rights as our own subjects have. This is all the more certainly so, as the law of trade-mark guarantees to the public at the same time a protection against deceits and swindles. But yet the law of most States³⁰ does not, as a matter of course, allow a foreigner to claim protection for his trade-mark, or to claim to have it

²⁷ But it is different in so far as the act may be made the subject of a civil suit or a criminal proceeding, as "*Concurrence illegale*." See, for instance, the English statute of 1887 [50 and 51 Vict. c. 28, § 3, etc.].

²⁸ In the case of a man's right to use a name, the result would be different; no one who had right to it would be able to interdict another who had right to it from using it in this country or abroad. For the right to a name is by no means so exclusive as the right to a trade-mark. There can be no certainty that several persons do not bear the same name and drive the same trade at different places.

²⁹ See Laurent, iii. § 352; Stern, in J. viii. p. 134, on the Dutch law of 25th May 1881, which knows nothing of any limitation. Neither does the law of Italy (cf. Fiore, J. ix. p. 502; x. p. 22), nor the law of England (see Kohler, p. 417) [46 and 47 Vict., c. 57, §§ 62 and 103].

³⁰ The consideration which dictates this limitation of the right to protection has generally been that it was desired to have a means of inducing other States to join in reciprocal treaties for protection. If we assume that foreigners acquire right to register their marks solely by virtue of some treaty published so as to have statutory effect, then any registration made before such publication is null, and can have no operation after the publication takes place: it must be re-registered. See Trib. corr. Seine, 13th August 1875: Pouillet, § 333, who is, however, inclined to save registrations made after the treaty is concluded, but before it is published.

registered.⁸¹ The determinant consideration, however, is not the nationality of the person, but the seat of his manufactory or trading establishment. If a foreigner has such an establishment in this country, he can claim a trade-mark; if a subject of this country has his manufactory abroad, he cannot. It is enough if a person has an establishment, in the true sense of the word,⁸² in this country; he may have other establishments at the same time abroad. The moment we find a trading or manufacturing establishment in this country, the trade-mark registered in our register is a trade-mark belonging to our country, and is to be tested by our law absolutely: it is not a mere accessory mark, whose legal character is dependent at the same time upon the foreign law.⁸³ The right of the person to the trade-mark itself is, however, acquired by use of it by the person concerned: by the registration he only obtains a special kind of protection. Hence it follows that the conditions necessary for this protection must be in existence at the moment at which any infringement, for which redress is demanded, takes place. A man who transfers his establishment to a foreign country, accordingly loses this protection, and the man who transfers his to this country acquires it, provided always that he registers his mark. But, of course, a right to damages, once vested, still stands, while an act done in prejudice of another's rights in a trade-mark will not be liable retrospectively to punishment, but the liability to punishment will continue if once it existed. The subject of this country, who acquires a trade-mark by assignment, may register it.⁸⁴ Juridical persons, corporations, and companies belonging to a foreign country, enjoy the same protection as physical persons.⁸⁵ But although, for want of an international treaty, a foreigner cannot sue a subject of this country for using a foreign mark, that subject, on the other hand, who so annexes the foreign mark, cannot acquire any right to it, since his act is an act of unfair trade competition. He has no right, therefore, to prevent any other competitor in trade from using it (Pauillet, *Traité des Marques*, § 335), and a mark so wrongfully used, even by a number of persons, does not become a piece of common property which any one may use. Thus, if a treaty for

⁸¹ Foreigners have, as a matter of course, an exclusive right to the use of their names in describing their goods, in so far as no other person's name prevents this, and so far as subjects of this country themselves enjoy such rights. See Kohler (p. 414), as to the positive enactments of different States on this point.

⁸² A mere agency will not be enough. On the other hand, domicile has nothing to do with the matter. (Pauillet, *Marques*, § 327.)

⁸³ In art. vi. of the Convention of Paris of 1883 it is provided (2) and (3): "That country shall be deemed the country of origin, where the applicant has his chief seat of business. If this chief seat of business is not situated in one of the countries of the union, the country to which the applicant belongs shall be deemed the country of origin." If recourse is had, as a subsidiary matter, to the country to which the person belongs, it is still necessary that there should be a subsidiary establishment in that country.

⁸⁴ Similarly the assignee of a foreign mark and of a foreign firm in France enjoys these rights, which the law of France allows his nation to enjoy: although the cedent would have no such rights according to the international relations in which his country stands. (French Ct. of Cass. 18th November 1870, J. III. p. 438.)

⁸⁵ Thus the fixed practice in France has it (Pauillet, § 330). Without this rule, international protection for trade-marks would for the most part disappear.

the protection of trade-marks is subsequently concluded, the foreigner who has right to the mark, may have it registered, and proceed against the subjects of this country if they shall make any further use of it. Pouillet (§ 336) very truly says: "*autre chose . . . est la tolérance, qui finit à la longue, par devenir . . . une preuve d'abandon volontaire; autre chose l'impuissance d'agir.*"³⁶

INTERNATIONAL TREATIES.

§ 359. A large number of treaties now secure to the subjects of foreign States the right of registration. The man who has an establishment in any State counts as one of its subjects for the purposes of these treaties. It seems doubtful whether this needs to be the leading establishment, as Kohler (p. 430) thinks,³⁷ since the rights of a subject may be fully constituted although the establishment is only a subsidiary one.

It may be that, even without a special treaty on the subject, the law³⁸ of some countries should allow foreigners to claim registration for their trade-marks, if in other States a like measure of protection is reciprocally extended to their subjects. This reciprocal protection may either be given by treaty, or simply by statute, or secured as a matter of custom by a course of usage. The protection does not need to be precisely the same in both countries; but there is no reciprocity if the foreigner may be refused leave to register at the pleasure or at the uncontrolled discretion of the officials of the other country. By the law of Germany, reciprocity will be proved as a fact by notice given by the Imperial Government. This notice is the only recognised means of proof in a German court on the matter of reciprocity: the German courts have not to decide the question of

³⁶ This was the opinion of the French *Avocat Général* (Bédarride), and the law of Belgium is to this effect. (Pouillet, § 337.) But the French judgments cited by Pouillet, and art. 28 of the Franco-Dutch treaty of 1873, take the opposite view. But for the view adopted in the text, see Ct. of Cass. at Turin, 3rd March 1880 (J. ix. p. 93, and Fiore, J. ix. p. 507). See, too, Norwegian statute of 26th May 1884, § 15 (6). "If the trade-mark of some foreign trade is refused registration in respect of the provisions of § 4, No. 5, *i.e.* prior registration of the same or a similar work, and if the foreign applicant shall prove in the process against the owner of the mark already registered, that this mark was a mark originally used by him (the applicant) which was appropriated by the other in knowledge of the facts, he may be declared, by a judgment of the court, entitled to have the mark registered, with exclusive right to its use for the kind of goods for which he was using it when the other person got protection. The action cannot be raised after the expiration of six months from the date when protection was given to the other." This enactment is only operative if it is applied by royal proclamation to some particular foreign State which makes corresponding concessions on its side. To the same effect is the Swedish law of 5th July 1884. (Translated and communicated by Pappenheim in *Zeitschr. für des gesammte Handelsr.* xxxiv. pp. 212-220.)

³⁷ See Braun (J. viii. p. 390) on the Belgian law of 1st April 1879. If there is only a branch establishment in Belgium, then, according to Braun, the Belgian law regards the goods produced by the principal establishment as foreign, and the mark upon them, apart from special treaty provisions, as a foreign mark.

³⁸ See Kohler's accurate discussion, at pp. 424 and 462, of the question of reciprocity and treaties.

reciprocity as a matter of fact, and considering the peculiar difficulties which often surround the question, this is a good practical rule.

Lastly, all foreigners must be allowed the protection which the law gives against fraudulent imitations, without requiring any registration at all. This distinction is very sharply and very soundly taken by the law of the United States. The civil protection of their Equity Jurisdiction is given to all foreigners without distinction,³⁹ whereas the special protection given to foreigners by the Registration of Trade-Marks Act of 8th March 1881 is only available for persons domiciled in the United States, or in a country which guarantees similar rights to citizens of the United States. In German law little heed is as yet paid to any such protection of the individual's rights which is not given to him by the statute,⁴⁰ a fact which is rightly deplored by Kohler both often and keenly.

PROTECTION FOR GOODS DESCRIBED OR MARKED WITH A NAME OR A FIRM.

§ 360. We have already noticed (p. 216) that the name of a person must in international law be regarded as something with which nature has endowed him, and not as the outcome of a privilege which is limited to a territory. But this assertion will only escape contradiction in so far as the name is intended to serve as a means of distinguishing persons and families one from another, and not in so far as the use of it or the imposition of a trading firm upon goods is intended to protect them from imitation. In this latter aspect the French Court of Cassation,⁴¹ by an unbroken course of practice, has refused the protection of the law of France to those who cannot claim a right to enjoy *droits civils* in the sense which that term bears in France,⁴² while the marking of goods with names or with firms is treated on the same footing as marking them with trade-marks in the proper sense. At the same time, it has always been recognised that in so marking goods falsely with the name of a foreigner, apart altogether from questions of protection which rest on treaties, a deceit is practised upon the public, the buyers of the goods; and that therefore, although the foreign manufacturer

³⁹ See Kohler, pp. 417, 418 (for a French translation of the statute of the United States, see J. ix. p. 385). On the law of England, see Phillimore, § 530c.

⁴⁰ By a French statute of 26th Nov. 1873, one who is proprietor of a trade-mark may have an official attestation of the mark appended to the goods prepared by him and marked with the mark in question. Then, by the law of France, any one who counterfeits this mark with the official attestation, in whatever country he does so, may be prosecuted in France, because what he has done is to counterfeit an official mark (see Pouillet *Traité des Marques*, § 340). It may be doubtful whether it is desirable to follow this French legislation. The extension of criminal measures to the acts of foreigners in a foreign country must be confined within very narrow limits. The true advantages of an international treaty cannot be reached in so simple a way.

⁴¹ See Pouillet, § 451. The inferior French courts often took the opposite view, and so too, apparently, did the practice in England. [“Every subject of every country . . . has a right to apply to this court to have a fraudulent injury to his property arrested,” *Collins Co. v. Cowen*, 3 K. and J. p. 428; Sebastian, pp. 74, 75.]

⁴² Pouillet, § 455, Lyon-Caen and Renault, § 3343, were of a different opinion.

or trader has no independent right of action, and damages cannot be awarded to him, still, under certain circumstances, official criminal procedure for fraud or deceit upon the public or the particular purchaser (*tromperie*) may be instituted against a man who has illegally used the name of a foreign manufacturer in order to describe his goods. The French law has likewise properly recognised that a Frenchman who has acquired right from a foreigner⁴³ to use his firm,⁴⁴ can take proceedings for any misuse of this name or firm just in the same way as if the name or firm had originally belonged to him. The rule "*nemo plus juris in alium potest transferre quam ipse habet*" does not apply to the case. The foreigner had full right to the name, but could only make it available in certain directions.⁴⁵

If we give foreigners protection for trade-marks in the proper sense, which are plainly more of an artificial creation of the law, we must also give them such protection as is known to our law in the exclusive use of their names and firms for describing their goods. The right to bear the name and to use the firm must then be decided by the foreign law, *i.e.* the law of the State to which the foreigner belongs, or of the State in which the firm has its trading seat, as the case may be. In such a case, if some subject of ours have a good right by the law of this country to bear the same name, the foreigner's right may become inoperative.⁴⁶

CONVENTION OF PARIS, 1883, AND PROTOCOL OF ROME, 1886. THE ENGLISH MERCHANDISE MARKS ACT OF 1887. FINAL REMARKS.

§ 361. In conclusion, we must again revert to the International Convention of Paris and the protocol drawn up at Rome in connection with it.⁴⁷ We shall be helped to appreciate these arrangements on the one hand by the English Merchandise Marks Act of 1887 (50 and 51 Vict. c. 28), which has been passed since this date,⁴⁸ and, on the other hand, by Meili's new work, although I cannot altogether agree with him in the value which he sets upon this Convention. Meili (p. 66) calls attention to the fact that Switzerland, and, if she should give in her adhesion to it, the German Empire also, will be compelled *e.g.* to give protection, in accordance with the rules of French law, to French tickets or labels in contradistinction to trade-marks in the proper sense, while Swiss and German tickets or labels are not protected in Switzerland and Germany respectively. We should

⁴³ But the name of a foreign manufacturer will receive in France the same protection as the firm-designation of Frenchman, if the foreigner has an authorised domicile in France, or if a diplomatic treaty makes provision that he should have it, or if (§ 9 of the statute of 26th Nov. 1873) Frenchmen enjoy by law this same protection in the country to which the foreigner belongs. See Lyon-Caen *et* Renault, *Dr. civ.* ii. § 3342.

⁴⁴ A French agent who merely represents the foreigner will not have this right.

⁴⁵ Pouillet, § 458.

⁴⁶ So French law. See Pouillet, § 454: "*Le nom étant la première et la plus personnelle de toutes les marques.*" See, further, the German statute, § 20.

⁴⁷ J. xiii. p. 257.

⁴⁸ Translated into German by Cruesemann, solicitor, Berlin, 1888.

be transgressing the limits which are necessarily imposed upon us, if we were to go into an enquiry whether Switzerland and the German Empire would find it expedient to do away with the distinction between labels or tickets and trade-marks. Let us assume this to be so, and that for the future, therefore, no objection can be taken to the general International Convention on the ground of any such miscarriage.

But this Convention, and in particular the protocol drawn up at Rome for supplementing it, go much further. Art. x. of the Convention provides that any industrial product falsely bearing the name of any locality as indication of the place of origin may be seized on importation into any State of the union, on this condition, viz.: that this shall only be done "when such indication is associated with a trade-name of a fictitious character, or assumed with a fraudulent intention." This qualification was deleted by the protocol drawn up at Rome. Accordingly, as Meili very rightly points out, the Convention has become to some extent an universal criminal statute directed against commercial dishonesty, or, as we may term it, a general statute against false pretences in trade.

That state of matters has important aspects, especially if the Convention sanctions the municipal law of any of its members in detaining goods, the marking of which seems to offend the provisions of the Convention, on an order from the Attorney General's office (*Staatsanwaltschaft*), without any application having been made by any injured party, or, as the English statute provides in the case of offences against its provisions, by the officers of H. M. Customs as part of their ordinary duties. It is hardly possible that in such matters subordinate officials should not make mistakes, which may, in the most irritating way, injure foreign manufacturers and dealers. Thus, by an overstrained measure of protection, the door will be opened to deceptions, extortions, and possibly to bribery, and what seemed to be an advantage for honourable manufacturers may turn out to be to their prejudice in a way that was not dreamed of. The matter is confined within definite limits, if all that is forbidden is, as in the case of the English statute [50 and 51 Vict. c. 28, § 17], the importation of foreign goods bearing to be of British manufacture, and it is only goods which are suspicious in this sense that are to be seized by the Customs officers. But how are English officers to ascertain with certainty what is the place of origin of all other kinds of goods, so as to determine their genuineness? A perfectly general law of that kind must operate differently in different places, according to the spirit which animates the officials of the different States. It goes so extraordinarily far into the general theory of criminal law, as the new British statute shows, and affects so vitally trade and commerce in general, that an International Convention which is responsible for such measures of seizure, seems to have very serious and dangerous aspects indeed.⁴⁹

⁴⁹ Unjustifiable seizures and more sweeping measures, alleged to be for the better carrying out of the Convention, may damage importation more than a protective duty would do.

The course on which the Convention has embarked leads ultimately to an universal criminal enactment against the misdescription of goods in commercial dealings, which would make any special protection of trade-marks a superfluity.

Such a criminal enactment is in truth a matter for the municipal law of each State, but does not belong to international law. The only matter of international interest is that the imitation of foreign products should be made liable to punishment in the same way as the imitation of our own products is punishable, or at least that such imitation shall not escape punishment, solely on the ground that the product which has been imitated is a foreign product, although it may be that practical considerations will prevent foreign and native products from being treated exactly alike. But because the matter thus in question is substantially a matter of domestic criminal legislation for each particular State, everything that sails under the flag of an "International Congress" is not on that account to be at once accepted as desirable. Again, new and far-reaching criminal enactments and regulations of matters of procedure, which limit the freedom of trade, should not be allowed to escape from the ordeal of a thorough test within each individual State on the ground that as "international" measures they are expedient. We regard, however, the recommendation⁵⁰ that counterfeit goods (*i.e.* in practice goods which are alleged to be or which seem to be counterfeit) should be seized,⁵¹ as a direct invasion of the domestic law of the individual State.

Powers of this kind will turn out to be something quite different in an absolute State, where officialism is paramount, and in which legal remedies against officials are narrowed or shut off altogether, from what they will be found to be in a country where the official system is subject to a jurisdiction that is really independent.

NOTE GG ON §§ 357-361. TRADE-MARK AND TRADE-NAME.

[The Act of 1883 (46 & 47 Vict. c. 57) provides for the registration of trade-marks as well as for that of patents and of designs. § 62 (1)

⁵⁰ The words used in the Convention—somewhat hesitatingly—are "may be seized," and not "shall." But we can trace in the language a recommendation that they should be seized.

⁵¹ An addition to art. x. of the Convention, which was made at Rome on the motion of the Belgian delegate, shows what may be the results in such congresses of keeping in view exclusively the wishes of the interested parties. The clause provides that manufacturer A of country X may order goods of manufacturer B of country V, and with B's consent mark them with his own (A's) name and place of residence. No subjective legal wrong, it is true, is in such a case suffered by the parties. But the fraud upon the public and their losses, and the injury done to competitors, may be all the worse. The French and Prussian delegates properly protested against this addition. If manufacturers and merchants wish to enjoy special protection under the sanction of the criminal law, they must not combine to cheat the public. See judgment of French Court of Cass. 23rd February 1884 (J. xi. p. 398). Of course, the case is different if the person who gives the orders puts his name on the goods as a dealer merely, and not as the manufacturer, Ct. of Toulouse, 8th December 1886 (J. xiii. p. 723, and Clunet, *ibid.* p. 724).

provides that the comptroller may register a trade-mark, on the application of any person, or on behalf of any person claiming to be proprietor of it. § 103, to which reference has already been made (*supra*, p. 771), makes provision for the registration in Britain of trade-marks already registered in such foreign countries as shall be included in an Order in Council made by Her Majesty under the provisions of the statute. The third subsection provides that the application for registration must be made "in the same manner as an ordinary application under this Act; provided that, in the case of trade-marks, any trade-mark, the registration of which has been duly applied for in the country of origin, may be registered under this Act." This subsection seems to introduce an important change in the law; it had formerly been held that it was for the courts of this country, when application was made to them for registration, to decide whether the mark was of a kind that could be registered. In the case of *Farina* (2), 1879, 27 W. R. 456, Vice-Chancellor Hall refused to allow the registration of a mark, because in his opinion it bore too close a resemblance to a mark previously registered, and this he did although the German court, which was the court of the domicile of both parties, had held that the similarity between the two marks was not so close as to prevent registration of the second. But this new enactment has been said (per Mr Justice Stirling, *in re Californian Fig Syrup Co.* 1888, L. R. 40, Ch. D. 620) "to relieve the foreigner who applies in this country for registration from certain of the liabilities of subjects in this country." This Mr Sebastian (p. 412) interprets to mean that the qualifications of a trade-mark for registration are to be gathered, not from British law, but from the foreign law of the place of the original registration, and in a more recent case (*in re Vignier*, 1889, L. T. Reps. N. S. p. 495) some encouragement is given to this view.

The law of England and that of Scotland had always afforded to foreigners the same protection for their trade-marks, either by way of actions of damages or by injunction, *i.e.* interdict, as was secured to native subjects. (*Collins Co. v. Brown*, 1857, 3 K. and J. p. 423, and *Singer Manufacturing Co. v. Kimball & Morton*, 1873, Ct. of Sess. Reps. 3rd ser. xi. p. 267.) But by the 77th section of the Act of 1883 it is provided that "a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade-mark unless, in the case of a trade-mark capable of being registered under this Act," it has been so registered. This section would seem to apply (1) to all trade-marks belonging to countries with which Her Majesty has made arrangements under § 103, and (2) to all trade-marks belonging to other foreign countries which have the characteristics required for registration in England, since, under § 62, any person, without distinction of country, may apply for registration. Such persons will have no remedy without registration; but in the case of a foreigner whose mark has become well known in this country, if we suppose that he does not belong to one of the favoured countries, and, in addition, that his mark does not satisfy the conditions

for British registration, he will not necessarily be deprived of remedy. If the infringement amounts to a fraud, he will be entitled to proceed against the person infringing at common law, just as one might do if the character of the infringement complained of were, instead of being the use of a trade-mark, the adoption of a particular style of packing or "get-up." See the cases quoted by Mr Sebastian, p. 389.

British agents for a foreign firm will be prevented from selling in England goods manufactured by their foreign principals, if they bear a false mark, to the injury of other manufacturers (*Siebert v. Findlater*, 1878, L. R. 7, Ch. D. 801), and an injunction will be granted against foreign manufacturers and their agents to prevent them from sending to Britain, or to India, or to any country with which the person complaining has an established trade, goods bearing an imitation of a British trade-mark, fraudulently adopted by the foreign manufacturer.

By the Merchandise Marks Act of 1887 (50 & 51 Vict. c. 28) stringent provisions are made for the punishment by the criminal law of offences connected with trade-marks. By § 2 every person who forges a trade-mark, or sells or has in his possession for sale, or for trade or manufacture, any goods marked with a forged trade-mark, or with a mark so closely resembling a trade-mark as to be calculated to deceive, shall be guilty of an offence against the Act, and to forfeiture of the "chattel, article, instrument, or thing, by means of or in relation to which the offence has been committed." On the ordinary territorial principles of criminal law, this section will be applicable to acts done in Britain, whatever may be the nationality or domicile of the person who commits them.

§ 11, however, provides that any person who, being within the United Kingdom, procures, etc., or is accessory to the commission, without the United Kingdom, of any act which, if committed in the United Kingdom, would be a misdemeanour under the Act, shall be guilty of that misdemeanour as a principal.

Again, by § 16, on the narrative of the expediency of making further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under the Act, provision is made for the seizure at the Custom House of the goods liable to forfeiture under § 2, and of all goods, which are truly of foreign manufacture, but bearing a name or trade-mark which is the name or the trade-mark of a manufacturer, dealer, or trader in the United Kingdom, unless such name or trade-mark is accompanied by a "definite indication" of the country in which the goods were made. The powers of seizure are carefully fenced by a series of subsections.]

Tenth Book.

LAW OF SUCCESSION.

I. GENERAL PRINCIPLES. SUCCESSION *ab intestato*.

THE VARIOUS THEORIES AND THE GROUNDS ON WHICH THEY REST.
PERSONAL LAW OR *lex rei sitæ* FOR IMMOVEABLE PROPERTY. THE
IDEA OF AN UNIVERSAL SUCCESSION DECISIVE IN FAVOUR OF THE
PERSONAL LAW.

§ 362. The law of succession prescribes how the property of one person on his death passes to another. This transmission we may conceive as being regulated either by (1) the law of the place in which the different assets of property actually are at the death of the person who owned them, or (2) by the personal law of the late owner.

In support of the *lex rei sitæ*, apart from the old argument of the statute theory, (according to which it was said that the question was one as to how things were to be acquired, and that no law but the *lex rei sitæ* could settle questions about things,) it has been urged, on the one hand, that the law of succession is a purely positive law, created by the State or the community, and that its validity cannot therefore be extended beyond its own territory,¹ and, on the other hand, that every statute which deals with succession has a political and social import, and that therefore these statutes are pre-eminently *jus publicum*. It is said that the social, and therefore the political, circumstances of a country are in no small measure dependent on the shape which the law of succession takes. As instances, we may notice the rights of the oldest child, the legality or illegality of entails, the contrast between full powers of testamentary bequests and limited powers. But, as matters of fact, these considerations are only

¹ See, against this position, which is still held by Demolombe, i. § 91, and Demangeat, Fiore, § 387.

cited in support of the supremacy of the *lex rei sitæ* over immoveable property. Succession in moveables has universally, ever since the days of the Middle Ages, been determined exclusively by the personal law² of the deceased at the time of his death, while the logical consequences of the general principle are kept intact by the application of the fiction "*mobilia ossibus inhaerent*."

But, as regards the former of these considerations, it is simply got rid of by remarking that acquisition by way of succession no more and no less belongs to the positive law established or, more properly, guaranteed by the State, than does acquisition by sale and tradition. Indeed, it is an absolute necessity that property should pass from one generation of mankind to the following, and the law of succession, taking the different shapes which it does take in different countries, does no more than regulate this transmission, which is in itself necessary, in different ways. The truth of the second argument, however, we may allow. But it can never prove that the State should subject to its own laws of succession the estate, belonging to one who was not its subject, which happens to be within its bounds. It can never have so strong a social or political interest as to induce it to do so. If the deceased and his family belong to another country, there is no such interest to be discovered at all. What concern is it of this country, if a foreign family, owing to the stupid division of the estate that belonged to the head of the family, be the question one of testament or intestacy, is ruined in its prospects? Is it not the most convenient course for this country to be content with what the other State provides for its own subjects?³

² I have not been able to find any authority save Kori, *Erörterungen*, iii. p. 19 (see, on the other hand, Wächter, i. p. 304), and the dissertation by Zollius (*de preferentia statutorum discrepantium*), quoted in Schäffner, p. 175, who maintains that moveable succession is subject to the *lex rei sitæ*, a view which is totally at variance with all regular intercourse among civilised States, and makes the creditor's security as well as the right of the heir dependent entirely on accident (see, on the other hand, Savigny, § 376; Guthrie, pp. 275, 276). The doctrine which many express, that the law of succession is a real statute, is modified by the fiction which they introduce, that moveables are situated at the domicile of the ancestor. The *Jus Asdomicum* mentioned by Dutch writers, which was in former times recognised in some parts of Holland, and by which intestate succession in moveables was regulated by the law of the place where the ancestor died, had reference only to the inhabitants of these provinces (P. Voet, *de stat.* ix. c. 1, § 9; Vinnius, *ad Just.* iii. 5), and does not contradict the notion of an universal succession. The place of death is substituted for the place of domicile. When foreigners are recognised as having legal capacity, and the *Jus Albinagii* disappears or dwindles into a duty upon succession, we hear of nothing in connection with moveable property except the rule of succession recognised by the *lex domicilii*. Savigny's view, that it is only a milder form of the *Jus Albinagii* to determine the succession in moveables by the *lex rei sitæ*, may be disproved historically. Nor can it be urged to disprove that the older writers held the theory of an universal succession, that by their views even moveables could by appointment of the testator have a permanent seat assigned to them as much as immoveables, and so be like them subjected to the *lex rei sitæ* (Mevius, in *Jus Lub. prol. qu.* 6, §§ 20-24; Carpzovius, *Defin. forens.* iii. const. 12, def. 13); what they there treat of is the moveable pertinents of real property—e.g. the stocking of a farm.

³ We meet this argument in French law. Portalis urges it. But see Aubry et Rau, i. § 31, note 31. See also Laurent, vi. § 148.

To this it has of course been replied, "That is quite true of moveable estate; but the ownership of the land constitutes the very foundation on which the State is built: in this matter, to recognise the operation of foreign law is to contradict the very conception of the sovereign power of a State." But if the State, in its laws dealing with succession, treats moveable and immoveable estate on exactly the same principles, if, even as regards real estate, it recognises as authoritative any purposes you please expressed by the deceased in his last disposition, if, again, it further permits any division you like of the moveable estate, what justification can we find for introducing that distinction, as a matter of principle, between moveable and immoveable estate into the system of law that is to guide us? How can we deny to a foreign law, which perhaps may be defended on very substantial considerations, what we concede to the will of the individual in support of which perhaps very little can be said?⁴

The distinction is not one that can be drawn from the abstract idea of sovereignty: moveables are, just as much as immoveables, subject to the sovereign power of the State, so long as they actually are within its territory. If private international law is to treat moveable and immoveable property on different footings, then the systems of municipal law which are in question, be it that of the State to which the deceased belongs, or that of the State in which the immoveable property happens to be, must themselves make a fundamental distinction between moveable property on the one hand, and immoveable on the other. That is of course quite possible, and is not unfrequently the case, and was still more frequently the case in the Middle Ages. This circumstance teaches us to understand on the one side the historical development that has taken place in the international treatment of the law of succession, and, on the other hand, the justification in certain circumstances of the theory, which upholds the validity of the *lex rei sitæ* to the present day, limited as the extent of that justification must be.

This is shown by the following considerations, which in our view must govern the international treatment of the law of succession:—

First, It might be the case that nothing but the actual assets belonging to the estate of the deceased and his rights should pass to the successor, and that all debts should be discharged by the death of the person to whom they originally attached. Such a rule, which would make succession merely a form for acquiring particular things and particular rights, could never be satisfactory, except in a very low state of civilisation—a state in which claims and debts existed for a limited time only, where payment

⁴ Mittermaier has rightly disputed the alleged public interest that would give the State right to determine questions of real succession by the *lex rei sitæ* (*Zeitschrift für Rechtsw. des Auslandes*, vol. ii. p. 272): "The public interest of a State, in which a real estate is situated, can go no further than to require that every person who seeks a real right in that estate shall observe the provisions under which alone the *lex loci rei sitæ* recognises such rights. . . . But it is an empty question to ask what public interest is concerned in determining whether A, who lives abroad, or B is to take a real estate in Baden as heir of C." Cf. Wächter, ii. p. 198. See Fiore, § 391, in agreement with the text.

followed immediately upon delivery, and in which credit was unknown: the existence of any claim would depend entirely upon the uncertain length of the debtor's life, and the heir would no more be under an obligation to pay the debts of his ancestor than the person who had got any article from that ancestor by purchase or by gift.

Secondly, The estate might pass as a whole to another person, who would possess it precisely as the ancestor possessed it, and therefore take over the debts with it⁵—in other words, so possess it that the legal personality of the ancestor would be revived in the successor. This is the rule of the Roman law, the system of a pure universal succession, and its result is the greatest security possible for the creditor, because the existence of the debt is quite independent of the life of the debtor,⁶ in so far as there is any one to take over the inheritance of the deceased as heir.

Lastly, We may figure an intermediate system: Certain articles included in the succession, such as real property is shown by its nature to be, are not affected by the debts; other assets of the succession are affected even after the debtor's death by his liabilities, but in such fashion that the things themselves are alone responsible, and the persons who take them by virtue of the law of succession, are only bound to discharge the debts in so far as their share of the succession will suffice. This intermediate rule is the rule of the older German law;⁷ and it may be

⁵ A new view recently proposed is that of Heusler in his *Institutionen des D. Privatr.* (1886), p. 533. He sees the distinctive peculiarity not in the liability of the heir for his predecessor's debts, but simply in the fact that "the mass of his property passes to him by virtue of a legal title." Heusler meets the obvious criticism that in that case a sale, *e.g.* which includes a number of articles, must involve an universal succession, with the remark that in such cases "the title in each transaction must be independently constituted." I cannot, however, succeed in discovering any tenable distinction between succession on the one side and sale on the other, as regards the unity and independence of the title under which the property is taken. A sale, under which several articles are sold for a lump sum, is certainly just as much one transaction as a testament, by virtue of which the heir takes several assets. The title given by the testament is, as regards the acquisition of the articles which it covers, no less and no more independent than the title given in a sale is for the article sold. Of course, the heir need not be liable for each and every debt of the deceased: there may be exceptional classes of debts, which expire with him. But as a general principle an universal succession implies liability for debts, although not necessarily to a larger amount than the value of the estate.

⁶ It is no essential of universal succession that the heir should be answerable beyond the amount of the succession. The truth rather is, that the succession is regarded as a purely arithmetical quantity, which may just as well result in a minus quantity as a plus (cf. Savigny, *System*, i. 383). The conception of an universal succession is satisfied if the heir performs exactly those prestations which the ancestor, if he had lived, was able to perform; that this is so is shown by the association in Roman law of the *beneficium inventarii* with an universal succession. Just as the *hereditas jacens* represents the ancestor, although there can be no notion of responsibility beyond the amount of the succession, so, too, does the heir, who represents the ancestor only to a limited extent. According to Roman law, if the heir enters upon the succession that implies at once a new and independent obligation on the part of the heir, *quasi ex contractu*, to pay the debts of the succession, and this liability no one can incur, unless he is of status such as to be able to bind himself by legal transactions.

⁷ Cf. Beseler, ii. pp. 486, 487; Landlaw of Saxony, i. art. 6, § 3; Stobbe, *Jahrbuch des D. Rechts*, v. p. 293.

reconciled, too, with a more advanced stage of civilisation, in which it is not uncommon that claims of debt should exist for a considerable time, while the creditor must have some security against the event of the debtor's death. The creditor may trust his debtor absolutely to the amount of the value of the property which is subject to be affected by debt after the death of the debtor, and still greater security is given if, as is the case in more modern times, it is competent, under certain conditions, to affect with liability for debts the specially important property in immoveables. If the rule of the Roman law ensures in the highest degree the creditor's safety, and gives his estate the greatest elasticity, the rule of the Germanic law, without overlooking the protection which the creditor needs, has at the same time in view the protection of the successor against a perpetuation of the liability for all time. The rule of the Roman law, which is quite unnecessary for the protection of the creditor, that all the successor's own resources and his own separate estate, against which the creditor could have no claim at the time the debt was contracted, should be made available to the creditor, is not retained: but the heirs and the family of the ancestor will not lose their right to the important estate, which, as a rule, no ancestor desires to withdraw from them, unless there shall be some special arrangement previously made to affect them. In other words, there is in the German system what is partly a particular, partly an universal succession: the latter exists for the moveable,⁸ the former for the immoveable succession; but still particular debts may pass along with the immoveable succession, if they are specially attached to it, and are in a certain measure made real rights.

It is a necessary result of regarding the position of the heir as an universal succession, by means of which the legal personality of the deceased passes over to his heir, that this transmission can only take place in conformity with the law of the land to which this legal personality of the deceased belonged at the time of his death—that is, the law of the last domicile which he had.⁹

On the other hand, if his position is regarded as a particular succession, then, as in the law of things generally, it is the law of the place to which the thing belongs that must be applied.

On the other hand, it is a mistake to refer the law of intestate succession to what, it is presumed, would have been the will of the deceased, and thus to establish the universal validity of the *lex domicilii*, as if the deceased must have known what this law was, and tacitly taken

⁸ Laurent (ii. § 129) thinks that the older German law had the idea of an universal succession to its full extent, and on this point he attacks Schäffner and me. His argument is the well-known brocard, "*Le mort saisit le vif*." The true reason for the sharp attack is (see § 131) that Laurent thinks that he sees me involved in the bonds of feudality, a spectre so familiar to his view.

⁹ Brocher, *Nouv. Tr.* § 72, finds this peculiar foundation for the doctrine, viz. he attributes a kind of juridical personality to the succession.

it to regulate his succession.¹⁰ But a proof to the contrary is the existence in Roman law of heirs that must be recognised¹¹—a provision by which an order of succession is introduced which not merely runs counter to the presumed will of the deceased, but is contrary to his plainly expressed will.¹² A further proof is that by older Germanic law testaments and dispositions *mortis causa* were not known, and the ancestor could not as a rule defeat the rights of his nearest heirs in heritage without their consent, even by a disposition *inter vivos*.¹³ Besides, we may possibly find it asserted—and by Wharton, § 557, we actually do find it so asserted—that the person who leaves the estate may in the case of real estate, *e.g.* have had the *lex rei sitæ* in his mind.

Savigny modifies this reasoning in this direction, that he does not seek to establish the order of intestate succession upon what may be presumed to be the wish of particular persons for their own individual circumstances, but bases it upon a general presumption to which the law of each different territory gives a different expression, according as it conceives the nature of the relations of the various members of a family requires. In this general sense, however, every rule of law rests upon what it is reasonable to suppose is the wish of the person concerned. There is no peculiarity or characteristic specially belonging to the law of succession, and that view will not support the application of the *lex domicilii* to that department of the law unless the *lex domicilii* is also to be applied to every rule of law.

Further, the application of the *lex domicilii* cannot be supported on the ground that the law of succession depends upon the personal properties of the one man concerned, and is, in fact, a law of status, or an enlargement of the personality of the ancestor.¹⁴ There is nothing to show either that the law of succession is part of the law of the ancestor's status, or that everything affecting status is, as a rule, to be settled by the *lex domicilii*. All rights may be represented as constituting an enlargement of personality,¹⁵ and the *lex domicilii*, therefore, would have to be applied in every case.¹⁶

But, in the third place, there is no more force in the assertion that the State in laying down rules of succession has persons only, and not property,

¹⁰ So, too, Bartholom. *de Saliceto*, in L. 1, C. de S. Trin. No. 14, and in more recent times, Glück, *Intestaterbfolge*, pp. 159-164; Gunther, p. 733.

¹¹ This law is founded upon the law of the succession of such heirs *ab intestato*. According to the theory given above, these rules of succession, although they are against the will of the testator, must depend upon a rule of succession which proceeded from his own will.

¹² See in my favour, Schäffner, p. 171, and Asser-Rivier, § 62.

¹³ See Walter, *D. Rechtsgeschichte*, ii. § 469. It is strange, and perhaps to be referred to Germanic principles in the law of succession, that questions of succession in Spain, where the point is whether the law of Spain or a foreign law shall be applied, are settled by the personal law of the deceased, but, when the doubt is between the provincial or particular systems with Spain itself, the *lex rei sitæ* is looked upon as decisive. See Torres Campos, p. 288, and the judgment of the Sup. Ct. of Spain, of 8th June 1874, there cited.

¹⁴ Maurenbrecher, i. § 144; Phillips, i. pp. 190-201.

¹⁵ Savigny, i. p. 334.

¹⁶ See to the contrary, Wächter, ii. p. 196.

in view; and that the laws of succession, therefore, affect only the subjects of a State, but affect them in all questions pertaining to their property.¹⁷ It might just as reasonably be said that these laws affect things only, and that the *lex rei sitæ* should therefore be applied.

No other ground can be found for assigning the law of succession to the regulation of the personal law of the person deceased than that succession is an universal succession.¹⁸ No other ground is tenable, and therefore we must admit that there is something to be said for the application of the *lex rei sitæ*, if and in so far as the principal of an universal succession is rejected. This gives a key to the historical development of theories of the international treatment of the law of succession, and to the contrast which exists up to the present time between the jurisprudence of the Continent of Europe on the one hand, which is spreading more and more, and the jurisprudence of England [of Scotland] and of the United States on the other.¹⁹

HISTORICAL EXPLANATION OF THE DIVERSITY OF LEGAL DOCTRINE IN DIFFERENT COUNTRIES.²⁰ NECESSITY FOR THE RECOGNITION OF THE *lex rei sitæ* TO A CERTAIN EXTENT.

§ 363. In the Middle Ages, and up to the beginning of the last century, even the Romanistic school of law lay under the influence of Germanic law. The full bearings of the doctrine of an universal succession were not yet understood, and therefore at this date the preponderance of opinion in Germany, the Netherlands, and France, was in favour of disposing of immoveable property by the rules of the *lex rei sitæ*.²¹ In later times

¹⁷ Wächter, ii. p. 198.

¹⁸ This ground is taken by older writers—e.g. Barthol. *de Saliceto*, in L. 1, C. de S. Trin., and is urged by most of the more modern German authors.

¹⁹ I am glad that this exposition has found approval with such an expert in legal history and in German law as Stobbe (§ 34, note 40).

²⁰ See in Fichardus, *Consilia* (edit. 1590, § 31, fol. 79a), a review of the different opinions held at that time. It is not, as Stobbe (§ 34, note 41) says, a dogmatic discussion.

²¹ For the *lex rei sitæ*: Bald Ubald, in L. 1, C. de S. Trin.; Molinæus, in L. 1, C. de S. Trin.; Argentræus, No. 24; Burgundus, ii. 16; Rodenburg, ii. 2, § 1; Abraham a Wesel, *de Connub. bon. Societate*, tract i. 1, No. 118; Christianæus, *Decis. Fris.* ii. dec. 4, No. 2, iv. 8, defin. 7; Petrus de Bellapertica, in L. 1, C. de S. Trin.; Petr. Peckins, *de Test. Conjug.* iv. c. 28, No. 8; Vinnius, *Select Jur. Quæst.* ii. c. 19; Colerus, *de Process. Execut.* i. 3, No. 230; P. Voet, ix. 1, No. 3; No. 50; Mevius, *decis.* ii. 99, and *Jus. Lub. proleg.* qu. 6, § 10; Everhard. jun., *Consil.* vol. ii. cons. 32, No. 10; *Consil.* xxviii. No. 78; Mynsinger, *Obser. Cent.* v. obs. 19; Cocceji, *de fund.* vii. 14, 19; Carpzov. *Defin. for.* p. iii. const. 12, def. 12; Ziegler, *Dicastice Concl.* xv. No. 28; J. Voet, *de Stat.* § 21, and in Dig. xxxviii. 17, No. 35; Boullenois, i. p. 223; ii. p. 383; Hofæker, *Princip.* § 140; Ricci, pp. 550, 551; Haus, *de Princip.* p. 36; Kori, *Erörterungen*, iii. p. 19; Mailher, *de Chassat*, No. 58; No. 292; Wheaton, i. p. 406; Félix, i. § 66, pp. 143, 144; Burge, iv. p. 154; Story, § 483 (and the practice in England and the United States); Demangeat on Félix, i. p. 144; Wharton, §§ 557 *et seq.*; Westlake-Holtzendorff, §§ 54 and 158; Foote, pp. 154, 194. (On the other hand, see Foote, p. 183, on the recognition of the *lex domicilii* in matters of moveable succession.) Brocher, i. p. 432, in so far as the existing French law is concerned. See, however, a well-reasoned judgment of the Trib. Civ. at Havre, 28th Aug. 1874 (J. i. p. 182), on the thorough

those jurists, in whose country the doctrines of Germanic law and feudal principles bear sway, adhered to the *lex rei sitæ*, while in other quarters, in which the law of Rome began more and more to govern the whole theory, the determination of questions in succession law by the *lex domicilii* pressed further and further to the front.²² We can thus explain without difficulty how it is the German jurisprudence that takes the lead in the recognition of the *lex domicilii*, and how, again, in French jurisprudence, the traditions of the eminent writers on the Germanic *coutumes*²³ are for a while used in defence of the *lex rei sitæ*. But we can also understand how since the enactment of the French Code,²⁴ in which feudal systems are entirely thrown

application of the personal law. The passages cited from the Roman law, L. un. l. ubi. de hered. 3, 20, Nov. 69, cap. 1, deal only with jurisdiction, and prove nothing as to the application of the local law of the thing. In Russia, too, the *lex rei sitæ* rules real property (v. Martens, § 76, note 4). He says, however, "the maxim is entirely at variance with the leading ideas of the law of succession."

In British India the *lex rei sitæ* rules the real property, the *lex domicilii* the moveable. (See Lyon, *The Law of India*, 1873, cap. v. § 5.)

In Austria, by a decree of the court of 22nd July 1812, and still more plainly by a law of the 9th August 1854, it is distinctly recognised as the duty and the right of the Austrian courts to take up the regulation of the real estate of a foreigner, and the *lex rei sitæ* is applicable by direct legislative enactment. The most puzzling complications must result from this confusion, for the idea of an universal succession is deeply rooted in the Austrian Statute Book, see § 531. (Law of 9th August 1854, § 2: "The administration of the real property of a deceased foreigner, which is situated in Austrian territory, belongs entirely to the Austrian courts, to which the law assigns such questions where its own citizens are concerned, and therefore the rights of all concerned must be attended to in accordance with Austrian law." See Unger, i. p. 199, and Vesque v. Püttlingen, on the conflicts which arise from this rule of law.) On the other hand, in a new Austro-Servian treaty, the national law of the predecessor is declared to be the exclusive rule. (See Paulovitsch, J. xi. p. 28.)

²² Besides those already mentioned, the following favour the *lex domicilii*:—Alb. de Rosate, Lib. i. qu. 46, § 8; Alexand. Tartagn. *Imol. Consil.* Lib. v. cons. 44; Puffendorf, *Obserat.* vol. i. obs. 28, § 5; Boehmer, *I. E. Protest.* iii. tit. 27, § 15; Seuffert, *Comment.* i. p. 258; Göschen, *Civilr.* i. p. 112; Holzschuher, i. p. 80; Wening Ingenheim, § 2; Mühlenbruch, § 72; Reinhardt, i. 1, p. 31; Mittermaier, § 32; Unger, i. p. 199; Bluntschli, i. § 12, 5; Oppenheim, p. 395; Beseler, i. p. 153; Eichhorn, § 36; Gerber, § 32; Rosshirt, *Civilr.* § 6; Thöl, § 79; R. Schmid, p. 93; Windscheid, § 35; Beseler, § 39, note 15; Roth, § 51, note 106; Dernburg, § 46, note 13; Judgment of the Supreme Court at Berlin, 4th Oct. 1844 (Decisions, 10, p. 177); Supreme Court of Appeal at Lübeck, 10th Dec. 1828 (Seuffert, 4, p. 165); 28th Feb. 1857 (Frankfurt Collection, 3, p. 112). (See, too, the judgment of the same court reported by Seuffert, 2, p. 447.) The practice of the Sup. Ct. of the German Empire takes the predecessor's personal law as the leading consideration, as we find from several decisions on different points in the law of succession. (See (i.) 29th Jan. 1883; Bolze, ii. § 36; Sup. Ct. at Darmstadt, 19th Nov. 1883 (J. xiii. p. 732).)

²³ From this comes, as Bouhier, chap. xxiii. No. 12, chap. xxvi. No. 71, with some sadness says, the *ancien préjugé enraciné* of the older French authors, *que toutes les coutumes sont réelles*. Bouhier, as President of the Parliament at Dijon, stood closer to the Roman law.

²⁴ The Code Civil, §§ 732 and 870, rests on the principle of an universal succession as do the Prussian A. L. R. i. 2, § 34, i. 9, § 350, i. 17, §§ 127 *et seq.*; and the Austrian A. G. B. §§ 532, 547-578. In opposition to these provisions, rules such as those of the Code Civil, art. 3, § 2, "*Les immeubles, même ceux possédés par des étrangers sont régis par la loi française*," Prussian A. L. R. § 23, and Austrian G. B. § 300, are applicable merely to real rights in particular parcels of heritage (the reverse is assumed in a judgment of the Cour Royale of 7th April 1833, and by Bornemann, Prussian L. R. i. p. 53; see, on the other hand, Koch on §§ 23 and 32 of the Introduction to the Prussian L. R.), for the law makes a marked distinction between the incorporeal right to the succession as an *universitas*, and the right to particular

aside as regards succession, and since the rules of universal succession, without any distinction in principle being drawn between moveable and immoveable property, have come to be generally recognised, the most modern French jurisprudence, like the new Italian school, has gone over with flying colours, and taken up its position on the exclusive application of the personal law.²⁵

Schäffner rejects the view we have adopted, although he admits it to be logically correct, and announces that he is in favour of the *lex rei sitæ*, because, on the one hand, so simple a thing as the law of intestate succession should not be made dependent upon such distinctions; and, on the other hand, because, if the *lex domicilii* is to be the rule, there must be a new exception when we have to deal with a prohibitory enactment. The latter difficulty has no application to the view we have adopted, and the former we can meet by remembering that the question, whether the *lex rei sitæ* regards succession as universal, is easily answered; and, where the *lex domicilii* and the *lex rei sitæ* both regard it as universal, it is only when we propose to apply the *lex rei sitæ* that difficulties arise. Savigny (§ 378; Guthrie, p. 288) gives the following illustration with reference to this matter: An inhabitant of Berlin dies intestate, leaving a widow and several near relations of different degrees; the estate consists of landed property near Berlin and in Silesia, a house in Ehrenbreitstein, and a house in Coblenz; besides that, the deceased has many personal debts, which, of course, affect all parts of his estate. According to the theory of our opponents, no fewer than four different systems of law must regulate the succession to these parcels of real property, and each of them may give its parcel to a different heir; there would, in truth, be four inheritances, regulated in the Mark of Brandenburg by the Joachima of 1527, by which

corporeal articles. Prussian practice is fixed: it applies universally the *lex domicilii*. See Forster-Eccius, i. § 11, No. 7, who approves of this practice.

²⁵ French practice still firmly adheres to the system of applying the *lex rei sitæ* in the case of real property (see judgment of the Ct. of Cass. cited by L. Renault (J. ii. p. 338), and Weiss, p. 834, note, viz. 14th Mar. 1837 (Sirey, xxxvii. 2, p. 195); 2nd April 1884 (J. xii. p. 77); Ct. of Pau, 17th Jan. 1872, and 14th Mar. 1874 (J. i. p. 79; ii. p. 357): it not unfrequently appeals simply to the older precedents, which it is believed the Code Civil intended to sanction. Brocher (*Nouv. Tres.* §§ 75, 76, and 88) although on the general doctrine an adherent of the view that the personal law should rule, thinks that to this extent the Code Civil has positively laid down that the *statut réel* is to govern.

But see, for the application of the personal law of the deceased, L. Renault (J. ii. p. 329); Laurent, i. § 294; ii. § 123; vi. § 128; Durand, § 186; Weiss, p. 834 ("la territorialité des lois successorales engendre des difficultés pratiques inextricables"). Despagne, § 490; Asser-Rivier, § 62; Labbé (J. xii. p. 14) declares that, so far as future legislation is concerned, the *loi nationale* of the deceased should be the exclusive rule. In Belgium the rule of practice has been hitherto, as in France, to apply the *lex rei sitæ*. See Haus, *Dr. Priv.* § 131; Picard (J. viii. p. 487).

Preliminary art. 8 of the Italian Code enjoins the observance of the national law of the deceased in the most thorough fashion. A decision of the Sup. Ct. of Spain in 1868, which enjoys statutory force, makes the national law of the deceased the rule. (See Salmeron, J. ix. p. 407, who describes the adoption of this principle as one of the most important advances in legal science.) See judgment of the Sup. Ct. of Spain, again, on 6th June 1873, J. i. p. 40. Calvo, ii. § 849, gives a review of the jurisprudence of various countries.

the widow has right to one half of the combined estate of herself and her husband,—in Silesia by the *Allgemeines Landrecht*, in Ehrenbreitstein by Roman law, and in Coblenz by French law. We shall thus in truth have four separate successions.

§ 364. If, on the other hand, universal succession is not recognised by the personal law, or, it may be, by the *lex rei sitæ*, and while therefore some debts are seen to be a special burden upon the real estate, while others have nothing at all to do with it, the greatest confusion would arise if the *lex domicilii* were generally applied, just in the same way as if, in the case of a feu, feudal and allodial debts were all thrown together.²⁶ No doubt, if we found a case—which according to the principles of Germanic law explained above, could only be counted an abnormal state of matters—where there was no universal succession, but yet the debts fell alike upon the moveable and real estate, then, in this case, the only expedient left would be a taxation and apportionment; but that would be due not to any error in our theory as to the collision of legal systems, but solely to the individual territorial system.

The following cases may serve to illustrate our meaning. By the law

²⁶ Cf. Vattel, ii. ch. 8, § 100: "*Les biens qu'il (l'étranger) délaisse en mourant, dans un pays étranger, doivent naturellement passer à ceux qui sont héritiers. Mais cette règle générale n'empêche point, que les biens immeubles ne doivent suivre les dispositions des lois du pays où ils sont situés.*" Renaud, i. § 42, ii. 3; and Kierulff, 79, 80, take our view. And so too does Stobbe, § 34, note 44; so too the practice of the Sup. Ct. of Oldenburg (Seuffert, xxiii. § 4). Muheim, for instance, goes wrong, because he does not take into account the possibility of a rule of singular succession prevailing by the *lex rei sitæ* but with liability for certain debts. He has, however, altogether misunderstood my meaning if he thinks (pp. 246, 247) that in my first edition I defended the application of the *lex rei sitæ* in the case of French and Swiss law. Of the Swiss law I said not one word. Preliminary Art. 8 of the Italian Code also goes too far in regulating the succession by the national law of the deceased, "of whatsoever nature the estate is, and wheresoever it is situated." It is also entirely wrong to say (like Muheim, p. 247) that the recognition of the *lex rei sitæ* is a consequence of the incapacity of foreigners to enjoy rights. A decision of the Court of Cass. at Turin, of 4th Dec. 1870 (Pallavicini v. Gavotti), has very properly recognised that the principle of the Italian Code cannot be carried out without certain modifications. Fiore (p. 633) criticises this decision unfavourably, and at the same time defends the literal sense of the Italian Code. But he is wrong. The question does not, as Fiore thinks, turn upon the fact that the Italian judgment will not receive an *exequatur* abroad, but rather on the consideration that in certain circumstances the Italian Court will have to declare certain real rights to be existent, which as a matter of fact do not exist, because the *lex rei sitæ* does not recognise them (e.g. shares in a trust estate which is indivisible). Two later judgments of the same court meet Fiore's argument excellently well (J. viii. p. 228); Esperson does not approve of these. So too the Court of Cass. at Florence, on 15th June 1875, decided in the same spirit (Gianzana, ii. § 178) that the *lex rei sitæ* must prevail if it claims to regulate the succession to different parcels of property.

Many modern treaties confirm our view that a certain respect to the *lex rei sitæ* may be required. If in country A the *lex rei sitæ* is strictly adhered to as the rule of succession—on what ground it matters not—then country B, in concluding a treaty which shall regulate the succession of the subjects of both countries, cannot but adopt the *lex rei sitæ*, notwithstanding that in country B the personal law is generally taken as the rule of succession. See Art. x. of the Russo-German treaty of 12th Nov. 1874, and Art. xix. of the Servian-German consular treaty of 6th Jan. 1883. Russia still insists strictly on the *lex rei sitæ*. See Durand, p. 525, on the Franco-Russian treaty of 1st April 1874.

of Scotland heritable bonds, which are obligations for payment of money secured by the hypothecation or the creation of some other real right over heritable estate,²⁷ fall upon this estate primarily, while in England the law makes the moveable estate liable in the first place for the payment of such obligations. If then a domiciled Englishman, who owns real estate in Scotland, has granted such an heritable bond over it, our theory will make the Scottish heir in heritage answerable without recourse against the English representative in moveables. By the terms of the bond the obligation is closely attached to the heritable subject, and becomes a real burden, which has the character of a personal debt only in a subsidiary sense. It has been so decided in England, upon what is certainly a singular ground, viz. that the disability of the Scottish heir to require the heirs in personalty to relieve him of the debt follows him to England.²⁸ Conversely, if the real estate is by the *lex rei sitæ* not primarily answerable for payment of debts, this is explained by the fact that the heir in heritage was originally only responsible for debts which had been created a real burden upon the estate, but that in later times he took the position of a cautioner, himself bound along with the principal debtor. He has, therefore, recourse against the foreign executor *in solidum*, even although the foreign law would allow the debt to attach to both moveable and immoveable estate; just as a successor in a feu, who pays what is subsidiarily a debt upon the feu, has recourse against the heir who takes the allodial estate.²⁹

²⁷ Story, § 366.

²⁸ Story, §§ 487, 488.

²⁹ In the result, Story, § 489c, and Pothier, des Successions, ch. 5, § 1; Burge, ii. p. 85, iv. pp. 724, 725, 732, 733; Merlin, Rép. Dette. § 3, iv.; Bouhier, ch. 29, No. 59, ch. 24, No. 186, are agreed. Story, § 486, reports the following case: "A person domiciled in England died intestate, leaving real estate in Scotland. The heir, who was one of the next of kin, claimed a share of the personal estate. To this claim it was objected that by the law of Scotland the heir cannot share with the other next of kin in the personal property of an intestate except on condition of collating the real estate; that is, bringing it into a mass with the personal estate, to form one common subject of division. It was determined, however, that he was entitled to take his share without complying with that obligation." This decision, too, is right. The Scots and English estates form two distinct and separate subjects, which stand to one another just as the succession to two different persons would. See, too, Westlake-Holtzendorf, §§ 110 and 152: "No law for the regulation of the claims of creditors or legatees, which is binding in the country in which the mass of a deceased person's estate is being administered, can ever throw a heavier burden upon his landed estate, with the object of satisfying the creditors upon the succession, than the *lex situs* allows, even although the deceased was domiciled abroad." [See Westlake, § 162.]

Art. vii. of the resolutions of the Institute of International Law passed at Oxford in 1880, reserves in the same way (Ann. 5th year, pp. 54, 55) the possibility of an application of the *lex rei sitæ*, if, that is to say, by that law or by the personal law of the deceased there could not be said to be an universal succession. The article runs thus: "*Les successions à l'universalité d'un patrimoine sont, quant à la détermination des personnes successibles, à l'étendue de leurs droits, à la mesure ou quotité de la portion disponible ou de la réserve, et à la validité intrinsèque des dispositions de dernière volonté, régies par les lois de l'état auquel appartient le défunt, ou subsidiairement dans les cas prévus ci-dessus à l'art. ii. par les lois de son domicile, quels que soient la nature des biens ou le lieu de leur situation.*"

NOTE HH ON §§ 363, 364. PRINCIPLE OF SUCCESSION IN BRITAIN AND THE UNITED STATES.

[The general principle followed, as the author correctly states, in England, Scotland, and America, in questions involving rights of succession, is that, if the subject be real estate, the *lex rei sitæ* prevails; if, on the other hand, moveables are the subject in hand, the law of the domicile of the deceased at the time of his death will decide.

Thus, too, as regards the incidence of debts, it is held that, while the creditors of the deceased must be satisfied out of any estate he may have left, be it moveable or be it heritable, the executor, if he pays an heritable debt, may have recourse against the heir, and in the converse case, the heir who pays a debt which is not truly an heritable debt, may have recourse against the executor. But although the two estates *inter se* are primarily liable each for its own liabilities, the executor who has paid away, or is in course of paying away, the executry estate, cannot be made liable to relieve an heir who has, out of the heritable estate, paid what was truly a debt upon the executry (Erskine, iii. 9, 47).

While, therefore, the creditors have a right to demand payment out of any estate they can find, each parcel must, in a question between the heir and executor, bear its own liabilities, and the *lex rei sitæ* will determine whether a debt has been well constituted against the heritable estate, so as to affect the heir rather than the executor. The law of England and of Scotland applies the *lex rei sitæ* so exclusively in regard to real property, that the law of the deceased's domicile will be entirely ignored in its apportionment of debts and legacies as between the personal and real estate. The latter is not affected unless the *lex rei sitæ* pronounces it to be (Westlake, § 162, and *Harrison v. Harrison*, 1873, L.R. 8, Ch. App. 342), and the heir taking it is not bound in any obligation of relief unless his own law, *i.e.* the *lex rei sitæ*, so provides (*Balfour v. Scott*, 1793, H. of L. 6, Bro. P.C. 550, referred to by Sir William Grant, M.R., in *Brodie v. Barry*, 1813, 2 Ves and Beames, 127). If he has by accident paid personal debts, he will have recourse against the executor, who is administering in the other country, by the laws of which an heir has no such right of relief. (*Winchelsea v. Garetty*, 1838, 2 Keen, p. 293.) Again, according to the authority cited by Story, and referred to in the text (*Drummond*, 1799, 6, Bro. P.C. 601, also referred to by Sir William Grant in *Brodie ut supra*), a Scottish heir will be liable to pay an heritable bond secured over the estate in Scotland which he takes, and will have no right of relief, that being the law of Scotland, although by the law of the deceased's domicile, *viz.* England, he would have had recourse against the executor.

For the law of the United States, which on this matter is the same as those of England and Scotland, see Wharton, §§ 560, 561.]

PRESUMED INTENTION OF THE DECEASED? IS NATIONALITY OR DOMICILE
TO RULE THE LAW OF SUCCESSION? COERCITIVE LAWS.

§ 365. Many writers³⁰ base the general recognition of the personal law of the deceased, in questions of succession, upon what may be presumed to have been his intention. We have already declared ourselves against any such basis for the doctrine. It has this further drawback, that, so long as we found on it there is just as much reason for taking the *lex domicilii* as the law of the nationality as the personal law which is to guide us, whereas on our theory, which is also the theory of the modern Italo-French school, the latter law, *i.e.* of the nationality, must alone be applied. For the law of the family and the law of succession stand in close connection one with the other,³¹ and if the law of the nationality is held to be regulative of the former, the law of succession, unless in so far as it falls in exceptional cases under the *lex rei sitæ*, must also be under the guidance of the law of nationality.³²

All are, however, agreed that the personal law which the deceased had at the time of his death must rule, while nothing whatever depends on the place where he happened to be temporarily at the moment of his death. But in the case of married persons a sharp line must be drawn between what is really succession, and what is the operation of the community of goods involved in marriage, either continued after the death of one of the spouses, or coming into existence then for the first time. Questions as to this community are to be determined by the law of the first matrimonial domicile (or by the national law of the spouses at the date of the marriage, as the case may be). Thus a judgment of the German Imp. Ct. (iii.), of 8th January 1886 (Bolze, *Prac.* ii. § 1184, p. 306), which is in my judg-

³⁰ *E.g.* Laurent, ii. § 123; Weiss, p. 832; Despagne, § 490.

³¹ Fiore, § 394, and Norsa, Rev. vii. p. 209, draw particular attention to this.

³² In Germany, of course, the ruling opinion is on this subject also in favour of the *lex domicilii*; but see *supra*, p. 203. See an interesting judgment of the Sup. Ct. of App. at Celle, reported in v. Bülow and Hagemann, *Prakt. Erörterungen*, vi. p. 140, and judgment of the Sup. Ct. of App. at Lübeck, on 21st March 1861 (Seuffert, xiv. § 107). The Imp. Ger. Ct. (i.), on 7th July 1883 (Dec. xiv. § 43, p. 183), has lately decided in this sense; so, too, the French Ct. of Cass. 7th November 1826 (Sirey, xxvi. i. p. 350), and the Saxon Code, § 17. In the same way, in England and the United States, domicile is still accepted, in so far as the moveable succession is concerned. In Austria the principle of nationality is recognised, but an exception is made in case the State, to which a foreigner who has died in Austria belongs, does not recognise the same rule (v. Püttlingen, § 83). The Italian Code, prelimin. art. 8, expressly declares that the law of nationality will rule in Italy. (See Fiore, § 394; Renault, J. ii. p. 329; Laurent, vi. § 128.) Treaty of the Spanish American States of 1878, §§ 20, 21. But subjects of these States have the same rights on the estate of a foreigner which happens to be in their country, as they would have if the deceased had himself been a subject. Asser-Rivier, §§ 62, 64; Durand, p. 387; Weiss, *ut cit.* French practice (see Ct. of Pau, 22nd June 1885, J. xiv. pp. 479, 485) as a rule puts the moveable property under the law of the domicile. French writers, however, seem nowadays to incline somewhat to the law of nationality. See indications of this given by Fiore, p. 619, and the Austro-French treaty of 1866, § 2 (J. ii. pp. 427, 428), in favour of a decision by the *loi nationale*.

ment sound, holds that the right of the surviving spouse, by the law of Lübeck, where the marriage has been enriched by succession, to remain in occupation of the estate, is merely a continuance of the right of property that is part of the married relation, and that the law of the last domicile of the deceased spouse, through whom the property came, does not regulate the matter. But a fiction of the death of any person (such as so-called civil death, often made part of a criminal sentence), which by the personal law of that person must have full operation, will have no effect in any other State, whose laws know nothing of such a fiction. No one can, in a foreign country, be put in possession of the property of a person who is actually still alive, by pleading any such personal law. If the person affected by the sentence is actually under the jurisdiction of the State which pronounced the sentence, it will be necessary to appoint a curator to him in the foreign country.³³

The case is otherwise where the question is one as to a presumption of death, where the exact moment of death cannot be fixed; in such questions the law which rules the succession in other respects must prevail (see Brocher, i. p. 414; Weiss, p. 847). If, however, two persons perish together in consequence of the same event, and if in such a case the personal law of A presumes that B lived longer than A, and proceeds on the footing that B thus became A's heir, while B's personal law rejects this presumption, or perhaps sets up the contrary presumption, viz. that A was the survivor, then A's nearest of kin must be B's heirs, and B's nearest of kin must be A's heirs, the order of succession among the respective nearest of kin being, however, in the former case determined by the law which prevails in A's country, in the latter case by the law of B's country. Thus each law will have its effect within its own jurisdiction.³⁴

An exception is not unfrequently made, and Fiore (§ 396) makes it, from the consistent application of the national law of the deceased, in cases in which the public interest would be injured if it were applied, *e.g.* if the foreign law rests upon some privilege of rank, or upon the advantage of being the first-born, etc., while the native law entirely rejects such privileges. Such an exception is on the one side, in theory, unsound, and on the other, in practice, unnecessary. It is unsound in theory, because, as we have seen, all systems of succession are founded on some political or social consideration or another, or at least are supported by such considerations. Thus we should very soon reach the total exclusion of the national law of the deceased. Again, the exception is in practice unnecessary. For all the doctrines which we thus endeavour to exclude from our native soil, rest upon the principle of some kind of separate succession, and thus lead to the exclusive application of the *lex rei sitæ*. But it is impossible

³³ To the same effect Weiss, p. 847.

³⁴ Weiss and Despagnet, § 499, propose to decide according to the probabilities of each case, *i.e.* give effect to neither law. That is capricious, and very often there is no probability in the matter.

to put absolutely out of view such doctrines, confined to a foreign country, or to declare that they are entirely invalid. Are we to ask *e.g.* an Italian judge, if an Italian falls heir to an entailed estate in Germany [entails of this kind being forbidden by the law of Italy] to declare, either that the German entail is invalid, a declarator to which we could not expect the German courts to pay any attention, or that the Italian, in respect of preliminary article 8 of the Italian Code, should renounce the German entailed estate? If a law, which proceeds on the principle of an universal succession, prefers the first-born to the whole estate, what concern has Italy with the fate of an estate, with which up to that moment it had nothing to do, even if, in the case on hand, it is an Italian who takes benefit by the state of the foreign law?³⁵

The question whether any particular thing is to be held moveable or immoveable (see *supra*, p. 505) is to be determined by the personal law, if that is the law that regulates the succession, but by the *lex rei sitæ* in the opposite case;³⁶ in the latter case, the question must be whether it is to be held to be a pertinent of some other thing, in which case of course the *lex rei sitæ* must be applicable.

CAPACITY TO TAKE. JURISTIC PERSONS IN PARTICULAR.

§ 366. The capacity of foreigners in matters of succession, both on its active and its passive side, is now more and more admitted in all civilised States. Some States no doubt only admit it on condition of reciprocal treatment which must be shown to exist. But still, limitations of legal capacity have survived longer than in other matters in the shape of a right of deduction (*Jus detractus*, *Abschoss*) where successions pass out of this country into the hands of foreigners, and in the shape of the *jus albinagii* (*droit d'aubaine*) where a foreigner has left an estate in this country. A long series of treaties between different States and territories abolished these dues and confiscations in their mutual dealings. Then, too, the late German Bund (art. 18 of the *Bundes Acte* and Resolution of the Bund of 23rd June 1817) entirely swept away all such dues in the States of the Bund, in so far as the subjects of the States belonging to it were concerned.³⁷ In France, the statute of 4th July 1819, "*Sur l'abolition des droits d'aubaine et de détraction*," gives foreigners full capacity of succession, making, no doubt, a certain limitation, with a view to obtaining

³⁵ See to this effect Durand, p. 390; Despagnet, § 492. Laurent's discussion, vi. § 32, is confused. Of course, the French judge is to sweep out of the world as far as possible all trusts, even although they affect foreign landed estate, and to treat them as non-existent.

³⁶ Most authorities make the *lex rei sitæ* the general rule here (Story, § 447). This is not quite accurate; if, for instance, the succession is universal both by the law of the domicile and the *lex rei sitæ*, but the *lex domicilii* provides that the real estate must go to some privileged heir for a consideration, the *lex domicilii* must decide whether the heir may take any particular thing for this consideration.

³⁷ For the present day, see art. 3 of the Imperial Constitution, and Stobbe, §§ 42, 43.

reciprocity, which is obscurely expressed, and has accordingly given rise to a multitude of controversies.³⁸

It does not, however, as a matter of course, follow from the admission of the legal capacity of foreigners for succession that foreign juristic persons and corporations will have the same rights of succession as such persons and corporations belonging to this country have.³⁹

Although at any given moment the property of a foreign foundation, for instance, may really serve the same objects as some institution in this country which bears the same or a similar name, we have no guarantee that that will continue to be so in the future, and all foundations are obnoxious to serious invasions by public authority under certain circumstances. For instance, a State might allow ecclesiastical or charitable foundations to flourish luxuriantly, in order that it might from time to time confiscate them for its own behoof, or for behoof of its political communities. And if the law which governs the succession requires a sanction from the State before a succession or a legacy can be taken by a foundation or by any juridical person, we can at least never find an equivalent for this sanction in the sanction of the State in which that foundation or juridical person is situated.

§ 367. Capacity to take by succession is, as itself a part of the general doctrine of capacity to have legal rights, subject, according to the principles already expounded (p. 304), to the law which rules the succession for other purposes, *i.e.* to the *lex rei sitæ* or the personal law of the

³⁸ On the different theories, see Weiss, p. 404. The Code Civil (§§ 726 and 912, also 11) required, as a condition of the capacity of a foreigner to take by succession, that Frenchmen must have the same privilege in that foreigner's own country by virtue of a treaty. The statute of 1819, without paying any attention to the requirement of reciprocity, provided that, in case there were French co-heirs in existence, these "*prélèveront sur les biens situés en France, une portion égale à la valeur des biens situés en pays étranger, dont ils seraient exclus à quelque titre que ce soit en vertu des lois et coutumes locales.*" The last words suggest the interpretation that the French co-heirs should levy their *præcipuum* upon French estate, even although it was not solely in their character as French subjects, *i.e.* foreigners, that they were excluded in the other country, but because of the order of succession there recognised. This would be nothing short of an invasion by the French law of the domain belonging to a foreign law. Accordingly Weiss, *e.g.* proposes to restrict the *præcipuum* of the French co-heirs to the case in which the succession is in itself subject to the law of France. This interpretation would seem, however, to be wrong, and to be rejected in practice. See *e.g.* Renault (J. iii. p. 15, and J. v. p. 611) on some further difficulties in the statute. See, also, criticism in Laurent, vi. § 164, although he says (§ 65) in his pompous way of this unfortunate statute, "*La loi de 1819 . . . inaugure l'avènement du droit international privé.*" The Belgian statute of 27th April 1865 (Laurent, iii. §§ 370, 371) provides simply and soundly, "*Les étrangers ont le droit de succéder, de disposer et de recevoir de la même manière que les Belges dans toute l'étendue du royaume.*" See the statute of the Netherlands, 17th April 1869. See Calvo on the French statute, ii. § 850.

³⁹ § 2 of the Austro-Servian Comm. Treaty of 1881 (J. xi. p. 26) refuses foreign juridical persons, other than trading or insurance companies, the right to acquire real property. According to Paulowitsch's exposition in the Journal, the foreign corporation does, however, take the price of the estate in Servia, although it must be sold.

deceased, as the case may be.⁴⁰ Many persons⁴¹ are deceived by the word "capacity" (*fähigkeit*), and are in favour accordingly of calling in the personal law of those who are to take. But the law, in declaring one to be "incapable" of taking by succession from another, simply means that this person shall not be the successor, although all other conditions necessary to his taking may be present: the law which decides all other questions connected with the succession, can never commit the decision of this point to any other law; this is only one special point in the general chapter of the succession. If the law of country A, for instance, declares that persons who are unconceived at the date of the predecessor's death, or children who are not viable, are incapable of taking by succession, the consequence of this rule is, under certain circumstances, to introduce an entirely different order of succession *ab intestato* or *ex testamento* from what would follow if there were a declaration to a contrary effect. We must, no doubt, keep in view that where the personal law of the successor would deprive him of the inheritance the moment he had taken it, it cannot reasonably be supposed that the law which would otherwise regulate the succession [*i.e.* the personal law of the predecessor, or, in exceptional cases, the *lex rei sitæ*] is to take no account at all of this. For in such a case the successor would in truth be a third person, *e.g.* the foreign State eager to confiscate the property, a monastery, or some other favoured institution. The State to which the predecessor belonged had no desire to give these bodies anything to the disadvantage of near relations of the deceased. It may then often happen that, in order to ensure that the law of succession shall be at once and completely worked out, capacity to take, both by the personal law of the successor and by that which in other respects regulates the inheritance, shall be required.⁴² The former, however, need not be regarded if the successor is in a position as a matter of fact to withdraw himself from the prejudicial operation of his personal law, which he has incurred in consequence *e.g.* of his residence in a foreign country. The impediment which exists in the personal law of the heir or legatee must be considered rather as a question of fact. We shall take it into account [and refuse to hand over the succession] if the refusal to take it into account would assist some institution with which our own law will have nothing to do, *e.g.* will further confiscation by a foreign fisk, or an annexation by the law of mortmain of monasteries, churches, etc.⁴³ (But in many cases, in particular in cases in which the incapacity to take is not

⁴⁰ Hert, iv. 13, 50; Bartolus, in L. 1, C. de S. Trin. Nos. 38, 40; Argentræus, Nos. 17, 18; Burge, iv. pp. 155, 217; Oppenheim, p. 396; Schmid, p. 96; Roth, *D. Privatr.* 51, note 107; Dernburg, *Pand.* § 46 *ad fin.*; Sup. Ct. of App. at Oldenburg, 5th March 1853; Seuffert, vi. § 308. The law of England and of the United States is to the same effect. Wharton, §§ 576, 578.

⁴¹ So Savigny, § 377; Guthrie, p. 283; Holzschuher, i. p. 80; Unger, p. 200, note 101; Vesque v. Püttlingen, p. 277; Fiore, § 397; Esperson, J. viii. pp. 226, 227; Laurent, vi. § 172; Weiss, p. 847. Sup. Ct. at Stuttgart, July 1862 (Seuffert, xv. No. 199).

⁴² In this matter I have altered the opinion I once held. Boullenois, i. p. 66, holds that the successor can only take, if he has capacity both by the law of his domicile and by the law which regulates the succession. See, too, Wharton, § 579.

⁴³ If a man enters a monastic order, which forbids its members to take successions, this may be regarded as a renunciation of all successions. See Hert, iv. 42.

rested, by the personal law of the person who is called to the succession, upon any exercise of his will, and so does not imply a renunciation of it by him, some assistance may be given by setting up a curatory.) The impediment, on the other hand, is not to be taken into account [and the succession is to be handed over] if the result of taking it into account would be the reverse, *e.g.* would involve the spoliation of persons who are persecuted on account of some political or religious profession.⁴⁴ Those, however, who commit the decision to the personal law of the successor, generally take the edge off the unpleasant consequences of their theory,⁴⁵ by having recourse to the coercitive character of this kind of law, to the plea of *ordre public*,⁴⁶ with which we are so familiar, and thus they refuse after all to give effect to such provisions, although they occur in the personal law of the successor.⁴⁷ Weiss, who (p. 847) treats the subject with a thoroughness which deserves recognition, has not made it absolutely clear what consequences must ensue if the successor is by his personal law excluded as unworthy or incapable, while he is recognised by the personal law of the predecessor. It is not possible without a complete contradiction to hold the principle of an universal succession, but still to say that a Frenchman, who would by his own law be *indigne* (see Code Civ. § 727), is *e.g.* in the very same succession to be successor to the estate which may be in Russia or Italy, while he cannot take what is in France. I am not aware what Weiss proposes to do in such a case about the discharge of debt. Even the public conscience will in the end fail to justify a legal contradiction.

We cannot allow ourselves, as Weiss allows himself (p. 849), to make too extended a use of the principle of *ordre public*. Where, for instance, the law of country A only allows illegitimate children, *enfants naturels* in the meaning of the French law, to take a limited part of their father's succession, that rests of course upon a consideration of morality: but such a consideration of morality is only applicable in the case of successions which are dependent on the law of that country, A. The *enfants naturels* are not treated as members of the family with the full rights of such members. But the law of that country, A, need have no concern about successions, which come

⁴⁴ It would, *e.g.* have this result, that the man who was declared by the law of his own country to be incapable of succeeding, owing to his religious profession, would be declared by our law also to be incapable.

⁴⁵ So Savigny *ut cit.*; Fiore, § 397; Weiss, p. 848; see, on the other hand, for the correct view, Muheim, p. 253.

⁴⁶ Laws as to incapacity to succeed have the character of coercitive laws, if any laws in the region of private law have that character, and belong to *ordre public*. Accordingly Savigny holds that the *lex fori* should be applied in all such cases.

⁴⁷ There are other intermediate views. Walter, § 43, says: "By the law of his own country a monk cannot take by succession; this has no effect in the country where the institution of monasticism is positively rejected, but it has where it is known, although this incapacity may not be attached to it." Stobbe, § 33, notes 52, 53, proposes that in general the *lex domicilii* of the successor should decide. But if the question be whether a particular person is capable of succession as to a particular predecessor, then, according to Stobbe, the law of the predecessor shall decide as to his capacity to take, just as it will determine the order of succession. This latter proposition is in all cases sound, but as Muheim (p. 253) rightly remarks, must be regarded not as a rule of capacity, but as a rule of priority.

to the bastard from without. If the law of the predecessor allows him to a more complete extent the rank of a member of the family, the law of country A is not charged with the duty of attending to the predecessor's morals, or of protecting his family from an intruder, who will prejudice their rights.⁴⁸ The law of country A would have no object in interfering, unless it entertained the principle that no bastards should take by succession, or at least that they should not become rich people. This shows us the fallibility of the argument of *ordre public*, even although it is elevated to a higher rank, with the title of *ordre public international*.

The law which regulates the succession in general will determine also what is the degree of kinship to which the statutory order of succession will extend. This will be the personal law of the predecessor in all the countries which recognise the principle of an universal succession.⁴⁹

II. *Mortis Causa* DISPOSITIONS AND CONTRACTS AS TO SUCCESSION.

CAPACITY TO MAKE A TESTAMENT.

§ 368. *Mortis causa* deeds and contracts as to succession are in truth operations of the will of the testator upon the statutory order of succession, whether it be that the legal heirs are thereby entirely excluded, and an arbitrary series of heirs instituted, or that subordinate provisions modify in isolated points the statutory order of succession, which would but for them take effect. The result of that is, that testate succession is admissible when the law which regulates the succession *ab intestato* permits this operation to take effect, and so *mortis causa* deeds will depend upon the personal law of the testator or the *lex rei sitæ*, according as the law which would regulate intestacy speaks of an universal or a particular succession.

The question of capacity to make such a deed—*i.e.* the recognition by law of a deliberate settlement of succession, expressed in some particular form—has been left to the determination of the law which in other respects regulates the succession,¹ *i.e.* to the *lex rei sitæ* or the *lex domicilii*, according as the author dealing with the subject holds that intestate succession is determined by the one or by the other.²

Some authors, however, moved by the expression “capacity” (*habilitas, capacitas, capacité*), have been led illogically to apply the *lex domicilii* in all

⁴⁸ In this sense see Esperson (J. viii. p. 227) and Laurent vi. § 244. That the right of the *enfant naturel* to succeed is to be determined exclusively by the personal law of the deceased is the judgment of the Ct. at Evreux on 17th August 1881 (J. ix. p. 194). See, too, Despagnet, § 536.

⁴⁹ Laurent, vi. § 226.

¹ To the same effect Brocher, ii. § 140, and Stobbe, § 34, note 54.

² The following support the *lex rei sitæ*: Bartolus, Nos. 38-41; Burgundus, i. 45; P. Voet, *de Stat.* iv. c. 3, § 12; Huber, § 15; Hert, iv. 22; Gaill, *Observ.* ii. observ. 125, No. 12; Stockmans, *Decis. Brabant.* decis. 125, No. 10; Rodenburg, ii. 5, § 7; Vinnius, *Select Juris. Quæst.* ii. c. 19; Cocceji, vii. § 4; Merlin, *Rép. Testament.* i. § 5, art. 2, No. 2; Ricci, pp. 544, 545; Ziegler, *Dicast.* Concl. 15, § 21; Burge, iv. pp. 217-220; Story, §§ 474 and 465; Bornemann, *Preussisches Civilr.* i. p. 13; Unger, p. 202. “In the same way *mortis causa* dispositions by a

questions of this class,³ although in other respects they are in favour of the *lex rei sitæ*. Some assistance has no doubt been given to this tendency by the fact⁴ that, on the one hand, if the territorial system which regulates the succession makes the capacity to execute a will dependent upon freedom from paternal control, the *lex domicilii* must, of course, determine whether such control exists or not; while, on the other hand, many authors go so far as to apply the *lex rei sitæ* to the conflict of systems of law, both of which treat succession purely as an universal succession; the testament, which in its nature is intended to dispose of the whole estate left by the testator, can only be upheld so as to have that comprehensive operation, if the *lex domicilii* is taken as the determinant of the capacity to test.

Legal capacity to act in a general sense is not to be confounded with the capacity of making a testament.⁵ The laws which set limits upon the former exist solely for the advantage of the *incapax*, but laws as to testamentary incapacity have in view the security and the advantage of the heirs *ab intestato*.⁶

That this view is false is, lastly, demonstrated by the fact that, if one law is to regulate testamentary capacity and another intestate succession, then we may have testacy and intestacy co-existent in the same instance; for if intestacy and its rule of succession are not excluded, they must receive effect, and nothing can exclude them except the law which is to regulate their operation.

When German systems come into conflict with the Code Civil, or when one of these systems is in conflict with another,⁷ our theory will make the

stranger of immoveable property are to be determined by the law of Austria, and that as much in questions of capacity as in reference to their substantive provisions." See v. Püttlingen, p. 278.

The following the *lex domicilii*: Hofæker, *De eff.* § 24; Molinæus, in L. 1, C. de S. Trin.; Bouhier, chap. 24, No. 91; Alder, Mascardus, *Concl.* 6, No. 42; Holzschuher, i. p. 80; Wächter, ii. p. 365; Thöl, *Einl.* § 79; Savigny, § 377; Guthrie, p. 282. It is indisputable that the capacity of testing on moveables must be determined by the *lex domicilii*. See Burge, iv. p. 580; Seuffert, Comm. i. p. 259.

Those who take nationality as the determinant make it the rule, of course, in these matters also. See Laurent, vi. § 184; he thinks capacity to test is a *statut personnel*.

³ For instance, Bald Ubald, in L. 1, C. de S. Trin. No. 79; D'Aguesseau, *Œuvres*, iv. p. 539; Fœlix, i. § 88, pp. 198, 199 (Demangeat on this passage, and i. pp. 64-65); Schäffner, p. 180; Hugo Grotius (*Epistolæ*, Amstelod. 1687, No. 464); Boullenois, i. pp. 486, 488, 714. Some of these authors with this further absurdity, that if a person is incapacitated by the *lex domicilii*, he must be held to be so everywhere; but if, on the contrary, the *lex domicilii* give him capacity, while the *lex rei sitæ* denies it, the testament is of no effect as to the real estate in question ("the *capacité de tester* is *personnelle réelle*.") Schmid, p. 98, and Asser-Rivier, § 64, are the modern representatives of this class.

⁴ Cf. Merlin, *Rep. Testament*, sect. 1, § 5, art. 1, iii.

⁵ See e.g. judgment of the French Ct. 30th Aug. 1820 (Sirey, xx. i. p. 447).

⁶ This refutes the argument urged by Schmid and Asser-Rivier against the view taken in the text. They think that the law refuses effect to the last wills of incapable persons merely because it desires to protect these persons against thoughtless acts. But the person who makes a will which he can destroy or revoke at any moment cannot be said to be injured by it.

⁷ There are, for instance, differences between the Prussian A.L.R., which gives the prodigal a limited capacity of testing—viz. over one half of his estate—(i. 1, 13, i. 12, § 37), and the common law of Rome, which declares him quite incapable; in the same way, between the Prussian A.L.R. ii. 2, § 201, i. 12, § 16, and the law of Hamburg (Baumeister, ii. p. 51) on the

personal law provide the general rule; while, if one of these systems comes into conflict with the common law of England, the *lex rei sitæ* must determine questions as to the succession to real property.

§ 369. If a change of domicile or of nationality, as the case may be, has taken place, the last personal law is that which rules, in so far as it is that personal law which supplies the rule;⁸ but a testament which is bad from the beginning cannot be made good merely by a subsequent change of domicile. The capacity to test must therefore be present according to the personal law at the date of death, and also according to the law which was the testator's personal law at the date when he made his testament.⁹

That is the result of the following reasoning. If any one is incapable of executing a testament, he cannot test in any form;¹⁰ the testament which he executes is just as invalid as if it were null from some defect in form. In the latter case, no one would hesitate to say that it continued to be invalid. But we may reach the same result by another chain of reasoning. If the testament is null by the personal law which the testator enjoyed at the time he made it, it is certainly not made good by a simple change in the personal law of that testator. If, conversely, it is null by the last personal law he enjoyed, *i.e.* at the date of his death, to uphold it would result in an insoluble conflict with the rights of the heirs *ab intestato*, who would say with good reason that their rights must be determined by the last personal law of the testator and by no other law. This view¹¹ is supported by analogous provisions of the Roman law which treat of the change of the legal relations of a person under the dominion of the same system of law.¹²

If the testator has full capacity by the law of his last domicile and of that which he had at the time he executed the deed, but is *incapax* by the

one side, which give children *in familia* the right of testing, and the common law of Rome on the other side, which denies it to them. Further, the English Wills Act of 1837 (7 Will. IV. and 1 Vict. c. 26, see Lehr, *Droit civil anglais*, § 919) makes persons under 21 years of age incapable of testing. By the common law of Rome, on the other hand, *puberes* can test, and so by the law of France can persons over 16 years of age, but not to the same extent as persons of full age. [By the law of Scotland a *minor pubes* can test on moveables, but not on heritage.]

⁸ If incapacity to execute a testament were a special kind of incapacity to act, the law of the domicile which the testator had when he made it could alone be applied.

⁹ Savigny, § 377; Guthrie, p. 232; Wächter, ii. p. 365; Stobbe, § 34, note 55. Förster-Eccius, i. § 11, note 7, Asser-Rivier, § 64; Burge, iv. p. 450. The decision of the German Imp. Ct. (iv.) to a different effect on 10th Nov. 1887 (*Dec* xviii. No. 59, p. 315) is founded on the peculiar provision of § 13, Pt. i. *tit.* 12, of the *Preuss. Allgem. Landrecht.*, which regulated the validity of the testament in question, because the testator had his last domicile within its territory.

¹⁰ Incapacity to test arose, according to older Roman law, from the incapacity to do the act in which the testament was, as a matter of form, clothed.

¹¹ Cf. L. 19, D. 28, 1, § 4 J, *quibus modis test. infirm.* 2, 17.

¹² Here Savigny, § 377 (Guthrie, p. 282), makes a distinction between physical and legal qualities. As regards the former, he takes the view of the text; as regards the latter, he thinks that the personal law of the testator, at the time he made the testament, should rule. This distinction is not tenable for the legal systems of different territories. The physical quality is only recognised in so far as the law recognises it, *i.e.* in so far as it is a legal as well as a physical quality.

law of some domicile which he has in the interval acquired and lost, his deed must be sustained.¹³

NOTE II ON §§ 368, 369. CAPACITY TO TEST.

[In Scotland, capacity to dispose of moveables by testament is regulated by the law of the domicile. By the third section of Lord Kingsdown's Act (24 and 25 Vict. c. 114) it is provided that no will "shall be held to be revoked or to have become invalid . . . by reason of any subsequent change of domicile of the person making the same." This would seem to have the effect of making the question of personal capacity dependent on the law of the domicile at the date of the execution of the deed. Such a result seems to be in accordance with good sense, and is laid down by Wharton as the true result (§ 570), although Westlake (§ 86) makes the question of capacity dependent on the law of the last domicile exclusively. Whatever the law may be, it is the same in England, Scotland, and the United States (see Jarman on Wills, pp. 2 and 4).

As regards real estate, again, in these three countries an incapacity existing by the *lex rei sitæ* must receive effect. There seems to be some doubt as to whether an incapacity existing by the law of the domicile should receive effect, as well as any that exists by the law of the *situs*. Lord McLaren thinks it should (Wills and Succession, i. § 44), but Wharton, §§ 570 and 572, and Westlake, § 165, confine themselves to a consideration of the rule of the *lex situs*, the former approving the doctrine of the text.]

FORM OF *mortis causa* DEEDS.

§ 370. The form of the testament must be determined on the same principles. All those systems of law, however, which look upon succession as an universal succession have, by force of custom, incorporated the rule "*locus regit actum*," both in moveable and in real succession, without drawing any distinction in this respect between judicial and extra-judicial forms.¹⁴

¹³ Burge, iv. p. 451; Boullenois, ii. p. 194.

¹⁴ The following hold a testament is good everywhere, if it is in accordance with the forms required at the place where it is executed: Bald Ubald, in L. 1, C. de S. Trin. No. 83; Alb. Brun. *de Stat.* x. § 56; Alb. de Rosate, L. 1, qu. 46, § 1; Hugo Grotius, *Epistolæ* (Amstelod 1687, fol.), Nos. 464-467; Rodenburg, ii. c. 3, § 1; Christianæus, in *leg Municip. Mechlin.* tit. 17, art. 1, No. 9; Stockmans, *Decis. Brabant*, decis. 9, No. 1: "*Hodie sine hesitatione judicamus sufficere sollemnitates, quæ obtinent in loco confectionis*;" Bartolus, in L. 1 C. de S. Trin. No. 36; P. Voet, 9, c. 2, No. 1; Mynsinger, *Observ. Cent.* v. observ. 20, No. 4 (illustrating the practice of the *Reichskammergericht*); Gaill, *Observ.* ii. obs. 123, No. 1; Carpzov. *Defin. forens.* P. iii. const. 6, def. 12, No. 1; Everhard jun. *Cons.* vol. ii. cons. 23, Nos. 9, 10, cons. 28, No. 79; Jo. a Sande, *Decis. Fris.* iv. 1, defin. 14; Cocceji, *de Fund.* vii. § 1; Seger, p. 24; Mevius, in *Jur. Lub.* qu. 6, § 43; Petr. Peckins, *de Testam. Conjug.* iv. c. 28, § 9; Ziegler, *Dicast. concl.* 15, § 16; Vinnius, *ad Jur.* ii. 15, § 14, No. 5; Dion Gothofredus, *ad Leg.* 20, D. de *jurisdict.* 2, 1; Vattel, L. ii. ch. 8, § 111; Hommel. *Rhaps. Quæst.* vol. ii. obs. 409, No. 5; Hert, iv. §§ 23-25; Merlin, *Rép. Testament*, sect. 2, § 2, art. 6, No. iii. sect. 2, § 4, art. 1; D'Aguesseau, *Œuvr.* iv. p. 637; Ricci, p. 533; Göttingen Faculty of Law (in Böhmer, *Rechtsfälle*, vol. ii. p. 81); Boullenois, i. p. 422; Titius, *Jus. Privatum*, i. c. 10, §§ 34, 35; Bouhier, chap. xxv. No. 61; Cochin, *Œuvres*, i. p. 545; Mittermaier, § 32, p. 121; Von Grolman, Anonymous Papers on Holograph and Mystic Testaments, p. 20; Glück,

All systems of law, whether the succession be universal or not, have done so as regards moveable succession.¹⁵ The result is that it is sufficient to observe either the *lex loci actus* or the *lex domicilii*, provided that there is no doubt that the testator intended to make a will.

It is quite in keeping with the permissive character of this rule,¹⁶ that the law of England and that of the United States should hold the form of the testament, in so far as succession in moveables is concerned, as governed by the law of the domicile, primarily, and that in earlier times it should have done so exclusively.^{17 18} We can also understand how it comes to pass, since the principle of universal succession has not, as yet, fully made its way into these systems, that, in countries in which English common law prevails, real estate is held to be solely governed by the *lex rei sitæ*. For, as we have seen, the rule "*locus regit actum*" does not apply to the acquisition of real rights over particular things.¹⁹

Pandects, i. p. 291; Seuffert, *Comm.* i. p. 258; Renaud, i. § 42, note 21; Gand, No. 579; Savigny, § 381; Guthrie, p. 322. Judgments of the Supreme Court of Appeal at Wiesbaden, 16th October 1822 (Nahmer, 2, p. 171); Supreme Court at Berlin, 3rd April 1857 (Striethorst, 23, p. 353); of the Court of Cassation at Paris, 30th Nov. 1831 (Sirey, 32, i. pp. 51-58); Wächter, ii. pp. 191, 370, 371; Schäffner, p. 188, and authorities cited there. The Hanoverian order of 29th Oct. 1822 gives validity to the testamentary dispositions of Hanoverian subjects executed abroad before a foreign court, and in a foreign form. It cannot be inferred from this that the rule "*locus regit actum*" would be excluded, if a legal transaction, which in Hanover must be entered upon in court, did not need that formality abroad. Fiore, § 494; Laurent, vii. § 411, but see below; Brocher, ii. p. 39; Vesque v. Püttlingen, p. 278; v. Martens, § 76, note 7; express provision of the law of Russia, see Serebrianny, J. xi. p. 359, but see below, note 21. Peruvian Code, § 679 (see Pradier Fodéré, J. vi. pp. 268, 269).

¹⁵ Thöl, § 83, note 4, seems desirous of confining the rule to public testaments. That is undoubtedly counter to the *communis opinio*. See Felix, i. § 69.

¹⁶ For the permissive force of the rule, see in modern times Savigny, § 381; Guthrie, p. 319; Wächter, ii. p. 377; R. Schmid, pp. 97, 98; Lawrence Wheaton, iii. p. 123; Asser-Rivier, § 63 (p. 121); Weiss, p. 861, and the instructive judgments of the old Sup. Ct. of Baden of 24th April 1862 and 23rd April 1863, given by Seuffert, xviii. No. 104. The opinion that in these matters the rule "*locus regit actum*" has a compulsory, and not merely a permissive force, has hardly any support.

¹⁷ Phillimore, §§ 864, 865; Beach-Lawrence *ut cit.*; Wharton, § 585. Art. 19 of the treaty of the Spanish-American States of 1878 expressly provides: "Foreigners may test in these countries according to the laws of the country of their birth or of their naturalisation, or according to those of their domiciles. Lehr, *Dr. civ. anglais*, § 927. The practice of the United States seems now to recognise in moveables the rule "*locus regit actum*," see Wharton, § 588. Lord Kingsdown's Act [1861, 24 and 25 Vict. c. 114] now regulates the practice in England and in Scotland. As regards moveables, this Act did not extend the law of Scotland further than it had gone before its date.

¹⁸ A person who has lost British nationality cannot make a valid testament in English form abroad (J. xii. p. 120). [*Bloxam v. Favre*, 1884, L. R. 9, P. D. 130. See also *Re von Buseck*, 1881, 9 P. D. 130.]

¹⁹ The following favour the *lex rei sitæ*: Burgundus, vi.; Cujacius, *Consult.* No. 3 (but in his *Observ.* Lib. xiv. c. 12, Cujacius recognises the *lex domicilii*, on the ground of the L. 9 C. 6, 23); Wheaton, § 81, p. 109; Burge, iv. pp. 220, 581; Story, §§ 474-478; Wheaton, § 587. These last testify to the practice of English and American courts. We can specially appreciate the propriety of the view taken by English jurists in connection with the principles of their common law, which divides every succession into moveables and immoveables, if we remember that, up to modern times, there were two separate forms for wills, according as they dealt with moveables or immoveables, and that the Statute of Wills (7 Will. IV. and 1 Vict. cap. 26) was

The personal law of the testator may exclude the application of the rule "*locus regit actum*" either altogether, in which case subjects of one country living in another would often be prevented from executing any settlements, or to a certain extent.²⁰ (*E.g.* it may do so in some such fashion as by refusing to recognise private settlements even although they are made abroad.) The code of the Netherlands, for example, has excluded the rule partially in its 962nd article, and by a decision of the Russian Senate in 1875,²¹ purely verbal testaments made in a foreign country by a Russian are not recognised. Accordingly, if we go strictly to work, we must, if a question is raised about the settlement of a foreigner made in the form of the *lex loci actus*, first ascertain that his personal law does not contain any such prohibition.

Since the personal law which rules matters of succession is the personal law which regulated the personal interests of the testator at the moment of his death, the testament, if it is to be maintained by reference to the personal law, and is not to be supported by the rule "*locus regit actum*," must, as regards its form, comply²² with the personal law which the testator had at his death. If the rule "*locus regit actum*" is applied, then, of course, a testament which has once been validly executed in conformity with the *lex loci actus* will not be invalidated by any change of domicile,²³ although one which is not in conformity with the forms required by the law of the place where it was executed, but is according to the forms of the domicile of the testator at that time, will be invalidated if the law of

the first means of introducing one form for both kinds of estate, besides certain privileges given to soldiers and sailors in making testamentary settlements of moveable property. Stephen, i. pp. 591-593, ii. p. 188. For the *lex rei sitæ*, see Field, § 595. Lehr, *Dr. civ. ang.* §§ 924-926.

²⁰ Thus Asser-Rivier, p. 138, note 2. On the other hand, the Sup. Ct. of Spain, in an interesting judgment of 6th June 1873, declared the validity of a holograph testament made by a Frenchman, even with reference to real estate situated in Spain, recognising the personal law as regulative. See Torres-Campos, p. 292. All the treaties as to jurisdiction reported by Krug contain this rule: All legal transactions *inter vivos* and *mortis causa*, must, in so far as their validity in form is concerned, be ruled by the law of the place of execution." But to this provision we always have this addition, "so far as the act is not executed there in order to escape the prohibitive law of another State," or this, "if the validity of any act is, by the conception of the legislation of either of the States concerned, made dependent upon its being executed before some particular official body, this direction must be observed." Now such additions go to show that the rule "*locus regit actum*" merely confers a power, for if it were founded upon purely legal deduction, and if, therefore, the form of any instrument were necessarily regulated by the law of the place where it was executed, then it would be quite out of place to speak of an exception, in cases, that is, where the law of any State expressly desired to exclude the rule.

²¹ Serebrianny, J. xi. p. 363.

²² See Picard (J. viii. p. 487): "*La volonté du testateur n'ayant son expression définitive que par la mort.*"

²³ Fœlix, i. p. 263; Schäffner, pp. 195, 196; Supreme Court of Berlin, 3rd April 1857 (Striethorst, 23, p. 353). "The formal validity of a holograph will made under the rule of French law is not lost if the testator shifts his abode into the territory of Prussian law, taking the will with him, and dies there; but in order to revoke the deed, those forms and acts required by the law of the new domicile must be observed."

his latest domicile requires some different form.²⁴ This logical deduction is broken through by Lord Kingsdown's Act of 6th August 1861 (24 and 25 Vict. c. 114), applicable in England and Scotland. By it the testaments of British subjects are held to be well executed, if they are in conformity either with the law of the testator's domicile at the date of execution, or with the law of the domicile of origin, or with the *lex loci actus*. It is expressly provided at the same time that a change of domicile shall never invalidate a testament which has once been validly made. These provisions²⁵ are very useful in practice for a country, the subjects of which travel so much, but they are by no means obviously correct.

NOTE KK ON § 370. FORM OF *MORTIS CAUSA* DEEDS.

[The law of England and Scotland is settled as regards moveable estate, for persons dying after 6th August 1861, if they are British subjects, by Lord Kingsdown's Act (24 and 25 Vict. c. 114): that statute provides, by § 1, that any will or testamentary instrument made out of the United Kingdom shall be held to be well executed by English, Scottish, or Irish courts, whatever the domicile of the person making it at the time of death may be, if it is executed according to (1) the *lex loci actus*, (2) the *lex domicilii*, or (3) the law of the domicile of origin: the common law of England held before the passing of this Act that the character and validity of any document propounded must be tried by the law of the last domicile of the testator; in Scotland, on the other hand, the *lex loci actus* had always been sufficient to render a will dealing with moveables effectual (*Purvis' Trustees v. Purvis' Executors*, 1861, Ct. of Sess. Reps. 2nd ser. xxiii. 812), the law of the testator's last domicile being also admitted as regulative of his testamentary dispositions of moveables. The second section of Lord Kingsdown's Act extends this principle to the three parts of the United Kingdom; the third section provides that no change of domicile shall render a testamentary deed once regularly executed invalid, nor alter its construction. As regards wills executed by persons who are not British subjects, the law of England will continue to require observance of the law of the last domicile (*Bloxam v. Favre*, 12th February 1884, L. R. 9, P. D. 130), even although they may have been so at one time and have lost their nationality, *e.g.* by marriage: the law of Scotland will recognise the *lex loci actus* as well as that of the domicile.

With regard to real estate, the rule in England and Scotland formerly was that the form of testamentary deeds was regulated by the *lex rei sita*

²⁴ See in this sense Wächter, ii. p. 382; Unger, p. 208, note 190; Asser-Rivier, p. 138, note 2. Cogordan, p. 132, in relation to the effects of naturalisation, takes a different view; v. Martens, p. 323 (§ 76, note 8), and Muheim, p. 256. V. Martens refers to English authors. This is inapposite, for they are dealing with Lord Kingsdown's Act.

²⁵ See on this Act Westlake-Holtzendorff, §§ 81 *et seq.*; Lehr, *Dr. Civ. Aug.* § 927; Wharton, § 586.

solely, and in England this is still law. In Scotland, by the terms of 31 and 32 Vict. c. 101, § 20, the law applicable to deeds of a testamentary character conveying heritage has been assimilated, in so far as regards the formal requisites of such deeds, to that applicable to deeds dealing with moveables, and hence the provisions of the *lex loci actus*, if observed, will sufficiently establish the validity of such a deed. In *Connel's Trustees v. Connel* (1872, Ct. of Sess. Reps. 3rd ser. x. 627) it was held that under the terms of this Act an English will containing a conveyance of Scots heritage, which would not have been received in Scotland prior to the Act as a probative deed, was sufficient to convey that heritage as having been validly executed as a testamentary deed in England. American law is the same as the common law of England.]

EXECUTION OF A HOLOGRAPH TESTAMENT.

§ 371. It is doubtful, and has been made matter of debate, whether the 999th article of the French Code declares merely that the rule "*locus regit actum*" is a rule that may be used by any one who pleases, and thus simply applies that rule as a permissive rule of law, or whether it ties up a Frenchman, who wishes to test in a foreign country, to a choice between the holograph testament of French law and the *authentique* or public or official testament of the country in which he happens to be, so that testaments which are not executed by public officers or notaries, and are not holograph, must be declared invalid, *e.g.* testaments made before seven witnesses in a country where the common law of Rome prevails. The article of the code in question provides: "*Un Français qui se trouvera en pays étranger pourra faire ses dispositions testamentaires, par acte sous signature privée, ainsi qu'il est prescrit en l'article 970, ou par acte authentique avec les formes usitées dans le lieu où cet acte sera passé.*"²⁶ The literal sense of

²⁶ Cf. judgment of the Cour de Paris, 30th November 1831 (Sirey, 32, i. pp. 51-58). See provisions of a similar kind in articles 992, 982, of the Code of the Netherlands, and in a Grecian statute of 1830 (Schäffner, p. 194). It is only an apparent exception to the rule "*locus regit actum*," if by the law of any place in particular, testamentary forms are confined to the subjects of a country or the citizens of a town, a case that seldom occurs nowadays. Cf. Schäffner, p. 190. The older French law (see Bouhier, cap. 28, No. 20; Boullenois, ii. pp. 75 and 97; Merlin, *Rép. Testament*, § 2, 4, art. 1) gave the inhabitants of these provinces in which holograph testaments were known before the days of the Code Civil, the right of testing in this form in a foreign country, although on the erroneous ground that the question here was one as to a personal capacity which accompanied the individual abroad. Against this see the text, *supra*, pp. 295, 302. It cannot be said to be by any special kind of legal capacity that the inhabitants of one country have the power of expressing their testamentary wishes in this or in that form. Thus, for instance, the special provisions enacted by the Prussian A. L. R. for the execution of testamentary instruments by minors under eighteen years of age (A. L. R. x. 12, § 17), will not apply to testaments executed by Prussian minors in a foreign country. The disposing will of the minors is recognised. This is sufficient to exclude any question of personal incapacity which would have to be recognised abroad. The position is just the same as if the special provisions which at present apply solely to minors were extended to all the natives of the country. Brocher (ii. p. 39) takes a sound view. If,

the article seems to be that the Frenchman's choice is restricted as we have stated.²⁷ But it looks as if the authors of the Code Civil had thought of the holograph testament of French law as something which is in contrast with the *testament public*—a variety of which is the *testament mystique*, mentioned in the 967th article—and then as in contrast with the *testament authentique* (arts. 968 and 999). Then we should understand as included in the term *authentique* every testament executed in a form which any foreign country might have prescribed for the protection of all concerned, such, *e.g.* as a testament made before witnesses; ²⁸ and in truth a holograph testament, which, so far as form goes, is very simple, may be described, in contrast with testaments hedged with such formalities, as *non authentique*. Again, it is very difficult to draw the line between forms which constitute a testament *authentique*, and those which do not, and thus we are landed in doubts and difficulties, which are all excluded, if we look upon the 999th article as simply being an application of the rule "*locus regit actum*."

LIMITATIONS ON THE RULE "*locus regit actum*."

§ 372. Further, we cannot approve of the view which a few authors adopt that a testament made abroad, in accordance with the forms there recognised, by a subject of this country, will only be held valid if the testator has not found opportunity subsequently in his own country to use the forms prescribed by its law.²⁹ We can conceive such a provision existing, and indeed in one old system of law³⁰ we know that it actually did exist. But the universal law of custom, which lies at the root of the maxim "*locus regit actum*," decidedly rejects such a limitation, and it is all the more impracticable as, in each particular case, the fact as to whether there was or was not opportunity will be very difficult to ascertain, while, according as individual opinions on this question of fact may vary, the legal interests involved are exposed to the greatest uncertainty.³¹ This

besides, we regard the law of the nationality as the law which must in principle regulate questions of succession law, then it, and not the law of the domicile, must decide whether one can validly test in holograph form abroad. Judgment of the Sup. Ct. of Madrid, 6th June 1873 (J. i. p. 39).

²⁷ Laurent, vi. § 411, and the author of the discussion in J. vii. p. 381, especially p. 387. The practice seems doubtful. See Despagnet, § 516.

²⁸ The paper cited in the last note reaches the conclusion that a testament subscribed by the testator and two witnesses in the English form should be held to be a testament in *forme authentique*. The preliminary article 8 of the Italian Code simply recognises the rule "*locus regit actum*" in its facultative sense as applicable to all deeds "*di ultima volontà*."

²⁹ Alderflycht, *Privatr. der Stadt Frankfurt*, i. 511.

³⁰ *Lübisches Stadtr.* ii. tit. 1, art. 16: "If one of our citizens die abroad, having made a testament according to foreign law, that testament will be recognised by our law. But such a testament must be executed under the presence of approaching death, and not fraudulently and of set purpose to defraud heirs."

³¹ See Schäffner, p. 188; Savigny, § 381; Guthrie, p. 323.

theory rests undoubtedly on the proposition, which we have already refuted, that no legal transaction can be entered into in a foreign country, even though it be in conformity with the forms recognised there, if it is *in fraudem legis domesticæ*.³²

There is, lastly, just as great error in the theory,³³ that, if the legislature, by appointing some particular form for testaments, has endeavoured to defeat forgery and falsification, this form must be observed even in a foreign country, and the rule "*locus regit actum*" can have no application. But almost every form which is appointed by any legislature for the execution of testaments has this object in view; the necessary result of this theory, therefore, is to deny all force to the rule "*locus regit actum*" in so far as testaments are concerned, and indeed, since we may well suppose that the forms required in all other legal transactions have a similar object, the result would be that this rule, so useful to commerce and in many ways quite indispensable,³⁴ would be swept away. That is certainly not the theory of the Prussian Legislature, as the treaties concluded by Prussia with other States show.³⁵

DISTINCTION BETWEEN FORM AND SUBSTANCE OF A TESTAMENT.

§ 373. It may at times be doubtful whether a provision of the law has to do with the form of a testament, in which case the rule "*locus regit actum*" is applicable, or whether it is a proposition of substantive law, *e.g.* affects the capacity of the testator, in which case his personal law, or in other cases the *lex rei sitæ*, would be the only rule for guidance. The tests for distinguishing one class from the other, in their true legal sense, which we worked out in § 121, may guide our judgment on this matter.³⁶

We cannot regard a provision that a testament, in order to be effectual, must be executed a certain time before the death of the testator, as a formal provision. A provision of that kind means to enact that, if a testator does not survive the execution of his testament some definite period,

³² Rodenburg, ii. c. 4, § 8; and Boullenois, i. p. 427, propose that the *lex loci actus* shall not be recognised where the law of the domicile has been deliberately evaded. See, too, the judgment of the Supreme Court at Berlin, cited *infra*, note 48.

³³ Koch on § 23 of the Introduction to the Prussian *All. Landrecht*. (See, on the other hand, Förster-Eccius, § 11, No. 7 *ad fin.* i. 12, § 17, § 66, § 139. In § 17 it is provided: "Persons who have not yet passed their eighteenth year cannot execute testamentary deeds except as under guardianship in judicial form." By § 66: "Every testament or codicil must as a rule be laid before the court by the testator himself, or published in judicial form.")

³⁴ For instance, by the Prussian A. L. R. a testament cannot be made without the co-operation of the court. In France no court is competent to undertake such a proceeding. *Quid juris*, if a native of Berlin falls sick in France, and must make his testament there? See Demangeat on Félix, i. p. 168; Savigny, § 382; Guthrie, p. 328.

³⁵ Savigny as cited.

³⁶ Many authors, *e.g.* Bouhier, c. 25, § 61, make a distinction between intrinsic and extrinsic forms, and only allow the rule "*locus regit actum*" to apply to the latter. See i. p. 348.

the deed, however executed, shall not be recognised as a declaration of his will. This purpose is not consistent with the notion of a mere formal provision.³⁷ And accordingly, so early as 1734, a French ordinance (arts. 74, 75) declared that the *trois mois de survie* of the testator, which were required by some provincial laws, constituted a *statut réel* to which the rule "*locus regit actum*" could not be applied.

In the same way we do not count it a mere formal provision that the heir-at-law must, as modern Roman law requires (Nov. 115), be expressly instituted or disinherited. These provisions give the heir-at-law material rights, and it may be possible to discover in them a coercitive provision to regulate the interpretation of testaments, a matter which must, in its turn, be dependent on the personal law. On the other hand, it is much debated, whether the provision of the 968th article of the French Code, which declares testaments made in common to be null, is to be regarded as a provision on a matter of form, which in view of the rule "*locus regit actum*" may be left out of account, when a testament is executed in another country.³⁸ I should be inclined, in agreement with the preponderance of practice,³⁹ to hold it to be a merely formal provision in the true sense of the word, since nothing prevents the testator from making the operation of his own testament dependent on that of another person, if he does so expressly and in a separate testament of his own.⁴⁰

EFFECT TO BE GIVEN TO THE CONTENTS OF *mortis causa* SETTLEMENTS.
LIMITATIONS PUT UPON THE TESTATOR'S INTENTIONS. PROHIBITION
OF BENEFITS TO PARTICULAR PERSONS.

§ 374. The law which rules the succession generally will on the contrary, of course, be the primary rule for determining the effect to be given to the contents of *mortis causa* settlements: that law, apart from cases in which the *lex rei sitæ* affects the matter, is the personal law of the testator. Benefits given by such deeds, the institution of an heir and the gift of legacies, are valid only in so far as the testator was at liberty to leave something to the person whom he mentions. Thus a legacy by a Frenchman would be invalid, left by him, contrary to art. 909 of the *Code Civil*, to the doctor who attended him in his last illness, or to the clergyman who ministered to him, although neither of these persons was French. We give no general solution of the question which arises in the converse case, whether a doctor or a clergyman of French nationality would be barred from taking anything, where the benefit was given to them by a foreign testator, whose personal law says nothing to the contrary. Weiss thinks

³⁷ Mailher de Chassat, No. 23 *ad. fin.*; Cochin, Œuvres, i. p. 545.

³⁸ On this controversy see Laurent, vi. §§ 314-319.

³⁹ See Trib. Civ. Seine 23rd December 1881, J. ix. p. 322.

⁴⁰ To this effect Aubry et Rau, v. p. 598, and Brocher, ii. § 144. Laurent takes a different view. He thinks the personal law of the testator should decide.

(p. 860) that they would take nothing. The question, however, turns on the consideration whether we are to find in the prohibition a mere protective measure in the interest of the heirs-at-law, and of course in the interest of the testator himself, to protect him from importunity; or whether it is to be held absolutely incompetent that any clergyman or doctor should on such a title, we do not merely say receive anything, but, if he has received anything, should keep it. The 909th article of the *Code Civil* cannot be said to go so far as that against the doctor or the clergyman. If the heirs-at-law have voluntarily made over the legacy, they will not be entitled to demand repayment. The most that can be said, then, is that on a literal reading of the 909th article⁴¹ the law of France declares that no such legacy can be claimed, that the doctor or clergyman cannot demand the legacy in a French court. Thus the legacy is not absolutely invalid: the persons favoured may sue for it, *e.g.* in the courts of the testator's own country, if his personal law contains nothing to the contrary. A provision such as we find in art. 907 of the *Code Civil*, which withdraws from minors the power of making *mortis causa* dispositions in favour of their guardians, will, on the other hand, only be capable of being enforced, if it is contained in the personal law of the minor whose succession is in question. The question here is a question simply as to a rule for the protection of the heirs-at-law or of the persons who would otherwise have been favoured by the minor; a rule of that kind may be left to the testator's personal law.⁴² Nor can it be said that the guardian by demanding the legacy or claiming as *heres institutus*, commits any offence against morality or decency, even if his own law should say that he does. His administration has been under the personal law of the ward, and this may very well take the view that, through some other enactments of its own, *e.g.* the oversight of officials charged with the superintendence of curatories, or the necessity of minors being somewhat more advanced in life [*proximi majorennitatis*] before they can make valid testaments, or the imposition of special forms in the case of minors, any improper actings by the guardian are rendered impossible.

The case stands otherwise if the law forbids bequests to particular classes of juristic persons, *e.g.* churches, etc., or will only allow them to receive effect on special license being given by the sovereign authority (see *Code Civil*, for instance, § 910). In such cases, the object aimed at is a

⁴¹ Weiss deduces from the words, viz.: "*Les docteurs en médecine . . . ne pourront profiter des dispositions . . .*" an absolute incompetency in a French doctor or a French clergyman to take a legacy. Laurent, vi. § 209, deduces indeed from these words, that the question in such a case is a pure case of *incapacité personnelle*, and that the law of the person favoured is thus the only law that can be applied. The majority of French authors, on the contrary, favour the law of the testator. See the citations in Laurent.

⁴² So, too, Laurent, vi. § 208. The like decision must in my view be given with reference to the limitation, imposed by the 908th article of the *Code Civil* on *mortis causa* settlements by parents upon their bastards. This is Demangeat's opinion (i. p. 122) and Esperson's (J. viii. p. 227). Laurent, vi. § 211, takes the peculiar view that the limitation must exist by the law both of the parent and of the child. That would result in a sort of penalty upon the child.

double one: an estate shall not be withdrawn from the next-of-kin, or shall not be withdrawn from them for inadequate causes; and, on the other hand, the property of the "dead hand," as it is called, shall not be augmented at pleasure. A juristic person, therefore, takes only if it has capacity to do so both by the law of the testator and by its own law.⁴³ If the one law, like the other, makes the acquisition of the property dependent on special authorisation by the State, then this double authorisation must be procured.⁴⁴ If real estate is the subject of a bequest, and that real estate lies in a third country whose law again makes a special authority necessary to legalise the acquisition of real estate by any juristic person, or by the kind of juristic person in question, then, if the favoured foundation desires to possess these estates *in natura*, a triple authority must be obtained.

NOTE LL ON § 374. LIMITATIONS ON THE TESTATOR'S POWERS.

[The English law of mortmain, whereby real estate may not be devised by will to charitable institutions, depends on the statutes 9 Geo. II. c. 36, re-enacted by 51 and 52 Vict. c. 42, which are confined in their operation to England. These statutes have been interpreted to the effect that their provisions have no application in a case in which a charitable bequest payable to an English charity is to be satisfied out of real estate, which does not lie in England (*Beaumont v. Oliveira*, 1868, L. R. 6, Eq. 534). But, on the other hand, English land will not be allowed to be taken by a foreign charity (*Curtis v. Hutton*, 1806, 14 Ves. 537). As stated by Westlake (§ 165, p. 191), "all questions concerning a restraint on the alienation or disposition of immoveables are to be decided by the *lex situs*." The Mortmain Acts go further than a mere prohibition against charities taking the testator's lands *in specie*. It is equally impossible under their provisions, *e.g.*, for Scots trustees to realise the truster's estate in England and hand the proceeds in cash to Scots charities (see opinion of Mr Justice Kay furnished to the Court of Session in the case of *Hewitt's Trustees v. Lawson*, 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 793).]

The Scots court, in the case of *Boe v. Anderson*, 1862 (Ct. of Sess. Reps. 2nd ser. xxiv. p. 732), held that the validity of a bequest for charitable purposes must be determined by the law of the testator's domicile. If invalid by that law, it could not receive effect in a foreign country. The ground of the decision is that, as the legatees take their interest, if any, under the law of the testator's domicile, that law must be examined to see if their title to claim their legacy is good. If that law gives legatees of their character no title, then their claim must be rejected.

⁴³ In English practice the validity of a bequest *ad piam causam*, in so far as moveables are concerned, depends primarily on the *lex domicilii*. See Westlake-Holtzendorff, § 114, note.

⁴⁴ So, too, Brocher, ii. pp. 22, 23; Weiss, pp. 576, 852; Hingst (Rev. xiii. p. 408) reports that in Holland a royal license is considered necessary to enable a Dutch foundation to receive legacies, even when the estate bequeathed is real estate situated abroad. See, too, Laurent, vi. § 280.

Again, the case may well occur that a person makes an universal settlement, disposing of both moveables and heritage situated in different countries. He gives by this settlement certain benefits out of the moveable estate to the person who would, failing a settlement, take his foreign heritage by the law of the country where it lies, but disposes of that heritage to some other beneficiary. His settlement is found according to the *lex situs* to be inoperative as regards the foreign heritage. Is the heir in that heritage entitled to take the benefits given to him by the settlement, and also urge his right to take the foreign heritage *ab intestato*? Or is he compelled, if he shall approbate the settlement by taking under it, to forego his right to the foreign heritage?

The principle adopted both by the law of Scotland and England is that the law of the domicile of the testator shall give the rule, that the settlement, executed in accordance with its provisions, shall receive full effect, and that the heir shall be called on to make his election. Thus the foreign real estate, if the heir gives it up, will go to the beneficiary favoured by the deed which was inoperative, although, no doubt, it disclosed, plainly enough, an intention on the part of the testator. In this way the law of the domicile may be said to affect indirectly real estate situated in another country (Dundas, 1830, H. of L., 4, W. and S. 460; *Ker v. Wauchope*, 1819, H. of L., 1 Bligh, 1; Trotter, 1829, H. of L. 3, W. and S. 427, Westlake, § 125).

But if the person who takes the double benefit under the will shall not, by his renunciation of his right to the foreign heritage, give it up to the uses of the will; if the foreign law, *e.g.* by the Mortmain Acts, withdraws the heritage, on the renunciation of the heir, from the operation of the will altogether, then the heir will not be called on to elect: he will be allowed to take both his provision under the deed, and the heritage *ab intestato* (*Hewitt's Trustees v. Lawson*, 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 793).

LIMITATIONS ON THE POWERS OF THE TESTATOR. PROHIBITION OF SUBSTITUTIONS AND OF ENTAILS.

§ 375. Limitations on the power of the testator freely to give effect to his wishes as regards *mortis causa* dispositions are of course effectual for international purposes if they are recognised by the law which regulates the succession generally. Thus, in so far as the principle of an universal succession is recognised, such limitations, if in accordance with the personal law of the testator, will be effectual even as regards estates situated in another country.⁴⁵ It will, therefore, be out of the question to apply the rule "*locus regit actum*."⁴⁶

⁴⁵ According to Vattel, ii. ch. 8, § 111; Boullenois, i. p. 443; iv. p. 217; and Story, § 473, the *lex rei sitæ* will rule. According to Wächter, ii. p. 366; Savigny, § 377; Guthrie, p. 283; Seuffert, Comm. i. p. 259; Holzschuher, i. p. 80; Fœlix, i. pp. 261, 262; Koch, on § 23 Introduction to Prussian A.L.R. (i. 1, p. 56); judgment of the Supreme Court of Appeal at Cassel, 28th October 1840 (Seuffert, i. p. 98); judgment of the Supreme Court at Berlin, 3rd April 1857 (Striethorst, 23, p. 354); Roth, *D. Privatr.* § 51, note 118; and Fiore, § 407, the *lex domicilii*.

⁴⁶ Rodenburg, ii. c. 5, § 8; Hartogh, pp. 134, 135; cf. judgment of the Supreme Court of

This rule is applicable to the question of the competency or incompetency of conditions, substitutions, and entails. Accordingly, a French testator—in so far as the *lex rei sitæ* does not recognise succession as a singular succession⁴⁷—is bound by the provisions of articles 896-899 of the *Code Civil*, which forbid entails or substitutions, as the French law calls them, even as regards real estate situated abroad.⁴⁸ Such a prohibition has, however, at the same time, an immediate real effect: the law will not allow any such limitation on the right of property. Accordingly, even a foreign testator cannot leave his real estate in France to any one under the restrictions of an entail. An entail will thus be prevented, whether it be incompetent by the personal law of the testator or by the *lex rei sitæ*.⁴⁹ The same rule holds if by the *lex rei sitæ* a liferent cannot

Appeal at Wiesbaden, 16th October 1822 (v. d. Nahmer, ii. p. 155), and the judgment of the Supreme Court of Appeal at Cassel cited in the previous note (Strippelmann, ii. p. 109); Schäffner, p. 198. In the case suggested by several writers (e.g. Wächter, ii. pp. 366, 367) that the law of the place where a landed estate lies enacts that such estates shall not be capable of transmission *mortis causa*, as a rule, and in accordance with our own view, the *lex rei sitæ* must be applied. Such provisions do not as a rule exist unless there is in that country in reference to such property a modified form of particular succession in use, Rodenburg, ii. c. 5, §§ 3, 4; Hert, iv. 23; D'Aguesseau, Œuvres, iv. p. 637; Wächter, ii. p. 386; Judgment of the Court of Cassation at Paris, 3rd May 1815 (Sirey, 15, pp. 1, 532). The rule "*locus regit actum*" is rejected in this case. There may, however, be figured cases in which, according to an established system of universal succession, property acquired by inheritance cannot be diverted from the heirs-at-law; in such a case the *lex domicilii* decides. These cases, although historically a remnant of Germanic theories of law, constitute nowadays an enlarged right in the *heredes legitimi*, who, in the division of the succession, are secured not merely in the value of the property which they take as heirs, but must get the particular items of which it consists.

⁴⁷ Very often this exception is disregarded.

⁴⁸ Savigny, § 377; Guthrie, p. 283; R. Schmid, p. 100; Brocher, ii. p. 54; Laurent, vi. § 328, especially p. 558; Sup. Ct. at Berlin, 8th May 1865 (Seuffert, xx. § 4). This judgment, however, does not treat the case as one of legal incapacity to act; Esperson, J. ix. p. 237; judgment of the C. de Paris of 7th Aug. 1883 (J. xi. p. 192).

⁴⁹ Aubry et Rau, i. p. 84; Savigny, *ut cit.*; Schmid; Bouhier, cap. 27, §§ 91-93; Weiss, p. 865, note 2; Wharton, § 598; judgment of the Rhenish Ct. of Cass. at Berlin, 9th July 1823 (Volkmar, p. 235). [Freke v. Carbery, 1873, L. R. 16, Eq. 461.] (reported by Westlake, Rev. vi. p. 390). The rule of English law, by which the testator can direct the accumulation of the rents of his property for a limited time only, is applicable to the landed estate of a foreign testator situated in England. See v. Martens, § 76, p. 323; Laurent, vi. § 328 *ad fin.* is indistinct. If the entail is lawful, but only with the license of the Government, then in certain circumstances a license from the Government of the testator's country may be required, in addition to one from that of the *lex rei sitæ*. In doubt, the latter only is required, except in so far as the rights of persons entitled by law to a share in the estate are concerned. The law of the place where the estate lies, however, will always and exclusively regulate the competency of executing a family deed of entail which is not testamentary—i.e. which cannot be recalled by the voice of the maker himself—and if it is necessary, besides, to obtain the approval of Government, the Government in question will not be that of the entailor's domicile, but that of the country where the estate lies. For the execution of a deed of entail in such a case divides the estate so entailed from the rest of the property before death, while in the former case—i.e. of a deed *mortis causa*—the trust for entail, like any other bequest, depends upon the same destiny as regulates the whole inheritance. Stobbe, § 34 *ad fin.* gives the same result for the case of an entail by *mortis causa* deed, except that of course he insists upon the rights of *heredes legitimi*, and those who are by law entitled to claim a share of the succession being recognised. But a prohibition of

be constituted in favour of several persons in succession one to the other. If, by the personal law of the testator, moveables can be made the subject of an entail, it matters not that such an entail is, by the law of the place where this or that particular thing at the moment happens to be, illegal. The validity of the settlement is not affected. An article is incapable of alienation only if the law of the place where the thing is recognises that it is so, and a change of situation will remove this peculiarity.^{50 51}

If the legatee cannot take some specific thing that has been bequeathed to him in consequence of a provision of the law of the place where the thing is—a case which will occur but very rarely in these days when the principle of the equality of foreigners and natives in the eye of the law is almost universally recognised, and when the adherents of different religious professions are all treated alike—the question whether the legatee is entitled to the value of the thing must be decided by the intention of the testator, *i.e.* as a rule by his personal law.⁵²

An obligatory duty laid upon any person by a testament is invalid if the law of the place where the duty is to be discharged forbids it.⁵³

NOTE MM ON § 375. VALIDITY OF TESTAMENTARY PROVISIONS.

[The validity of a condition in restraint of marriage was held by the House of Lords to be determined by the law of the testator's domicile (Ommaney *v.* Bingham, 1796, 3, Pat. App. 448). The limitations imposed upon testators by the Mortmain Acts and other similar rules have already been considered, *supra*, p. 822.

It has been held in Scotland that, although by the law of that country moveables, *e.g.* jewels, cannot be entailed, there is nothing to prevent the will of a domiciled Scotswoman, who has directed such moveables to be settled along with English real estate (the law of England recognising the possibility of settling moveable property in that way) from receiving effect. The principle of the decision seems to be that the intention is not unlawful, but fails in Scotland from want of legal machinery to carry it out: if England can supply this machinery, there is nothing in public policy to prevent it (Marquis of Bute *v.* Lady Bute's Trs. 1880, Ct. of Sess. Ca. 4th ser. viii. 191).

If the law should, for reasons of public policy, forbid a testator to make this or that disposition of his property, *e.g.* forbid him to direct

entails, conceived as it is in the *Code Civil* (see also Italian Code, § 899), goes further: an entail directed by the settlement of a Frenchman, or an Italian, is invalid, even although those particular rights are not affected.

⁵⁰ Wächter, ii. p. 368.

⁵¹ Brocher, i. p. 422, is on this subject opposed to the absolute invalidity of a foreign entail in France, but gives no distinct solution of the question.

⁵² See the provisions of the law of Rome for the case that the legatee has not *commercium* in the thing bequeathed: L. 49, §§ 2, 3, *D. de legat.* ii. L. 40, *de leg.* i. The case is most likely to occur in the case of a legacy *ad piam causam*. The view of the English law agrees with what is said in the text. See Westlake-Holtzendorff, § 184, note.

⁵³ Cf. *supra* the law of obligations, §§ 248 and 255.

accumulation beyond a certain period, as by the Thelluson Act the law of Britain does, and fences its prohibition by declaring any such directions to be null and void, such a law must receive effect if the domicile of the testator is in Britain, or if the testator, being himself a foreigner, is disposing of the rents or produce of real estate situated in Britain (Freke *v.* Carbery, 1873, L. R. 16, Eq. 461).

Where the law of the domicile of a deceased person forbids one of the successors in moveables, if he is also heir in heritage, to claim his share of the moveables without bringing the heritage into the common mass, yet, if the heritage be in a foreign country, it will not be affected by this rule, and the heir will take it without thereby putting himself under any such obligation. So, too, in the converse case, where the heritage is in a country which applies the rule of collation, he will take both, since the law of the succession generally, the law of the domicile, knows no such law (Balfour *v.* Scott, 1793, H. of L., 3 Pat. App. 300; Robertson *v.* Macvewan, 18th Feb. 1817, Fac. Coll.]

RIGHTS OF *heredes legitimi* AND OF PERSONS ENTITLED BY LAW TO SHARE IN THE SUCCESSION.

§ 376. The right of *heredes legitimi*, and of those persons to whom the law itself gives a right to claim a share of the succession⁵⁴ (in the law of France the *Réserve* of the heirs-at-law, on the one hand, and the *quantité disponible* on the other) [in Scots law rights of legitim, etc.] must, of course, depend on the same law as regulates succession *ab intestato*. For these are simply rights in certain privileged heirs *ab intestato*, which cannot be defeated by the testator, or can only be defeated by him on certain conditions. According as we propose to apply the law of the domicile or of the *rei sitæ* to intestate succession, we must also apply either the one or the other to questions of this kind.⁵⁵ Of course,

⁵⁴ See, on the *querela inofficiosa donationis*, *supra*, § 235.

⁵⁵ For instance, for the *lex rei sitæ*: Argentræus, as cited; J. Voet, in Dig. 5, 2, § 47; Christianæus, in *leg. Municip. Mechlin.* xvi. art. 26, No. 4; Burge, iv. p. 303; for the *lex domicilii*, Bouhier, chap. 25, Nos. 50-56; Seuffert, *Comm.* p. 259; Walter, § 49; Wächter, ii. p. 365; Savigny, as last cited; R. Schmid, p. 100; Stobbe, § 51, No. 11; Dernburg, *Pand.* § 46, note 14; Imp. Ger. Ct. (i.), 29th January 1883, J. xi. p. 312. An undetermined case in the older French jurisprudence was whether, in the case that one *coutume* allowed a party to test upon a definite share of his *biens propres*, or *acquêts*, if he was possessed of *biens propres*, it was necessary to reckon up all the property belonging to one testator in whatever territory it might be situated, if a question arose as to whether he had exceeded the *quantité disponible* in his testamentary arrangements. Cf. Merlin, *Rép. Réserve Coutumière*, § 3, No. iii. But although by older French law, following the principles of Germanic law, the family estate was not held to be capable of being the subject of a disposition *mortis causa* or of a gift, and testamentary provisions were only allowed exceptionally in reference to some part of such estates, and the conception of a *quantité disponible* was retained by the Code Napoléon (cf.

therefore, if we proceed on the principle of an universal succession, we must take into account, in estimating the shares to which these *heredes legitimi* are entitled, real property which is situated abroad, just as much as real property which is situated in this country;⁵⁶ and in cases where donations are challenged as encroachments on the rights of these heirs, our computation must proceed in the same way. We must not, however, confuse the rights of a surviving spouse proceeding upon a marriage contract, or given by force of a law which directly regulates the relations of married persons in questions of property, with the rights of these *heredes legitimi*. The personal law of the testator or predecessor regulates the latter;⁵⁷ while the former are dependent on the law, which, once for all, settles the relations of the spouses in matters of property.⁵⁸ The provision of the *Code Civil*, for instance, by which a husband who contracts a second marriage is limited in his testamentary rights, forbidding him to leave his second spouse more than a specified proportion of his property, is a provision in the sphere of succession law.

In accordance with this doctrine, it is not the national law of children of a former marriage,⁵⁹ who may own allegiance to a State to which the testator does not belong, that will rule, but it is the testator's last personal law. So, too, the right of the poor widow by Roman law to the fourth part of the estate which is left, must be treated either as a true succession or as a legacy *provisione legis*,⁶⁰ and therefore as dependent on the last personal law of the deceased husband. This right, therefore, may, however inequitable such a result may seem to be in the circumstances, be lost by a change in the husband's personal law.^{61 62}

Zacharia, Franz. C. R. iv. § 586, notes i. and ii.), it can only be the *lex domicilii* and not the *lex rei sitæ*, as in the case of the old *coutumes*, that is to be applied in cases of conflict between the *Code Civil* and a system which holds the theory of succession as an universal succession; because the provisions as to the *quantité disponible*, contained in the *Code Civil*, are no longer limited to family estates or real property, but apply to all property, heritable or moveable. French authors, however, seem to regard the rights of the *héritiers à réserve* as a *statut réel* upon the same grounds as were assumed by the older authors. Demangeat on Fœlix, i. p. 63; Fœlix, i. p. 129; Aubry et Rau, i. pp. 84, 101, 102; and the decisions cited by Weiss (p. 866); judgments of Ct. of Cass. 22nd March 1865 (Sirey, i. p. 175), and 4th April 1881 (J. ix. p. 87); Trib. Civ. Seine, 6th December 1882 (J. v. p. 164). See Laurent, vi. § 273, on this traditional view. The more modern French school favours the application of the national law of the testator. Laurent, *ut cit.*; Asser-Rivier, § 65; Clunet (J. v. p. 165); Weiss, p. 866. Since the publication of the new Italian Code, all the Italian authorities take this last view. See Fiore, § 408; Despagne, § 530.

The law of England and that of the United States are logical on this point in distinguishing between the real and the moveable estate. Westlake-Holtzendorff, § 114, note; Wharton, § 570.

⁵⁶ But see Trib. Civ. Seine, 21st May 1879 (J. vi. p. 549); see also Clunet's note.

⁵⁷ Imp. Ger. Ct. (i.), 23rd January 1886, and (vi.), 12th December 1887: "The spouses' rights of property are ruled by their first domicile, their rights of succession by their last."

⁵⁸ Imp. Ger. Ct. (iii.), 8th January 1886 (Bolze, ii. § 36, p. 8).

⁵⁹ Trib. Civ. of Lyons wrongly so decided, 19th November 1880 (J. ix. p. 419).

⁶⁰ See Windscheid, *Pand.* iii. § 574.

⁶¹ To the contrary effect C. d'Aix, 21st March 1882 (J. ix. p. 541).

⁶² On the challenge of gifts *inter vivos*, see *supra*, § 285.

NOTE NN ON § 376. HEREDES LEGITIMI.

[The laws of England and Scotland adopt the doctrine of the text; for the former, see Westlake, § 122, p. 132; for the latter, the leading case of *Hog v. Lashley*, 1792, 3 Hagg. Eccl. 415, and 3 Paton's App. 247, and that of *Kennedy v. Bell*, 1864, Ct. of Sess. Reps. 3rd ser. ii. p. 587. The law of Scotland will not pay any heed to an English marriage contract, the terms of which are said to exclude a demand made for legitim out of the estate of a father who died a domiciled Scotsman, although at the date of the marriage contract, in which the claim is said to be discharged, he was a domiciled Englishman—*Trevelyan v. Trevelyan*, 1873, Ct. of Sess. Reps. 3rd ser. xi. p. 516. "The question seems to be this, whether or not the succession of a domiciled Scotsman is to be regulated by the law of Scotland"—*per* Lord Neaves.]

CONSTRUCTION OF TESTAMENTS.

§ 377. No general rules can be laid down for the interpretation of *mortis causa* deeds—*i.e.* for ascertaining the true meaning and intention of the testator. There is no doubt that in all questions as to the regulation of his family affairs, the author of a deed will be presumed to have had the law and the forms of expression recognised in his own country in view much more readily than in questions as to obligatory contracts; there is no necessity, as in transactions *inter vivos*, where one has to observe the good faith on which the other party relies, to demand that the forms of expression in use at the place of execution should be observed;⁶³ and accordingly the appropriate interpretation is as a rule that which the language in use at the testator's domicile, be it ordinary colloquial language, or technical language, requires.⁶⁴ We can, however, imagine cases in which the testator may express himself in the language of the place where the thing in

⁶³ Ct. of Bourdeaux, 17th July 1883 (J. x. p. 631); a testament was not necessarily to be interpreted by foreign law, because the testator, who was spending some time in a foreign country, had used a foreign form.

⁶⁴ The following support the interpretation according to the terms and language of the domicile:—Hert, iv. 25; Molinæus, in L. 1, C. de. S. Trin.; Jo. a Sande, *Decis. Ins.* iv. tit. 8, defin. 7; Feelix, i. p. 262; Burge, ii. 857, iv. 591; Story, § 479 *et seq.* A will executed in Scotland by a born Scotchman, who had settled in England, was interpreted according to the language of English law. Story, 479*f.* Illustrations: A legacy made by the will of an Irishman is *in dubio* to be held to be in pounds of Irish currency (Story, 479*b*); the persons indicated by the *lex domicilii* of the testator are those who must be presumed to be instituted under a destination to heirs-at-law (Burge, ii. pp. 857, 858; Story, § 479*h*). An heir, instituted by a testator domiciled in Berlin, need not, although the estate which he is to take lies in a country subject to the common law of Rome, or the testator, during a short stay in such a country, has executed his testamentary disposition before its courts, or had it recorded there, wait for the purification of the condition attached to his institution. He transmits to his heirs all that is destined to him, if the condition is operative at all. Prussian A. L. R. i. 9, § 369, 370; cf. L. and § 7, C. de *cad. toll.* 6, 51; L. 59, 101; D. de *cond.* 35, 1. For the *lex domicilii* see Phillimore, §§ 870, 871, 878; Westlake-Holtzendorff, § 160.

question is situated,⁶⁵ or may be presumed to have used that of the place of execution—*e.g.* if he has lived for some time at the place of execution, and has conceived his testament in the language of his temporary home and not of his domicile.⁶⁶

It will often be matter of doubt, whether we are to construe the language used by reference to the forms of expression known at the domicile, or those known in the native country of the testator. The whole scope of the testator's language must be taken into account, and we must also consider the circumstance whether the testator has or has not had for a long time the same domicile furth of his native country. If we take a man's national law as the law which on principle should prevail, we must in doubt construe the provisions of his last will in the sense which this law puts upon them, and construe his expressions as the language of his native country would be construed. When a man is making his last arrangements for the affairs of his family, he will generally be more likely to think of the country of his nationality, than he would be in making a contract of ordinary everyday life.⁶⁷

We should not, however, feel ourselves constrained, in a pure question of construction, where a change of domicile or of nationality had taken place, to regard the last personal law of the testator and the language in use at his last domicile as the proper test. The testator has declared himself in the language of the personal law which at one time was his, and has used its expressions. If he had desired to alter anything subsequently, he could have made a new will.⁶⁸

Older writers interpreted a man's testament as regards immoveables by the *lex rei sitæ*, and Wharton (§§ 592 and 597) still represents this point of view. We can only assent to this principle of construction in special circumstances. Although Wharton seems desirous of giving a preference to the law of the last domicile in cases in which, according to his view, the

⁶⁵ How is the case to be decided where a testator, belonging to country A, leaves to B, who belongs to another country, a legacy payable on B attaining majority? Is it the law of A or of B that is to determine the date of majority. In English practice it has been held [in *re Hellmann's Will*, 1866, L.R. 2, Eq. 363], that the court will recognise as major one who is major by the law of his foreign domicile, though still minor by the law of England, but will not pay a legacy to a father as the guardian of foreign infants, although the law of their foreign domicile authorises such payment. In my opinion, the question would be whether the postponement of payment was intended to confer an advantage on the person burdened with the payment, or to ensure the interests of the legatee, the legacy not to be entrusted to his guardians. In the former case the law of the testator, in the latter that of the legatee, will rule.

⁶⁶ Boullenois, i. p. 503; Savigny, § 377. Guthrie, p. 283, upholds the interpretation in most cases according to the law of the last domicile.

⁶⁷ Laurent, vi. § 303, does not in such cases give an absolute preference to the *loi nationale*, but in doubt he pronounces in favour of it. Weiss, p. 864; Despagnet, § 519.

⁶⁸ So, too, Laurent, vi. § 308. If the testator provides that the succession shall take its course as by law, the course of succession is that which prevailed at the domicile which the testator then had, and a subsequent change of domicile will make no change upon the law which is to be followed (so decided by the German Imp. Ct.; see Stobbe, § 34, note 55). This decision cannot be applied in every case in which the testator says that he leaves his succession to be ruled by the law.

domicile is the consideration which is to guide the decision, he seems by that to mean no more than that coercitive rules of construction on the one hand, that is, provisions which are in truth directly made by the law itself, must be applied according to the rules of the law of the last domicile, and that, on the other hand, a construction put upon a testament by a court of the last domicile must be recognised in other countries.⁶⁹

NOTE 00 ON § 377. CONSTRUCTION OF TESTAMENTS.

[In Scotland the law of the last domicile will regulate the construction of testamentary deeds as to moveables, unless the frame of the deed, and the circumstances of its execution, and the history of the testator, point to another law as intended by the testator to be taken as the canon of construction (*Mitchell & Baxter v. Davies*, 1875, Ct. of Sess. Reps. 4th ser. iii. p. 208). These questions were under review in the recent cases of *Brown's Trs.* 1890, Ct. of Sess. Reps. 4th ser. xvii. p. 1174, and that of *Smiths*, 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 1038. In the former of these cases, Lord Fraser held that the presumption in favour of the law of domicile at the date of death, was displaced by the facts that that was a derivative domicile taken by the testator, as a married woman, from her husband; that the settlement was executed in another country, by a lawyer of that country, in his own terminology, and created a trust the domicile of which was also in that country. In questions as to real estate, the law of Scotland holds that the *lex rei sitæ* will rule, but it has been decided that the terms of a foreign deed, executed by a domiciled foreigner, dealing with Scots heritage, and using technical terms of foreign conveyancing, will receive effect in Scotland in such a way as will most nearly give effect to the intention of the maker of the deed, although the technical language used may be unintelligible to Scots conveyancers (*Studd*, 1880, Ct. of Sess. Reps. 4th ser. viii. p. 249). The import of this decision seems to be that, although the *lex rei sitæ* will be presumed in cases of real property to be the test for the interpretation of ordinary, non-technical language, or of words which have a technical meaning in the law language of the *situs*, still, if technical foreign words are used, these must be translated with the help of foreign lawyers, so that the intention of the testator shall receive effect. If words are used which have a technical meaning both in the language of the *situs*, on the one hand, and in that of the place of the execution or of the drafting of the deed, or of the testator's domicile, or whatever may be the law which comes into competition with that of the *situs*, on

⁶⁹ The question whether a legacy, which has not been reduced into possession by the legatee himself, falls to his heirs, or rather to the heirs of the testator, or to the person who would be liable to pay it as a burden, must be determined by the personal law of the testator. Laurent, vi. § 313, who seems to reach the same result that it is a question of the construction of the testator's intention (*question de volonté*). That may be the case. But in many instances the testator will not have made the thing clear to himself (see art. 1039, of the Code Civil, and art. 890 of the Italian Code, which to some extent takes a different view).

the other, then the whole circumstances of the case must be scanned, in order to arrive at the testator's intention, the court being, however, always guided by the presumption in favour of the *lex situs* in cases of doubt.

The principles of the law of England, both as regards moveable and as regards heritable property, seem to be identical with those that have been applied in Scotland. For the rule in the case of moveables, Westlake, § 123, and *Bradford v. Young*, 1885, L. R. 29, Ch. D. 617, may be consulted. As regards heritage, see Westlake, § 170, and cases there cited.]

EXECUTORS OF A WILL.

§ 378. The powers of executors nominate must, logically, be determined by the testator's intention, ascertained, it may be, by construction, and by his personal law, in so far as this latter law is held to be regulative generally of questions in the succession. It would lead to intolerable contradictions if the rights of executors were to be determined by one law, while the rights of heirs and legatees were determined by another.⁷⁰ Even the provision of the 1031st article of the *Code Civil*,⁷¹ which only empowers the executor of a will to realise the moveables in exceptional cases, cannot be applied if the personal law of the testator gives the executor wider powers. It will be impossible to say that in such a case the question is one as to imposing a limitation on property, which is not sanctioned by the *lex rei sitæ* (see *Code Civil*, art. 541). The freedom of property situated in France will not be permanently prejudiced by such sales, and it is certain that commerce will not be impeded. The only matter in question is the right of the heirs. The opposite view would give rise to the most irritating complications. Of course, however, the executor, even when named by the testator, is bound by the general restrictions which the *lex rei sitæ* imposes on the assumption of the possession of the assets belonging to the estate (see below, § 383).

NOTE PP ON § 378. POWERS OF TRUSTEES.

[The powers of an executor will by the laws of England and Scotland be determined by the laws of the deceased's domicile, any express powers conferred on them by the deceased being, of course, recognised, unless these are against public policy. Where, however, a testator has appointed a continuing trust with a local habitation in another country, *e.g.* for the establishment of a system of charitable education there, then the law of

⁷⁰ In this connection, see Laurent, vii. § 168.

⁷¹ Laurent (*ut cit.*) is, by his theory of *ordre public* or *lois de police*, forced to declare this 1031st article to be a *Statut réel*. See the Dutch decision reported by Hingst (Rev. xiii. p. 408). "If by the Dutch law, the *lex rei sitæ* the executor needs a special authorisation for realising immoveables, then in every case an authorisation granted by the court to whose jurisdiction the testator belonged is sufficient."

that country will regulate the conduct of the trustees appointed for the management of the bequest, and will interpret according to its own rules the succession to the original trustees prescribed by the truster. If he has used, for instance, the term "heirs" of the original trustees, the law of the place of administration will read the word "heirs" in its own sense.

(Att. Gen. *v. Lepine*, 1818, 2, Sw. 181; *Emery v. Hill*, 1, Russ. 112; *Ferguson v. Marjoribanks*, 1853, Ct. of Sess. Reps. 2nd ser. xv. p. 637; and *Lord Deas in Boe v. Anderson*, 1862, Ct. of Sess. Reps. 2nd ser. xxiv. at pp. 755 *et seq.*)

The law of the *situs* will determine the powers of trustees of a domiciled foreigner vested with heritable property.

But while the powers of the trustees will, like other questions as to the import of the will of the deceased, be determined by the law of his domicile, or of the *situs* of real estate, as the case may be, the courts of any country in which trustees can be personally made liable, by reason of their presence within the jurisdiction, may interfere at the suit of a beneficiary to compel the trustees to do their duty, and may for that purpose entertain whatever process is most suitable. In England, the fact of the presence of trustees will justify what is known as an administration suit.

But while courts have jurisdiction, in such circumstances, to see that trustees carry out the trust committed to them, it may very well be that they should refuse to exercise the jurisdiction, because the courts of some other country present a more convenient *forum*.

While these statements are true of trusts with continuing powers of administration, they are not applicable to the case of executors; the jurisdiction to appoint them and to control their actings is purely territorial. See *Orr Ewing's Trs.* 1885, Ct. of Sess. Reps. 4th ser. xiii. (H. of L.) 1, and *infra*, pp. 839, 840, and also pp. 937, 938.]

REVOCATION OF *mortis causa* PROVISIONS.

§ 379. The recall of a *mortis causa* provision, by a final act of the testator himself, *e.g.* by his selling something which he had bequeathed as a legacy (cf. *Code Civil*, § 1038), is, of course, to be submitted to the test of the law which regulates the succession generally, without any regard to the place in which the act involving the recall was done.⁷² The rule "*locus regit actum*" is, however, the rule applicable to a recall effected by some special formal document.⁷³ But, since it is by no means necessary that an act which destroys some legal relation should have this destructive effect by the *lex loci actus*; since indeed it is quite sufficient—unless where in the case of real rights the *lex rei sitæ* has to be observed—that the loss of the legal relation in question should follow according to the rules of that law which regulates the material import of the legal relation; the recall of a testament, *e.g.* by a

⁷² See Brocher, ii. p. 50.

⁷³ Ger. Imp. Ct. (i.) 7th July 1883 (Dec. xiv. No. 43, p. 183).

deliberate cancellation of the document, will be effectual, if the personal law of the testator recognises such a cancellation, and in spite of the fact that this form of cancellation may be unknown at the place where the cancellation took place.⁷⁴ If a subsequent testament validly executed recalls a prior testament, then, in virtue of the rule "*locus regit actum*," the same effect must be produced by a subsequent testament executed in another country and valid by its law.⁷⁵ The cancellation of a testament by some particular events,⁷⁶ e.g. the subsequent birth of children, is in the same way to be decided by the law which regulates the succession generally.⁷⁷

CONTRACTS AS TO SUCCESSION.

§ 380. Contracts as to succession are substantially to be dealt with according to the same rules as testaments. Thus, unless the *lex rei sitæ* in some exceptional cases falls to be applied, the last personal law of the testator will rule. In mutual contracts the law of the first decessor will govern.⁷⁸ Of course, by an alteration in the personal law, it may be brought about that a contract as to succession which was originally valid, should become invalid or at least challengeable, if, for instance, the last personal law of the testator rejects such contracts altogether, or if it gives *heredes legitimi* larger rights of challenge. But the freedom to change one's domicile, to emigrate, and to change one's nationality, cannot be impaired by virtue of a contract as to succession, which cannot in any case be presented as a perfectly secure right of property.

III. TAKING UP THE SUCCESSION AND REDUCING LEGACIES INTO POSSESSION.

GENERAL PRINCIPLES.

§ 381. Special difficulties may be raised in connection with the taking possession of successions and legacies, or with the renunciation of them,¹ on

⁷⁴ Despagnet, § 521 : App. Ct. Hamburg, 12th April 1883 (Seuffert, xlviii. No. 202).

⁷⁵ Gand, No. 597, is of a different opinion. He approves of a judicial decision by which it was held that a holograph testament executed in France by an Englishman could not be revoked by a second testament executed in England, and complying only with the formal requisites of an English and not of a French deed of the kind, in so far as the first comprehended estate situated in France.

⁷⁶ On the effects of a change in the personal law upon matters of this kind, see *supra*, § 376, note 59.

⁷⁷ Trib. Bourdeaux, 17th August 1870, and again 5th August 1872 (J. i. pp. 183, 184), with reference to the 1698th article of the statute book of Louisiana.

⁷⁸ So Savigny, p. 314 ; Unger, p. 205 ; Schmid, p. 100 ; Stobbe, § 34 *ad fin.* ; Wharton, § 600.

¹ The possession and the renunciation of a succession must necessarily be subject to the same law. The latter is simply the negation of the former.

the other.² In the first place, it may be said without fear of contradiction that a succession can only be taken up by satisfying the requirements of the law which regulates the succession itself. This is a plain deduction from the fact that by taking up the succession a man excludes all remoter heirs and eventual legatees, while it must necessarily be the law of the succession in general that is to regulate the order in which these heirs are to be called and their rights.³ It was therefore quite logical in the older writers, who looked upon the *lex rei sitæ* as the general law for regulating the succession in immoveables (*e.g.* Burgundus, *ad consuet. Flandr.* ii. 16, Merlin, *Rép. voc. Dette*, § 4, note 1), to hold that the *lex rei sitæ* must regulate also the entry on the succession.

At the same time, the rule "*locus regit actum*" in its permissive sense must also be applied, if special acts, *e.g.* declarations of acceptance of the succession, are necessary and must be expressed in certain prescribed forms. Of course, if the idea of the succession as a singular succession is the prevailing theory of the law, the rule "*locus regit actum*" is then necessarily excluded,^{4,5} and, as in other cases, it may be excluded either expressly or by implication by the law which regulates the succession in its material aspects. On the other hand, doubts may easily arise of a real intention on the part of the heir or legatee to take up the succession or the legacy, if the law of the succession,⁶ or the law of the place where the heir or legatee resides, requires some particular form,⁷ *e.g.* a declaration in writing, while all the declaration that is made is an informal declaration.⁸ The rule that the law of the succession must be applied will suffer an additional exception, which is, however, an exception in appearance only, where that law prescribes special protective rules in

² At the same time the matter has, as yet, been very little discussed; the most thorough-going discussions are by Laurent, vi. § 373, and Brocher, i. § 129. The former's exposition is arbitrary, and not very satisfactory.

³ As the rights of creditors on the succession against the heir in all cases depend upon whether he has entered on the succession or not, *i.e.* really become heir or not, it follows that, no matter where these creditors are domiciled, or where their claims have arisen, they will have to recognise a renunciation of the succession which satisfies the law of the succession, *i.e.* as a general rule the personal law of the deceased.

⁴ To this effect Boullenois, i. 237, 238; Burge, iv. p. 641.

⁵ From this point of view it was an error in J. Voet (in Dig. 29, 2, § 31) to make the *lex domicilii* of the deceased the general rule for the taking up of the succession on account of a *quasi* contract to be discovered in the *aditio hereditatis*, which contract was held to have an universal operation.

⁶ Esperson (J. ix. p. 275) and Stobbe, § 34, note 47, seem to hold this law as the exclusive rule. See App. Ct. at Berlin, 17th December 1855 (Striethorst, xix. p. 186), and apparently to the same effect the App. Ct. at Lübeck of 7th February 1874 (Seuffert, xxxiii. No. 88).

⁷ *E.g.* the 778th article of the French Code requires a written acceptance by the heirs-at law.

⁸ The rule "*locus regit actum*" is, for example, in cases of succession which fall under the French law, excluded as regards the renunciation of the succession by the 784th article of the code. For the "*renonciation*" can only be made before a particular court ("*au greffe du tribunal de première instance, dans l'arrondissement du quel la succession est ouverte*"). See Laurent, vi. § 377, who deduces the same result from his mistaken theory of the *acte solennel*. See *supra*, p. 273.

taking up or in renouncing a succession, which are applicable to certain classes of persons only, obviously with the object of protecting these persons specially from a hasty decision which may be prejudicial to them, or with reference to their family relationships, as, for instance, in the case of a married woman. These are limitations on the capacity to act,⁹ and consequently it is not the law of the succession, but the personal law of those who take, that will regulate it.¹⁰

§ 382. It cannot, however, very well be that a person who belongs to another country, and who is resident there, should be bound simply in virtue of the law of the succession, which is quite unknown to him. Thus, for example, the heirs who take are only liable to creditors, if both the law of the succession and the personal law of the person taking, concur in holding that there is ground for that liability. We may infer that such a liability exists in the case of a foreigner, who, at the time when the succession opens, is resident in the country whose law governs the succession. But any such inference would be unfair, in the case of foreigners, from whom we cannot expect an adequate knowledge of the rules of a law of succession which is strange to them.¹¹ But a declaration of acceptance, whether it be valid on the principle "*locus regit actum*," or in conformity with the law of the country of the person who takes, if it satisfies at the same time the law of the succession, subjects the person who makes it, in accordance with the *quasi-contract* involved in the taking up of the succession, to the law by which that succession is regulated, as regards all the consequences of acceptance; e.g. the *beneficium inventarii* will be that which is known to this law. If there is to be an appeal to this *beneficium*, all the provisions of the law which regulates the succession must be observed.

⁹ Cf. e.g. *Code civ.* §§ 776 and 461.

¹⁰ See Stobbe, § 34, notes 48-50. To this category belongs, too, the question whether a trustee in a sequestration can take up a succession which has fallen to the bankrupt, or the curator of a lunatic one that has fallen to his ward. To this effect see Sup. Ct. at Stuttgart, 27th November 1879 (Seuffert, xxxv. No. 90); see, too, Sup. Ct. of App. at Lübeck, 7th February 1874 (Seuffert, xxxiii. No. 88); Sup. Ct. of Comm. of the Emp. 23rd October 1874 (Seuffert, xxxi. No. 2). The Ct. of Appeal at Oldenburg, 5th March 1863, is wrong in holding the law of the succession to give the rule (Seuffert, vi. No. 307).

¹¹ If the heir is domiciled in a country where Roman law rules—e.g. in the town of Hanover—he will not come under personal liability, although he allows the period which the Prussian law assigns (A.L.R. i. 9, §§ 384 and 421) for deliberation and making up of inventories to pass by without taking any steps, unless during this period he resides in Prussian territory. It is at variance with the principles of international law that inhabitants of one country should be put under obligations by the law of another country without their consent, and without having left their own territory (cf. judgment of the Supreme Court at Berlin, 1st Nov. 1850, Decis. 20, p. 204). All that the courts of Prussia or the next heirs and the creditors could do would be to require the heir domiciled in Hanover to make his election within a definite time, and if that elapsed without his taking any step, then the consequences provided for such a case by the Roman law would follow, unless the Prussian law is more favourable to the heir in the event of his taking up the inheritance. This latter limitation is explained by the consideration that the heir cannot be put under any further obligations than those which are imposed on him by the law under which the succession falls.

In particular, the liability of the person who takes for the debts of the succession is regulated by the law of the succession; this will determine *e.g.* whether he is liable *in solidum*, or only *pro rata*, personally or only to the amount of the value of the estate which he takes; it will determine his liability to collate,¹² and the dues payable on the succession.¹³

Some lawyers¹⁴ propose that on all these questions the law of the place where the greater part of the inheritance lies should rule. This proposal rests upon an erroneous application of the provisions of the Roman law as to jurisdiction in *Fideicommissa*, provisions which have nothing to do with local law.¹⁵

Others propose that the law of the last domicile shall be applied to all questions under this head, although for all other questions of succession they regard the *lex rei sitæ* as regulative. The reason on which they justify this view¹⁶—viz. that the obligations of the heir arise from a *quasi* contract, which must be held to have been entered upon wherever the last domicile (*domus mortuaria*) may have been—is condemned and refuted by their own general theory, by which succession is held to be a mere transmission of the various assets of property to the heir. Their mistake is accounted for in this way, that they apply the *lex rei sitæ* to cases of conflict between territorial laws that hold the theory of an universal succession; accordingly the grossest inconsistencies in questions as to the taking up of the succession and the liability of the heir are found to arise in attempting to apply this general theory.

TAKING POSSESSION OF THE SUCCESSION. LAW OF ENGLAND IN PARTICULAR.

§ 383. The actual taking possession of the different assets of the succession is, however, subject to the *lex rei sitæ*, and this rule is not confined to the case of immoveables.¹⁷ Accordingly, it may well be that, in cases of succession which, so far as the order of succession goes, are subject to the law of some other territory, the rule may hold good that the articles which belong to the succession cannot be taken into possession without some authorisation from the Government of the country in which they are, and that no debts due to the succession can be sued for—the law of the debtor being in this matter regulative—unless some such authority has been obtained. This is the case in England and the United States.¹⁸ The

¹² So Schäffner, pp. 179, 180. Boullenois, i. pp. 275, 276; Burge, iv. p. 730. It is obvious, however, that if the person whose duty it is to collate does not take up the succession, the other heirs can only challenge a gift made to him under the conditions stated above, § 362, pp. 795, 796. See Boullenois, *ut cit.* and the case cited by Story, § 146. [For the English rule on collation, see p. 826.]

¹³ Judgment of Sup. Ct. at Lübeck, 28th Feb. 1857 (*Frankf. Samml.* iii. p. 112).

¹⁴ *E.g.* Paulus de Castr. in L. *fin. fidei comm.* 50, D. *de jud.* 5, 1. Cf. L. *con. C.* 3, 17.

¹⁵ See against this, Savigny, § 376; Guthrie, p. 281.

¹⁶ See, for instance, J. Voet, in *Dig.* 29, 2, § 31.

¹⁷ Despagnet, § 500, 3.

¹⁸ See Lehr, *Dr. civ. anglais*, § 1006.

heir must obtain authority from a competent court to enter upon possession of the moveable estate—letters of administration—and then pay the creditors of the deceased and his legatees *in mobilibus*, under the superintendence of this court. This rule is applied to any moveable estate of a foreigner which may happen to be in England.¹⁹ The title of the heir to obtain letters of administration is, however, regulated by his *lex domicilii*, and this procedure takes place not only when the whole aggregate of a succession is in question, but even when a claim is made before the court to some one asset falling to the heir. Its object is to give security to the creditors and legatees, and its application to the moveable estate of foreigners situated in the country must be held, according to the principles of international law, to be as sound as to determine the rights of preference among the creditors according to their own law.²⁰ The carrying out of these principles in detail present a variety of difficulties. But as these involve for the most part matters of English law, it will be better to refer to English authorities for an exposition of them (in particular to Westlake and to Wharton).

It seems doubtful, and it is, in view of the multiplicity of commercial relations, a question of interest, whether one who has paid to a foreign heir *in bona fide*, before he has obtained letters of administration, is discharged of his debt.^{21 22} If, however, a foreign heir has once taken possession of an asset belonging to the succession according to the law of the foreign country, he needs no further authorisation to entitle him to vindicate this article if it is subsequently taken from him in England: he sues in his own name.²³ The administrator of an Englishman—or, if we take the *lex domicilii* as regulative of the personal law, of a person domiciled in England—appointed in England, will be treated in a foreign country as having a title to take possession of articles belonging to the succession, and to raise actions for debts due to the estate.

INTERPOSITION OF COURTS OF LAW IN MATTERS AFFECTING SUCCESSIONS.

§ 384. The interposition of the courts in matters of succession takes very different shapes in different countries. In particular, there are important differences in the conditions under which the courts *ex officio* assume the regulation of such estates, and specially again in their

¹⁹ See Story, §§ 507 *et seq.*; Wharton, §§ 604 *et seq.*; Westlake-Holtzendorff, §§ 57 *et seq.*

²⁰ Wharton, § 507.

²¹ Westlake, § 98, thinks that in strict law an English debtor will not be discharged, if the person who receives payment had no title from an English court.

²² Ct. of the Emp. (ii.) 29th December 1886 (Bolze, iv., note 17, p. 5); the law of the domicile of the deceased held regulative of the extent of the liability of those persons who, on the strength of their presumptive rights as heirs, have taken possession of the estate, and are called to account by the true heirs, although they have taken and held possession at some other place.

²³ Wharton, § 614.

procedure with reference to successions belonging to foreigners.²⁴ In recent consular treaties, consuls are, in many cases, invested with the right to assist in the regulation of successions belonging to subjects of the State which they represent. The extent of the powers so conferred is, however, very different in different cases. It is impossible, without encroaching on territorial rights of jurisdiction, to commit to consuls the task of satisfying creditors or settling disputes connected with the succession. On the other hand, the principles of international law contain nothing that need prevent them from having committed to their superintendence measures which are purely for preservation and for the division of the estate among heirs and legatees, all of whom belong to the same nationality as the deceased. (See *e.g.* Italo-German consular treaty of 1869, § 11; German-Brazilian consular treaty of 1882, § 18; Greco-German treaty of 1882, § 15; treaty between the German Empire and the United States in 1871, §§ 10 and 11.)

In England, the leading principle is that an heir, in so far as the moveable estate is concerned, must, as a matter of form, always be looked upon primarily as an "administrator": *i.e.* he must first be named administrator by the court, at one time the ecclesiastical court, now the Court of Probate (see Lehr, *Dr. Civ. Anglais*, § 1003). This holds even in the case of one who inherits from a person domiciled abroad, if he takes into his possession things which happen to be in England, or if he proposes to sue in England for debts due to the estate. But in such cases the English court will accept as authoritative the certificates and decisions of the court of the domicile, and will entrust the administration even of the English estate to the foreign administrator appointed by the court of the domicile. So far will this be carried, that if the court of the deceased's domicile recalls any declaration it may have made as to the title of an heir, the administration which was granted in England will also be recalled, and will be given out anew to the person who has a title under the sentence of the foreign court. But the powers of the administrator in England will be determined by the law of England. They can, however, in no case be wider than they are by the *lex domicilii* of the deceased: they will *e.g.* be limited if the *lex domicilii* limits them, as the law of Germany limits the powers of an executor, to interim measures. These arrangements and conceptions of English law lead to many doubts on matters of forms and relaxations of the strict rules.

If any special forms, such as entry in a register of securities, are

²⁴ F. Böhm's *Handbuch der Internationalen Nachlassregulirung* (Augsburg 1881) is principally dedicated to an exposition of the manner in which the courts of different civilised countries interpose, and of the rights and duties which fall upon the different parties affected. Of course, rules of private international law and of civil procedure have often to be applied, and the author gives a short sketch and a table of the order of legal succession for each one of the States, whose system he takes into consideration. See the detailed exposition of the treatment of the successions of foreigners in Austria in Starr's *Rechtshülfe in Oesterreich*, pp. 76-226.

required for taking up a real right bequeathed as a legacy, by the law of the place where the thing in question is, if, that is to say, the full right cannot be created or be transferred by the *mortis causa* disposition alone, then the legatee acquires by this *mortis causa* disposition no more than a right of action for this real right.

NOTE QQ ON §§ 383, 384. ADMINISTRATION IN ENGLAND AND SCOTLAND.

[Personal property situated in England cannot be taken up by an executor, nor will an executor have any title to sue in England, unless he has obtained an English grant of probate. So, too, in Scotland no executor will have an active title to sue the debtors of the deceased without confirmation. In both countries the jurisdiction of the court in matters of administration—using that word in its narrow sense of the procedure by which the representative of a dead man takes up his moveable property for distribution—is strictly territorial. But the courts to whom it falls to appoint executors will always respect the title already conferred upon a particular person by the court of the deceased's domicile, and will incline to appoint him to the office (*in re Stewart* 1838, 1, Cur. 904; *in re Oliphant*, 1860, 30 L.J.N.S., P. and M. 82 (*Preston v. Melville*, 1841, 8, H. of L. 1 and 2 Rob. App. 80) unless he is unfitted by reason of some circumstance (*e.g.* minority), which is viewed as a disqualification by the English or Scots courts (*Duchess of Orleans*, 1859, 1, S. and T. 253). So far is this principle of comity carried that, where an administrator had been originally appointed in England, the country of an ancillary administration, and a different person was appointed by the court of the country of the principal administration, the English appointment was recalled, so as to bring the administration in England into conformity with that in the foreign country. *Enohim v. Wylie*, 1862, 10, H. of L. 1.

When administration is granted to one on account not of a nomination by the deceased, but on account of a beneficial interest in the succession or of kinship to the deceased, it is to the law of the domicile of the deceased that we must look to determine the beneficial interest or kinship. (*Westlake*, § 75; *Alexander on the practice of the Commissary Courts*, p. 44.)

The statute of 1858 (21 and 22 Vict. c. 56) provides a simple and expeditious method of obtaining confirmation within the different jurisdictions of the courts of England, Scotland, and Ireland, but preserves intact the right of each country to dispose of the moveables situated within its territory by an order of its own courts.

When administration, in the sense already defined, has once been granted in any country, it must proceed in the country in which possession under that grant is taken (*Preston v. Melville*, *ut supra*). That is to say, the executor appointed by the courts of that country is not in safety to part with any of the assets taken up by him till the debts of the estate due to creditors in that country are paid, not even if he proposes to pay them over to

trustees appointed by the deceased for permanent purposes in another country. Creditors belonging to the country where an executor has been appointed, whether in the course of the leading administration or of an ancillary administration, are entitled to seek payment from him in the courts of that country, and, if necessary, to institute an administration suit so as to take accounts of the estate vested in that executor, and ascertain what sum, if any, remains to be handed by the executor to the permanent trustees, who belong to another country (Orr Ewing's Trs., 1885, Ct. of Sess. Reps., 4th ser. xiii. (H. of L.), 1. See Lord Chancellor Selborne, at p. 10, in explanation of the case of *Preston v. Melville*).

Where there is administration in another sense, *i.e.* a continuing administration by trustees, the courts of the country in which the trustees are personally present have jurisdiction to enforce the due performance of the trust at the instance of any beneficiary, and will exercise this jurisdiction, if it is shown that the trustees are evading an accounting in the country to which they are primarily subject. See Lord Watson's opinion in Orr Ewing's Trs. *ut supra*.]

DISTRIBUTION OF THE SUCCESSION.

§ 385. The distribution of the succession must in general be subject to the law of the succession. Most of the difficulties which arise in applying the provisions of the law of France on this subject are caused²⁵ by the fact that the law of France on this point, again, is in reality founded on the principle of an universal succession, while the tradition of French lawyers nevertheless tries to combine with it, so far as immoveable estate is concerned, the *lex rei sitæ*. It must, however, be kept in mind that provisions, the object of which is to extend to particular classes of persons, such, for instance, as minors, a special protection,²⁶ are not to be applied to foreigners belonging to these classes, if their own domestic law does not look upon such a measure of protection as necessary. Conversely, however, foreigners cannot make any such protective measures available, if they are not known to the law under which the distribution of the estate takes place.²⁷ Provisions, by which real rights are affected, and in particular affected in

²⁵ See specially Laurent, vii. § 13, who labours unprofitably in this subject, with his theory of the universal validity of the testator's intentions on the one hand—the testator has frequently not thought on the subject at all, and has therefore had no intentions on the point—and with the theory of the *statut réel* in the sense in which he uses the term. Brocher, i. § 133, and Weiss, p. 869.

²⁶ See Laurent; Weiss, p. 870.

²⁷ See Weiss again, p. 870, on §§ 466 and 840 of the *Code Civil*. Weiss does not indeed enunciate the principle which is adopted in the text (*supra*, p. 340). His deliverances are, however, in conformity with this principle. It is sufficient, then, to observe the law of the court which has the distribution of the estate in hand, if there is any question as to protective forms (Laurent, vii. § 20, and Weiss *ut cit.*). It would often be impossible as a matter of fact to observe any other forms, on account of differences in the constitution of different courts. But where, for instance, a guardian cannot undertake some particular transaction without the sanction of the supreme controlling authority, or of the family council, this approval is not a mere form, it is a material part of the transaction.

their relations with third parties, can only be carried out in so far as the *lex rei sitæ* allows it to be done. In these matters subtle distinctions often require to be made. Although, for instance, the law under which the succession itself falls, permits the testator to put off the distribution of the succession under certain conditions for a certain time (see Italian Code, § 984), a provision of that kind by a testator has no effect upon things which happen to be in another territory, where the rule is that every co-owner of a thing may at all times force a distribution, and where even an agreement to the contrary has no effect.²⁸ Although, again, the law of France (*Code Civ.* § 883) sets up the principle that, as it is generally expressed, the right which the co-heirs take has at the date of the distribution a declaratory effect, that is to say, must be regarded as if the co-heir, who eventually takes, had taken the whole subject directly from the testator, so that all rights in the thing created in the meantime by other co-heirs shall receive no effect, while the rights which the co-heir, who eventually takes, has created, receive effect over the whole subject; this rule cannot claim to receive effect in another country, *e.g.* in a country where the common law of Rome prevails, or in Spain, where the heir, who takes the thing at the period of distribution in its entirety, receives it as regards the shares apportioned to the other co-heirs as their singular successor.²⁹

A rule like that of the French law is very highly prejudicial to the rights of third parties, who may in the meantime have acquired real rights over the thing in question from the other co-heirs. It attacks the very system on which property and real rights as such are based. On the other hand, it would be a complete contradiction to apply that rule to some of the things which belong to the succession, while it would not be applicable to the rest of the articles that go to make up the same succession.³⁰ Thus it will only operate when the succession as a whole falls under the law of France, or under some other system which is similarly expressed, *i.e.* it only operates for the assets of a French succession which happen to be within a territory that is subject to the French law.

The same principles must regulate the obligation to collate (*rapport* in the law of France³¹): this obligation cannot have a direct real effect with retrospective operation (see *Code Civ.* § 865), unless the law of the succession and the *lex situs* both attribute these virtues to it [see *supra*, p. 826, as to the law of collation in England and Scotland].

²⁸ Weiss (p. 859) goes too far in refusing, on the head of the 815th article of the *Code Civil*, all effect to a provision of that kind made by an Italian testator over property situated in France. The testator's provision must have at least as much effect as can, under art. 815, be attained by means of a contract, *viz.* postponement of the distribution for five years. See Despagnet, § 505, who declares in favour of the *lex rei sitæ*.

²⁹ Weiss, pp. 872, 873, agrees with me. Laurent's inference (§ 28), that the intention of the party is the basis of art. 883, is entirely perverse and impracticable. Of course, parties always desire what the law of France enjoins, and thus everything and nothing can be proved.

³⁰ Laurent (§ 29) decides to the contrary, and of course finds that the result is inconvenient. As so often happens with him, he invokes the expedient of a treaty! Despagnet, § 505, decides that the *lex rei sitæ* is exclusively applicable

³¹ See Laurent, vii. § 30.

LIABILITIES OF THE SUCCESSION. RIGHT OF SEPARATION. TRANSFERENCE
OF THE SUCCESSION OR A PART OF IT.

§ 386. We have already, in expounding the general principles which regulate the law of succession, disposed of the incidence of the debts of the succession as a matter of principle. If we are not embarrassed by any of the special principles which cast the burden of particular debts on the real estate according to the *lex rei sitæ*, in which case there may well be an exception from the system of an universal succession,³² the only course which we can possibly take is to hold all who take under the succession liable in proportion to the value of their shares.³³ If we start with the principle that the personal law of the deceased shall be the only rule for the regulation of the succession, then without any further trouble we shall find in it the order of liability. That law, too, must decide whether and under what conditions those who take are liable beyond the amount of the succession with their own means, and whether they can save themselves from this further liability by taking and special precautions (*e.g. beneficium inventarii*). The heir cannot appeal in this matter to his own personal law. The law allows him to choose whether he will take up or renounce the succession, and allows him nothing more. The same principles must determine his right to recall his resolution to take up the succession.

The so-called right of separation enjoyed by the creditors on the succession, introduces a kind of bankruptcy procedure. In so far, then, as isolated groups of assets are made the subjects of particular [as distinguished from general] processes of this kind, the law which regulates each of these processes must decide as to the creditors' rights of separation. The primary object is to extract what was, as a matter of fact, the property of the deceased from the mass of property belonging to his heirs, and that has, as a rule, to be done in a question with the creditors of these heirs in bankruptcy, the rights which these creditors enjoy in respect of the bankruptcy being limited, as it is maintained, by this right of separation. But, since the

³² See *supra*, § 364 *ad fin.* The question, too, whether the heirs are liable *in solidum* for the payment of a legacy which is made a burden on the succession which they take, is a matter for the law of the succession, *i.e.* for the last personal law of the testator. The heir takes the succession exactly as this law gives it to him. See an interesting, and, as I think, a sound decision of the Ger. Imp. Ct. (iii.) of 2nd Feb. 1885 (Bolze, *Praxis*, 2, § 37, p. 9). If in the settlement it is provided that the heir, and not his heirs again, is to be burdened with the payment, but that he is not to be required to meet it during his life, the legacy not being payable till his death, then the law of the last domicile of the heir who has been put under the burden will decide whether his heirs are or are not liable *in solidum*: but if the heirs of the heir are burdened with it, then the law of the last domicile of the original testator will rule.

³³ Wharton, § 620 *ad fin.* See, too, Brocher, i. § 135, p. 432. He thinks that, for a satisfactory solution of these questions, treaties will be required. If the estate cannot meet its liabilities, and if therefore a kind of process of bankruptcy is set on foot—a character which the English procedure and that of the United States always have, and which other States have where the succession is taken up *cum beneficio inventarii*, then the principles of the international law of bankruptcy must apply. See Wharton, §§ 621 *et seq.*

lex rei sitæ is the law that must regulate particular bankruptcies, even as regards moveable property, this right of separation must also be ruled by that law.³⁴ On the other hand, the creditors of the succession have no other rights than those which are given to them by the law which rules the succession generally. This right of separation, then, only operates in so far as both systems of law concerned recognise it.

The question as to the effect of the transference of a succession as a whole, or of an imaginary share of it, the share *e.g.* falling to one of the co-heirs, must, on the other hand, be dependent on the law which rules the succession. For the ultimate question in such cases is whether the person who takes from the original heir is himself to be recognised as an universal successor, *i.e.* as having come in place of the heir. Accordingly the 841st article of the French *Code Civil*, which deals with the *retrait successoral*, and gives the co-heirs a right to buy out any one to whom one of these co-heirs has sold his share of the succession, on payment to him of the purchase price which he has paid or agreed to pay, will apply to all successions which depend on French law, successions to a Frenchman, but to such successions only.³⁵

ESTATE TO WHICH THERE IS NO HEIR. *Hereditas jacens.*

§ 387. The question to which State property is to fall where there is no heir, whether to that in which it is situated, or to that to which the last possessor belonged, is dependent upon whether the right of the State to succeed is to be considered to be a right *occupationis* or a right of consolidation belonging to the feudal superior,³⁶ or as a true right of succession. In either the first or second case, the property will go to the State where the property is situated; in the last case it will fall to that of the domicile of the deceased, in so far as both States hold the theory of an universal succession, or as the estate is made up of moveables.³⁷ The theory which is in conformity with modern ideas of law, which is more deserving of our respect, and which undoubtedly now prevails as the theory of the law

³⁴ Brocher, i. § 135, p. 435, agrees with the result. Laurent, §§ 56, 57, hesitates between *statut personnel* and *réel* as a description of the character of the rules of law as to this right of separation. Despagne, § 509, decides in favour of the personal law of the deceased, and thinks that the *lex rei sitæ* should be observed as well, but only with reference to a few regulations, which exist in the interests of public credit (*e.g.* *Code Civ.* §§ 2111 and 880).

³⁵ No unreasonable results will flow from this theory, unless the *lex rei sitæ* is perversely applied to the successions of foreigners in France, or, on the other hand, to the succession of Frenchmen abroad. See Laurent, vii. § 26; Brocher, i. § 133 *ad fin.*

³⁶ So in real estate by the law of England (Blackstone, ii. p. 243; Stephen, vol. i. p. 433).

³⁷ Savigny, § 377; Guthrie, p. 285, decides in favour of the *fisk* of the domicile, from the point of view of the Roman law, which treated the *fisk* as a real heir. So, too, Roth, *D. Privat.* § 51, note 120.

in Germany,⁸⁸ is that, if there is no one nearer in blood to be called to the succession, a man's fellow-countrymen must be regarded as his heirs. This view is supported by the fact that it is the State to which a man belongs that fixes the circle of those who are entitled to succeed to him as heirs, drawing it more or less wide, as it pleases; while, on the other hand, it has more or less of the air of robbery for a State to seize on the moveable estate of a deceased person, who was by mere accident resident there at the moment of his death. Thus the State whose subject and citizen the deceased was, will be entitled to succeed to him. But, beyond Germany, the other rule still prevails, and each State seizes the moveables which happen to be within its borders.⁸⁹

The law which governs the succession generally must regulate the question of curatory of an *hereditas jacens*. Thus, if an universal succession is the prevailing theory, the personal law of the deceased will determine the power of the curator to realise the estate, and to raise actions in connection with it, and the officials of the State to which the deceased belonged will name the curator. Any State, of course, within whose territory assets of the succession are found, may set up a provisional curatory for an *hereditas jacens*.

⁸⁸ See Windscheid, *Pandekten*, iii. § 622, note 1; Unger, *Das österreichische Erbrecht*, § 90, note 10.

⁸⁹ So in particular the law of France, on the ground that the question is one as to sovereign rights: if we consider it closely this is a *petitio principii*. See Laurent, vi. § 255: he approves of the French rule; so, too, Weiss, p. 850. Yet there are not altogether wanting defenders of the view taken in the text even in France; Laurent himself cites Antoine, "*de la succession légitime et testamentaire*," p. 89; Fiore pleads the right of *occupatio* (§ 402).

Wharton (§ 693) favours the view that immoveables must fall to the *fisk rei sitæ*; he very properly distinguishes countries in which an universal succession is recognised from those in which it is not.

In Bavaria, according to Roth, the principle of *occupatio* prevails.

The Austrian *fisk*, on principles which Unger describes as being universally regulative of succession in its international aspects, will appropriate the estate left by a foreigner who has no heirs, so far as it is immoveable and locally situated in Austria, and the whole estate of an Austrian who has become domiciled abroad, and who dies without heirs, in so far as it is situated in Austria.

Eleventh Book.

LAW OF PROCESS.

I. GENERAL PRINCIPLES.

THE PROCESS AS A WHOLE.

§ 388. When any legal relation is made the subject of competition or dispute in court, it assumes a new shape. It is submitted for ascertainment and constitution by some particular sovereign authority, or by its courts. From what has already been laid down (p. 79), it necessarily follows that it is submitted to the operation of the law of the court which is charged with the process, but, from the nature of the case, in so far only as the provisions of that law on the matter of procedure are concerned; it is not submitted to any rules that may be found in that law dealing with the legal relation as such, and apart from its aspect as the subject of an action. Again, since the decree in a process may itself be regarded as an independent legal relation, which will no doubt react in its turn on the substantive legal relation, we reach this proposition, viz. the rules of procedure to be applied in any process are always to be found in the law of the country to which the court belongs, the *lex fori*.¹

¹ See, in particular, Foote, p. 500: "No principle of private international law is more certain in itself, than the rule that the form of remedies or modes are regulated solely by the law of the place where the action is brought." On the other hand, it is a mistake to apply to the constitution and the procedure of courts of arbitration no law but the law of the country to which the contract of submission in itself belongs (see Ger. Imp. Ct. (i.), 2nd July 1884, Blum, *Ann.* i. No. 1). This decision bears that the 857th section of the German *Civilprocess-ordn.* contains substantive provisions of law [and is not a mere code of procedure], and that, therefore, in certain circumstances it is not to be applied by German courts. The section deals with the case in which circumstances may require that an arbitration process should be facilitated by the nomination of an arbiter by the competent court. By the older common law of Germany it was incompetent to do anything of the kind, unless special provision were made for it in the contract of submission. It must also be kept in view that some summary form of procedure is allowed by reason of the assent of the debtor as implied in the terms of his contract: it can only be put in force if the *lex fori* and the *lex loci contractus* concur in holding that the contract is to be so construed (see e.g. Colerus, *de proc. execut.* ii. c. 3, §§ 21-23).

We reach the same result in another way. The process with all its forms, and all the procedure by the parties and by the judge, has this object, and this object only, viz. to create in the mind of the judge a persuasion that the rights which are in question do or do not exist. Just as, in the case of an individual, persuasion can only be effected by attention to the peculiarities of his character, the State, in the same way, represented by its courts of justice, will only allow itself to be persuaded according to the peculiar regulations under which it has placed itself.²

PARTICULAR STEPS OF PROCESS. APPLICATION OF THE *lex fori*.

§ 389. It may, however, happen, in the course of what may be a long series of different steps of procedure which go to make up a process at law, that some of these steps of procedure must necessarily be taken outside the State to which the court that is to decide upon the whole case, belongs. Are we then to follow the law of the place where these isolated steps of procedure take place, or the law of the court in which the action has been brought, and by which the decision in the action, *i.e.* the decision as to the legal relation which has become the subject of a dispute, is to be pronounced?

In this case, too, it is a matter of no difficulty to find the answer, which follows from the logical application of the principle which we have already recognised.

The steps of procedure which fall to be taken in a foreign country are simply conditions and preliminaries for further procedure in the court in which the process is pending, and in which the decision upon the main question in the case is to be given, and in particular they are necessary conditions of the decision which is eventually to be pronounced there. If in the circumstances of any case it should be necessary to cite a party, or take the evidence of a witness, or make some inspection, or refer some point of the case to oath in a foreign country, the court where the leading process depends must be guided by its own law in determining whether the act that has been done in another country will warrant it *e.g.* in proceeding with a hearing in the absence of the persons who have been cited, or in going on to give judgment on the truth or falsity of the averments of parties.

The opinion which we have pronounced as to steps of procedure taken in a foreign country is, however, liable to serious modification, if we have to consider a case, in which the court where the principal process is in dependence requires some magisterial or judicial procedure to be gone

² It is often attempted to refer the exclusive or predominant application of the law of the court to the fact that the matter is one of public law (see Mittermaier, *Archiv. für die civil. Praxis*, vol. xiii. p. 298). On the other hand, Wach (*Civilproc.* p. 220) rightly asserts to the contrary that "a judge of this country is often compelled to apply the public law of another country, *e.g.* if the relation which is in question is one of *status*, and is a relation which belongs to some foreign territory."

through in a foreign country, or a case where the rule "*locus regit actum*" may be applied.

A magisterial or judicial act can never be performed by the functionary charged with it, except in the mode which the law of his own State imperatively enjoins as the mode which in all cases must be observed. An act which is wanting in some of the essentials thus imperatively required by that law is in its legal aspect no valid magisterial act at all, and cannot be so regarded even by the judge of another country. If the law of a judge, before whom some instrument is being drawn up, requires, for instance, the co-operation of some specially qualified draftsman, then any draft drawn up by the judge alone, without the co-operation of a draftsman, cannot, even in a foreign country, be recognised as valid. It cannot be so recognised even in a country, in which a judge does not in the like circumstances require to have a draftsman's co-operation. It is, of course, quite possible that State A is well justified in reposing a more extensive confidence in its judges than State B can repose in its judges.

Again, as regards the rule "*locus regit actum*," it is in the first place possible, that the performance of any act may be subject to coercive laws and to customs which prevail at the place where it has to be performed. These laws or customs must regulate procedure in such cases just as they regulate the conditions of the performance of an obligation. An example of such customs will be found in the existence of certain holidays. But, in the second place, the court where the principal process is depending may be concerned to secure that one of the parties, or a witness—a specialist—should do something which gives rise to a special obligation either under the principles of civil or of criminal law, *e.g.* should emit an oath. In undertaking an obligation of such a character, in particular if it is an obligation of public law, or of criminal law, the *lex loci actus* must be observed. The court in which the principal cause depends must require that the law of that foreign country should be observed, if it desires to have some record or document strong enough to serve as a foundation on which it may base its own judgment on the case. It may possibly go further in its demands, and may require something more than the foreign law allows, in conformity with its own ideas, but as a general rule there will be no object in doing so.³

It is certain that a judge, who is not entrusted with the decision of the leading points in the case, but to whom there is merely committed some subsidiary and isolated point requiring to be disposed of in the course of the main action, has no other law but his own to guide him. If he were to release himself from the rules of this law, and to appeal to the divergent law of some other country, his actings would be null, and under certain circumstances he might make himself criminally responsible. Whether he may, without prejudice to his duty of observing his own law, and in order to satisfy the requirements of the law of the court where the principal process is in dependence, follow, in addition to his own forms, forms that

³ In the same way the law which regulates the substance of a legal relation may exclude the recognition of the rule "*locus regit actum*."

are prescribed by the foreign law in the like cases—the parties to the case acquiescing—is a question of the neighbourly respect that every country pays to the law of other countries, which we shall deal with more fully in due course. In the meantime a more important question, which may be raised in connection with the auxiliary procedure, is the following.

Every civil action involves in substance, on the one hand, a determination of parties' rights, and, on the other, a compulsitor for the actual realisation of rights which have been or are to be determined. This compulsitor may in the abstract be regarded as a process auxiliary to the determination of the rights of parties, but, like every other public or official auxiliary process which invades the legal jurisdiction of a foreign country, this compulsitor is in some degree subject to the law of the land in which it is carried out, and this question at once arises, viz.: Must a court to which application is made to enforce or to authorise the enforcement of some foreign decree, assume, in dealing with the application, that a foreign decree stands on the same footing as a decree pronounced by one of their own courts? Is a foreign judgment, as regards its effect upon the substance or the form of the right that is in question, and its enforcement, to be placed on the same footing as a judgment of a judge of this country? or on what conditions is it to be so ranked? If we assume, in the meantime, that, under certain conditions, this may and must be so, it is obvious that the question, whether the foreign judicial sentence, with which in any particular case we are concerned, is a good decision in law or not, is a question that must primarily be answered by the law of the foreign judge himself. The question, on the other hand, whether this decision is to have legal effect given to it in this country, is a question for our own law, guided no doubt by general principles of international law, which are everywhere recognised, and permeated by common international conceptions of justice.

In recent times, Wach in particular has offered a very sound opposition to the authority of the rule that the judge can only apply his own native law, and cannot apply foreign rules of procedure. It follows from what has been said, that he must not unfrequently examine the foreign law, and make application of it, whether it be that he proposes to use some step of procedure that has been taken in a foreign court as a foundation for his judgment, or that he proposes to enter on some procedure in his own court that is auxiliary to a foreign process, or to give authority for such procedure. This much, no doubt, is true, that in so far as the question is one of the conduct of a piece of procedure or of its operation, the judge's native law must be applied to regulate the procedure, and to determine the effect in this country of any procedure of a foreign court. Since the ways and means, by which some substantive right is to be pleaded in court, are quite a separable and distinct idea from that of the substantive right itself, since these ways and means are, as it is often expressed, no *jus quæsitum* of the parties, we cannot imagine that it should be necessary for the law of procedure to take into account the long antecedent history of the

substantive right, and all the effects which a chain of different legal systems, belonging to different countries, have had upon it. The relations of parties in a suit, as such, arise for the first time within the territory belonging to the law of the court in which the suit depends, and arise under the conditions which it imposes, although incidental steps of procedure, emerging in the course of the suit, may again allow a series of foreign systems of procedure to come into operation. Accordingly, it is necessarily a matter of much less frequent occurrence, that occasion should be found for the introduction of any foreign system of procedure, than that private persons, by coming and going from one country to another, by the despatch of goods and the exchange of offers and acceptances from one country with another, should tend to impress upon their substantive legal relations the stamp of a series of legal systems belonging to different territories. It is thus true, as a matter of fact, that the rule that native law is to be applied is much more universally applicable in the law of process than in matters of substantive right. But, in so far as international law is concerned, we can recognise no other principle in matters of procedure from what we recognise in matters of substantive law. When we say that the judge, in so far as procedure is concerned, can apply none but the law of his own country, this is only true, as a matter of principle, in the same sense as it is true in questions of substantive law. The judge must yield absolute obedience to the law of his own country. But, although that law may completely exclude consideration of all other systems of law, it by no means follows that it will do so. The necessity for orderly and secure commerce, the nature of the subject that is to be dealt with, and traditional usage, are available to assist us in interpreting the law on this side, just as we can also avail ourselves of certain principles of public law, which the legal system of a State cannot transgress on pain of severing itself from the general community of public law in which all civilised States have a share.⁴

⁴ To this effect Menger, § 12, on note 4. Savigny, on the contrary, § 361; Guthrie, p. 146, errs. So, too, does Wetzell, *System des ordentlichen Civilproc.* § 42, note 23. These authors maintain that the judge, in all questions as to the prosecution of a right, must follow exclusively his own law. V. Bülow in *Archiv. f. d. civil Prax.* vol. 64 (1881), p. 151, supports the rule that suits belonging to this country must follow the process law of this country, by the consideration that "a judge who should proceed in accordance with foreign rules of procedure, would turn himself into an official of another country, and would be false to the duties he owes to his own State." But no one asserts that the judge is to apply foreign law at the bidding of a foreign power; what is asserted is that he may apply it at the bidding of his own law, not perhaps expressed, but implied from the nature of the question that is being dealt with. See in this sense Wach, *ut cit.* But, although I entirely assent to all the rest of Wach's criticism of the formula proposed by v. Bülow and the grounds on which he puts it, I cannot regard Wach's own formula as altogether happy. On p. 220 he says, "The native judge must apply foreign law, in so far as the question is one as to the operation to be allowed to steps of procedure that have taken place abroad, in this country." It would be sounder to say that foreign law must settle what are the requirements of steps of procedure that take place in the foreign country, but that the law of this country must determine the effect of steps of procedure taken in this country in connection with the foreign suit. Perhaps that is all that is meant. The effect to be given to legal procedure abroad upon legal procedure here is dependent on the

SUBSTANTIVE RULES OF LAW IN THE SHAPE OF RULES OF PROCEDURE.

§ 390. Most authors,⁵ however, adhere to the simple rule, which in practice is approximately correct, that in the law of procedure the *lex fori* alone shall rule; they admit the possibility of taking foreign rules of law into account as an exceptional matter, and notice at the same time that it is not always easy to decide, whether we have to do with a rule of substantive law or merely with a rule of procedure.⁶

Many laws are only apparently rules of procedure, but, in truth, are rules of substantive law, or, at least, are so mainly. For, just as in older systems of law, legal relations are very frequently embodied in the forms of judicial procedure, so it is far from uncommon, even at the present day, to explain the legal import of particular facts by the form in which they must be presented in pleading before a court, and according to the conditions and limitations which regulate their presentation to the court. We must not deny to a law, which treats of the method of setting a legal right before the court, all influence upon the material legal relation which is to be discussed: and if, for instance, it is enacted that a certain state of facts shall not be considered as valid either to found an action or to meet it, the result, of course, is to declare that that state of facts shall not give rise to any rights, a form of expression which rests upon the consideration that it is only such facts as can be in some way pleaded in an action, that can be said to have the character of legality at all. The question does not depend upon whether the doctrine of law is on its face described as a rule of process, but rather whether its sole object is the determination and actual realisation of some legal relation which has already come into existence. It is, therefore, another part of our task to exclude from the rule above stated all enactments which only apparently regulate the law of procedure.

But in our view there is a vital distinction perceptible between the position of the court which has to decide the issue in the case, or which

rules of the latter in any case; as regards the essentials of any such foreign procedure, the courts of this country may appeal to the foreign law. But even in this modified shape the proposition is not absolutely correct. On p. 222 we find the following propositions, viz.: "Foreign procedure is regulated by foreign law, by the law of the country where it takes place: our law decides whether it belongs *de jure* to that foreign country, and whether its result on the merits of the case is such as should be recognised." I would rather give in my adherence to these propositions, which do not, however, harmonise with Wach's former proposition already quoted. The problem, however, is not to be solved by the enunciation of such simple propositions, as the exposition in the text will show.

⁵ Cf. e.g. Bald Ubald, in L. 1 C. de S. Trin.; Burgundus, v. 1; Rodenburg, ii. p. 1, c. 5, § 16; J. Voet, in Dig. 5, 1, § 51; Mevius, in Jus. Lub. Proleg. qu. 4, § 6; Hert, iv.; Bouhier, chap. 28, v. 87; Boullenois, i. pp. 528, 544, 545; Mittermaier, Arch. f. d. Civil Praxis, 13, p. 298; Massé, ii. No. 220; Seuffert, Comm. i. p. 260; Pardessus, v. No. 1496; Burge, iii. p. 1054; Wheaton, § 94, p. 125; Story, § 556; Thöl, § 77.

⁶ The older writers distinguish between *litis ordinatoria* and *litis decisoria*. Cf. Paul de Castr. in L. 1 C. de S. Trin.; Rodenburg, ii. p. 2, c. 4, § 5; Boullenois, i. pp. 535, 536; Mittermaier, as cited; Schäffner, p. 201; Heffter, p. 75.

proposes to do so, the court in which the main process is dependent, and, on the other hand, the position of the court which is concerned merely with some subsidiary step in the procedure—however important that may be. The same step of procedure, its conditions, its competency, and its effects may be subjected, and properly subjected, to an entirely different determination, according as that determination falls to be given by the court where the principal process depends or by the auxiliary court, as we may for shortness call it. This distinction has, no doubt, already been taken as a foundation for discussion in the literature of private international law. But it has not been brought forward with the necessary distinctness, and this is the source of much conflict. I think that it is necessary to base the analysis of the whole subject of international procedure on that distinction.

II. ATTENTION TO BE PAID TO FOREIGN RULES OF LAW BY THE COURT OF THE PRINCIPAL PROCESS.

A. PRELIMINARIES (*Instruction*) OF A PROCESS.

CITATION OF THE PARTIES: OF OTHER PERSONS (WITNESSES, EXPERTS).

§ 391. According to what we have already said (p. 845), every step of procedure must, on principle, if it is to serve as a satisfactory basis for the judicial decision, satisfy the requirements of the law of the court in which the principal process depends. This, as we have said, suffers exception only in so far as:—

1. The law of that court itself requires some magisterial or judicial step to be taken abroad, and that necessary step cannot be validly taken, except the State within whose jurisdiction the magistrate or judicial person acts, invests his act with the attributes of magisterial judicial procedure in accordance with its own rules.

2. The law of the principal court recognises the rule "*locus regit actum*," or requires something to be done which will, by the law of the country in which it takes place, have obligatory effect.

Accordingly, the question whether a citation or service upon a party has been validly made, must primarily be determined by the law of the court in which the principal cause depends, independently of the fact whether the person to be cited actually is or is not in this country, or belongs as a citizen to this country or to some other. But for this rule we could not explain the effect which is conceded to public citation, by public notice or advertisement, in reference to persons who happen to be in another country: modern codes of procedure generally contain rules for the citation of persons who happen to be in a foreign country.¹

¹ See Felix, pp. 191-208; Asser-Rivier, § 73; Fiore, *Eff.* § 102. See an interesting judgment of the Trib. Civ. de la Seine, 30th March 1886 (J. xiv. p. 614). This holds that the citation or the service of a party by the agency of private persons, in conformity with the law of the

It is a different question whether it may not be necessary, in order to cite persons who are in another country, to use the co-operation of the foreign country and its officials. As a general question this must be answered in the affirmative, and is so answered by actually existing systems of law, although to a different extent by different systems. The person, who is to be served with a writ, must, if possible, actually receive it, and it is desirable to have credible proof that he has done so. This can only be secured by the help of officials of the foreign State,² and questions as to whether such assistance, given by the foreign officials, was really a valid official proceeding, and whether an instrument following on it truly bears the character of an "authentic" instrument, *i.e.* an instrument attested by magisterial or public authority, must be determined by the law of the official who actually carries out the service or citation in the foreign country, and by no other law. The same law must say into whose hands a writ should be delivered, if the party himself cannot be found at home, with a view to its being passed on to the proper party, or to what place it may be affixed (*e.g.* in the house occupied by the party who is to be cited), so as to have the same effect as if it had actually been given to the party. For local circumstances can alone determine whether, and under what circumstances, we may depend upon the writ actually reaching the party who is to be cited. Finally, the local law must decide whether the day on which service was attempted was a holiday.³

All other questions as to the citation of parties are, on the contrary, to be determined by the law of the court in which the principal suit depends. It must, *e.g.* determine whether in exceptional cases writs may be served on a holiday with full legal effect, *i.e.* whether the case is one for summary despatch, and also whether a party had sufficient time allowed to him to

place where the principal suit is in dependence, may be treated as sufficient, and, so far as this is concerned, the rule "*locus regit actum*" is deprived of its character as a coercitive or compulsory enactment. Weiss (p. 946) throws out a doubt, but without giving any practical effect to it, whether we can speak of a process as instituted, or, as a consequence, of a *lex fori* in the sense in which it is regulative of such matters, before any citation has reached the defender. But every court, which sets itself in motion for the determination of a cause, is the court of procedure in the sense we mean, and every State rules the procedure competent in its own courts with the same sovereign authority as it possesses over things which are within its own territory. Whether the decisions given by its courts will be recognised abroad, whether in the particular case they may not, as a matter of fact, have no effect at all, is a different question, which we shall treat more in detail when we deal with the subject of jurisdiction.

² What we may describe as the one-sided fictions, which are adopted as matter of convenience, are to be absolutely rejected, and are in truth an impediment to the mutual recognition of civil judgments by different States. French law, *e.g.* (*Code de procéd.*, § 69) makes use of one, when it holds service to have taken place upon a person who is abroad, by simply handing the writ to the French Attorney General (*Staatsanwalt*) to be disposed of as he shall think fit, see Fiore, *Eff.* § 103. Lomanaco, pp. 225, 226. Asser-Rivier, § 74. The German Code of Civil Procedure (§ 182) has properly shaken itself free from the example of the French law which is followed in many other quarters. This is the provision, simple and sound: "Service which requires to be made abroad is made by way of petition to the competent officers of the foreign State, or to the resident consul or ambassador of that State. In Italy there are provisions very much the same as in France. Fiore, *Eff.* § 104.

³ See Starr, *Die Rechtshülfe in Oesterreich*, p. 21, on citations in different countries.

prepare for the conduct of his case in court. All such questions are questions connected with the relation which is constituted by the existence of a process, and the duties of parties involved in that relation. In all such matters, parties are entirely dependent on the *lex fori*. It may be, if the course of the *lex fori* were inequitable, that this might justify a refusal by the court of another country to give effect to any decision that might follow. Lastly, the questions as to what the contents of the writ which is to be served should be, must of course be determined solely on the law of the court where the principal process depends. For the question here is simply what notice must be given to the party to warrant, according to the requirements of the law of the court where the principal suit is in dependence, further procedure in the case, *e.g.* decree by default or in absence. Again, if the foreign country shall refuse to give its assistance, however desirable it may be that it should give it, or if citation is impossible because no one knows where the party is, we see at once how sound the proposition is, that the duties of parties are, as matter of principle, dependent on the law of the court where the suit is in dependence. For in such cases no one doubts that the law of the court has power to make valid orders, according to its own discretion, for citation by public advertisement, in so far as the suit dependent before it is concerned.⁴

Since the essential points in citation are that notice should be given to the party, and that there should be a record of notice having been given, the question may be raised, whether citation could not be effected directly through the agency of the consuls or of the diplomatic representatives of the State in which the suit is in dependence. General principles of public law, however, compel us to answer this question in the negative—unless such powers are committed to the consul or ambassador by treaty—and the same answer must be given even where the service is to be made upon a person who is a subject of the country to which the court belongs.⁵ By custom a certificate of citation has come to be regarded, not merely as a document recording a fact, but as a magisterial act. It may, at least, very easily become a magisterial act, in so far as it is not in all cases completed by a voluntary delivery and acceptance of the writ, but involves a commission to third parties to hand the writ to the person to whom it is addressed, or the affixing of it to the house of the party cited, etc. The result is that, without the authority of the State in which it is to take place, it cannot be effected, even upon subjects of the State which the consul or the ambassador represents. The only exception is in the case of such subjects as enjoy the privileges of extra-territoriality, for they are subject to the jurisdiction of their own country, and not to that of the country in which they happen to

⁴ See German *Civilprozessordnung*, § 186: "If it is not known where a party is, citation may be made by public advertisement. This public citation is lawful also in cases in which it is impossible to carry out the conditions that are necessary for personal citation in a foreign country, or in which there is no prospect of effecting it under these conditions."

⁵ See German *Civilprozessordnung*, § 183.

be.⁶ In the same way, of course, consuls and envoys of European powers can cite persons who are subjects of the State which they represent, or are under its protection, within territories in which, as in heathen countries,⁷ they enjoy by treaty or by custom a kind of general extra-territoriality (although it differs in many respects from true extra-territoriality).⁸

But the citation of persons who are not parties to the process is quite another matter. Their obligations, in particular the obligations of witnesses and of experts, is entirely independent of the law of the country in which the court is situated. It is one of the general obligations of citizenship, or, more correctly, an obligation laid upon them by the system of public order under which they themselves live. The citation of a witness or of an expert is therefore, both as regards its form and its import, to be tested by the law of the place where it takes place, and by no other law. A citation of a party must, no doubt, be treated in the same way, in so far as the result of non-appearance in obedience to it is fine or imprisonment, and not merely some disadvantage in the depending process.⁹ For the obligation of the parties as such created by the citation, to submit to the law of the court where the suit is in dependence, is based upon the power of that law to regulate and dispose of the suit itself.

REQUIREMENTS OF STEPS OF PROCEDURE CONNECTED WITH PROOF.

§ 392. The court in which a suit depends, in dealing with steps of procedure connected with the leading of evidence which are taken by a foreign judge in a foreign country at the request of the court itself, or on the motion of the parties, must apply the same principles, and the further principle (see *supra*, pp. 847, 848), that the obligatory effect of such proceedings must, from considerations of public law, be tested by the law of the place where it is done.¹⁰

⁶ Wetzell, *Civilproc.* note 22, § 33, is of a different opinion, appealing to older writers (in particular Gaill, *Observ.* i. 56, and Mevius, *Decis.* vii. §§ 390, 391), in so far as the addressee voluntarily accepts the citation. This theory may be accepted under this limitation, just as in earlier days it was not uncommon to serve citations by means of notaries, who have no magisterial powers. Modern usage is, however, as I think, against this.

⁷ See the detailed exposition in *v. Bulmerincq*, § 78.

⁸ By the concluding part of § 182 of the German *Civilprozessordnung*, that is the only case in which it is lawful to effect a citation by the direct instrumentality of a consul or envoy of the German Empire. The commentary on this section by Struckmann and Koch seems to assume, that such direct citation is lawful in all countries without distinction, and over all persons who reside within the official territory of the consul or envoy. But the German statute of 10th July 1879 upon consular jurisdiction regulates that jurisdiction, in the cases there contemplated, not generally for all countries without distinction, but thus only, viz. § i. (1): "Consular jurisdiction will be exercised in countries in which such exercise is lawful by custom or by treaty." And in (2) that jurisdiction is made applicable only to "*schutzgenossen*," i.e. persons enjoying the protection of the German Empire, and not to the citizens of any country on plea (see § 22 of the statute of 8th Nov. 1867).

⁹ See German *Civilprozessordnung*, § 579 (3), according to which the personal appearance of the parties before the court may, in matrimonial cases, be required under pecuniary penalties.

¹⁰ Asser, § 85, followed by Smits in his dissertation on *International Bewijsrecht* (p. 48),

The requirements of official documents or records drawn up in connection with the leading of proof must be tested by the law of the judge who draws up the document or records the proof, and not by the law of the judge before whom the suit depends. Of course, it may well be that the law of the court in which the suit depends, if its rules for the conduct of proof within its own territory are different from those of its neighbours, should require more in the way of external formalities in the record of the proof, or on the contrary content itself with less in the way of formality; and it may have the proof taken by commissioners of its own (who will, however, in that case only enjoy the rights of private persons in the foreign territory), unless, indeed, the foreign State should forbid such a course, or unless the taking of proof by a private person is an offence against some criminal statute, which is in force within that foreign territory.^{11 12} But it is by no means logical to use the law of the court in which the suit depends to test documents, or reports, or records, drawn up by foreign officials, as "authentic" records of the proceedings, to use the French expression.¹³ Such a view of the matter means that we hold the whole judicial organisation of the foreign State to be one on which we cannot safely rely, or that we regard the procedure of the foreign court as entirely irreconcilable with that of

raises the question whether the judge, if he is not expressly allowed by his own law to make a requisition on a foreign court, can appeal to a foreign court for its assistance in enquiries into fact, or on any other point. Asser says that he cannot. In our view it depends on the principles upon which legal procedure, in the court to which the judge belongs, is administered. If, for instance, that court carries the principle of the necessity of oral depositions to the utmost extent, however absurd it may be to do so, or if, like the law of England, it has some substitute for a requisition, then we may agree with Asser. But if neither of these alternatives is present, then Asser's theory is simply a denial of justice to the party who wishes to adduce proof, and could not even be justified by a thorough distrust of foreign courts. For the proof taken abroad will always be subject to be weighed and considered by the judge to whom the suit belongs. As far as I know, the courts on the continent of Europe have always given themselves the very natural indulgence of asking foreign courts for their assistance, in cases in which they had any expectation of its being accorded to them.

¹¹ The practice of England and of the United States up to a recent date was to take this latter course. Commissions were given to private persons, in general persons learned in the law, to hear witnesses, etc. (see Wharton, § 723; Fœlix, i. § 240; Phillimore, §§ 882 *et seq.*) But now, since the statutes i. Will. IV. c. 22, and 3 and 4 Vict. c. 105, permit English courts to address requisitions to foreign courts for assistance, it seems that this method has been more commonly adopted. In the province of Hannover, *e.g.* a commission conducted by a private person could never examine on oath, for private oaths are not allowed there.

¹² It would be possible, too, for evidence to be taken in a foreign country by the consuls of the States to which the court belongs. In such cases, of course, the consul will proceed according to the legal rules of the State which he represents, and consular examinations of this kind may be taken at the request of other States, if the witness belongs to the nation represented by the consul. The consular laws of the State which the consul represents will rule this question (see, as regards Italy, Fiore, *Eff.* § 227). But, for the exercise of any compulsiator, the consuls must appeal to the officials of the State in which they reside (except in the East, where the so-called capitulations are in force). See Fiore, § 228, and the correspondence between the German foreign office (v. Bülow) and the ambassador of the United States (Fish), in the year 1874, in Beach-Lawrence, iv. p. 99.

¹³ What is recognised as correct and formal in the country in which the record is drawn up must be so recognised everywhere. Phillimore, § 913. The decision of an English court quoted in § 914 [*Savage v. Hutchison*, 1855, 24, L.J.N.S. (Ch.) p. 332] applied this rule to

our own courts. If that be so, we should rather seek assistance from an extended consular jurisdiction, or from private commissions such as those that are issued by the courts of England and the United States.¹⁴

NOTE RR ON §§ 391, 392. COMMISSIONS AND CITATIONS OF WITNESSES,
ETC., IN ENGLAND AND SCOTLAND.

[By the rules of the Supreme Court of Justice in England drawn up in 1883 (xxxvii. ii. Examination of Witnesses, R. 5), it is provided that the court or a judge may in any cause or matter, where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge, or any officer of the court or any other person, and at any place, of any witness or person, etc.

This rule seems merely to be declaratory of the existing law. The English courts had, before this date, been in the habit of issuing commissions to individuals for the examination of witnesses abroad, and had not unfrequently nominated as commissioners the judges of foreign courts, not as judges, but as individuals. Where, however, such a commission had been issued to judges as individuals, and these judges (Hungarians) refused to execute such a commission, it was reissued to the court of which they were members. (*Fisher v. Sztary*, 1858, 31, L. T. p. 130.) The existence of the alternative practice of issuing commissions, either to the judges as individuals or to the court of which they are members, is proved by the case of *Clay v. Stephenson* (1837, 7, A. and E. 185), and it is indicated that the more general practice was that commissions should issue to individuals.

No commission, however, will be issued where it appears that the witness, in order to the thorough testing of his evidence, should be cross-examined with much minuteness, and the foreign rules of procedure do not admit of any such cross-examination (*Crofton v. Crofton*, 1882, L. R. 20, Ch. D. 760).

As may be inferred from this judgment, a court employed by a foreign court to collect evidence for it, must follow its own rules of procedure, although there is no reason to suppose that a foreign court would refuse to accede to any reasonable request made to it as to the method of executing the commission, such suggestion not being expressly forbidden by its own legislation, or contrary to its public policy. It is the practice

corrections which a foreign notary had made, in a document drawn up by him, without specially authenticating them. The rule must also apply to certified copies prepared in the country in which the original documents were drawn up (cf. *Brocher*, ii. § 177), but only in so far as these copies take the place of the originals, without further enquiry into surrounding circumstances. See 14 and 15 Vict. c. 99, § 7, and *Phillimore*, §§ 507 and 923. What has been said is specially true of extracts from land registers. Officials and notaries in many countries do not give the parties the original documents, but merely certified copies, and preserve the originals in their records. See *Fœlix*, ii. § 305.

¹⁴ If then, for instance, the law of the court where the process depends requires that the person whose examination is recorded should sign the record of it, a record must be accepted as sufficient even without this signature, if the law of the judge who takes the deposition does not require a signature.

in Scotland, for instance, where the aid of a foreign court is invoked to assist the Court of Session in taking evidence, that interrogatories and cross-interrogatories should be adjusted in Scotland and transmitted to the foreign court for its guidance.

But a private commissioner must substantially follow the instructions he receives in the instrument appointing him, although the court will not be critical to find out objections to his conduct (Taylor on Evidence, § 513). If a commissioner—an individual or a foreign court—admits or rejects evidence contrary to the rules of the Court from which the commission issued, the result may be that the whole commission will be suppressed (Taylor, § 512). Considerations of public policy, however, *e.g.* the competency of examining the husband and wife of a party, may well be determined by the commissioner in accordance with his own law (see p. 865).

In the case of *Clay v. Stephenson*, cited above, the court applied this rule even to the conduct of a foreign court appointed to act as commissioners, and refused to accept certified copies of the evidence in place of the original, although these copies were authenticated by the officials of the court. This decision may, perhaps, be explained by the fact that the commission in that case was intended to have been issued, not to the court, but to the individual judges composing it. Otherwise the decision seems to involve a denial of justice to the party who had asked for the commission.

The law in Scotland is the same as the common law of England. The court will not grant diligence for recovery of documents, registers, etc., in the custody of a foreign court. It will, in the case of such documents being required, grant commission to examine the custodiers as witnesses to speak to the entries in these documents and registers (*Maitland v. Maitland*, 1885, Ct. of Sess. Reps. 4th ser. xii. p. 899). In the same way the Scots Court will only allow registers under its care to be taken out of Scotland in exceptional circumstances, even although they may be called for to be exhibited to an English Court. In any case, they would be sent under the care of a Scottish officer, whose duty it would be to exhibit them merely. He could not allow them to be taken out of his sight on any account whatever.

By the statute 19 and 20 Vict. c. 113, provision is made for taking the examination of witnesses in this country, *i.e.* Great Britain and Ireland, or any of Her Majesty's colonies or possessions, with reference to suits on commercial matters depending before foreign courts. Application is to be made to the supreme court of the country where the evidence is desired to be taken, accompanied by a certificate from the ambassador or diplomatic agent of the foreign power, whose courts desire the evidence. The court to which application is made may give directions as to "the time, place, and manner of such examination, and all other matters connected therewith as may appear reasonable and just." Oaths or affirmations, where affirmation is lawful in place of oath, may be administered, and a witness shall be protected against incriminatory questions on the production of documents *secundum legem actus*, *i.e.* the law of the country where the

evidence is taken. This statute is, in Scotland, generally worked by the appointment of commissioners, who act according to their own law.

Commissions in jury trials in Scotland are regulated by Act of Sederunt, 16th February 1841, § 17.

There is a series of statutes for facilitating the obtaining evidence, either oral or written, in the courts of the United Kingdom, in cases in which the witnesses or documents are either within the jurisdiction of some one of the supreme courts of the United Kingdom other than that in which the action is pending, or within the jurisdiction of a supreme court in some other part of Her Majesty's dominions.

The first of these statutes is 6 and 7 Vict. c. 82. § 5 of this statute says that if any person, who has been served with written notice to appear before a commissioner appointed by the courts of England, Ireland, or Scotland, to execute a commission in a part of the realm other than that under the jurisdiction of the court granting the commission, shall refuse or fail to appear, it shall be competent to apply to any of the superior courts in that part of the realm in which the commission is to be executed, for a warrant to compel the attendance of such person before the commissioner, or the production of any writings or documents to be mentioned in the order compelling attendance. There are provisions for penalties and for payment of expenses.

Under this statute it has been held in England (*Burchard v. Macfarlane*, L.R. (1891) 2, Q.B. 241) that the courts there will apply their own rules in granting or refusing to interpose their authority to further the execution of a commission in England, and will not make an order for discovery of documents against a person who is not a party to the cause, although the Scots court has granted a commission for recovery of these documents, the ground of judgment being that English practice allows no such order.

By the statute 17 and 18 Vict. c. 34, powers are given to the supreme courts of the United Kingdom to assist each other in compelling the attendance of witnesses who may be beyond the jurisdiction of the court before which the action is pending, but within the jurisdiction of one of the courts of another part of the United Kingdom.

The statute 22 and 23 Vict. c. 20, makes provision for obtaining evidence in the United Kingdom, and recovering documents there, upon an application from any competent tribunal in Her Majesty's dominions, and the statute 48 and 49 Vict. c. 74, makes similar provision for collecting evidence and recovering documents in India.]

FORM OF OATH.

§ 393. Much doubt may arise as to the form in which witnesses and experts are to be sworn, and special difficulties may occur in the deposition of a party upon oath. Since the oath is a pledge of the trustworthiness of the deposition, or of the averments made by the party, as the case may be, and as the trustworthiness of a deposition or of an averment must certainly be tested by the law of the court in which the process depends, it seems as if this law must regulate questions as to oaths. But, in so far as it is

thought essential that the witness or party should, in the event of his giving false evidence, be criminally responsible, the law of the place where the oath is emitted must be held to be the only possible rule, for the conditions of criminal responsibility are determined by the law of the place where the criminal act is done.¹⁵ But we reach the same result if we consider the matter in the light of the solemn moral duty which the witness or party owes to the judge. It is natural that this duty should be discharged in the form known to the law of the place where it is discharged. No doubt the law of the court may require some further forms, or forms altogether different; for it decides with absolute authority, if it desires to do so, the question whether proof which has been led satisfies its requirements. But, if it required a form which could not be reconciled with the requirements of the place where the oath was emitted, it would deprive itself of all the guarantees with which criminal, and, as a rule, moral responsibility also, invest the proof. It is only by regarding the oath in the strictest sense as a proceeding of a religious character, or one belonging to some particular form of faith, that we can reach the conclusion that an assertion solemnly deposed to in a foreign country and involving criminal responsibility by its law, recognised too as an oath by that law, should not be recognised everywhere as an oath, because it was emitted without reference to religion or to some particular creed. But no such narrow standpoint of religion or creed can be assumed to exist, and in any case it is of no practical importance, since, as we shall show more fully below, the court on which the demand is made can very easily refuse to invest the emission of an oath with forms for which its own law makes no provision. The prevailing theory must then be that the oath must be regarded by the court where the suit depends as validly emitted, if it is sworn in the form recognised by the place where it is given.¹⁶

[Affidavits such as are required by the Scots Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, § 23), may be taken by creditors who are furth of Great Britain and Ireland before "a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides," his qualification being attested by a British minister or consul, or by a notary public. Affidavits generally may be taken before British consuls abroad. 6 Geo. IV. c. 87.]

PROBATIVE FORCE OF EVIDENCE ADDUCED. COMPETENCY OF EVIDENCE IN GENERAL.

§ 394. It is obvious that the weight to be attached to the depositions of witnesses and of experts is to be estimated by the law of the court and

¹⁵ Fiore, *Eff.* § 233, lays it down that, if an expert is not sworn, the value of the deposition is not thereby affected, if an oath is not required by the law of the court upon which the requisition for evidence has been made.

¹⁶ Wharton, § 676, is to the same effect: Laurent, viii. § 57, is so also. The latter on the peculiar ground that the law as to the form of an oath is a "*statut réel*." See Fiore, *Eff.* § 231.

Sup. Ct. of App. Dresden, 1st October 1858 (Seuff. xiii. No. 66): "The antagonist of the

not by the law of the place where the evidence is given.¹⁷ (See *supra*, p. 846.)

But, in not a few cases, the question as to the weight of evidence depends upon the question of form. *E.g.* the law of the court which is appealed to to take the evidence requires witnesses to be examined in private without the parties being present, while the law of the court where the principal suit depends requires exactly the reverse, viz. that the examination of witnesses shall take place in public, and that the parties shall have an opportunity of being present; or the law of this latter court requires certain general questions to be put as a preliminary to the witness, while the law of the place where the witness is examined knows nothing of such questions. Of course, there is often an opportunity of meeting the difficulty by a request, addressed by the court which desires the evidence or by the party to the foreign judge, that he will, besides observing the forms prescribed by the law of the place where the examination is being taken, also observe the form in question, prescribed by the *lex fori*.¹⁸ Not even the most pedantic of lawyers could maintain that the court which desires assistance may not make this request.¹⁹ But, if the foreign court does not accede to the request,²⁰ or, if the two forms are irreconcilable, the court where the process depends has full discretion to say to what extent the

juraturus must recognise the form of the oath in use in the foreign State, although it is different from the form in use here, if it rests on the law and the religious convictions of that foreign country, and if the emission of an oath has in that foreign country the same religious, moral, and political import."

A resolution of the Institute of International Law in 1877, as to civil procedure, runs thus (Ann. ii. pp. 45, 49): "*Le tribunal qui procède à un acte judiciaire en vertu d'une commission rogatoire applique les lois de son pays en ce qui concerne les formes du procès y compris les formes des preuves et du serment.*"

Sup. Ct. of Jena, 10th May 1850 (Seuff. xii. No. 319), is to a different effect. Judgments of the Old App. Ct. at Cassel, on 22nd December 1841 and 28th September 1853 (Heuser, Ann. iv. pp. 235, 236), lay down that the form of an oath, which a foreign court has asked one of the courts of this country to take, must be regulated by the law of this country to this extent at least, that the invocation of God, required by this law, must not be omitted. The question arose with reference to the French form, "*Je le jure.*"

¹⁷ Mittermaier, *Arch. f. d. Civil. Prax.* xiii. p. 316; Martin, *Vorlesungen* (1855) i. p. 99. A judgment of the Imperial Court of 23rd April 1872 (Dec. vi. p. 72) expressly says: "The form of taking the evidence is to be regulated by the law of the foreign court, which is asked to take it, the trustworthiness of the evidence is to be estimated by the law of the court where the suit is in dependence. Renaud, *Civilprocessr.* § 9, note 6; Wharton, § 752; Westlake Holtzendorff, § 329.

¹⁸ Another question (see next paragraph) is whether, under certain circumstances, the *lex loci contractus* or *actus* should not determine the competency and the effect of particular kinds of evidence.

¹⁹ Cf. v. Duhn, in *Arch. f. d. civil Praxis*, vol. xlii. (1859) p. 44, and the judgment of the Sup. Ct. of App. at Lübeck of 31st March 1837, there cited.

²⁰ The judgment of the court at Lübeck, cited in the last note, very truly says: "The party who is pursuer or defender in the court where the action depends, must not make it impossible, by his studied refusal to concur, for the auxiliary court to observe the forms of the other court." The party, as such, if he desires to win his case, is always bound to follow the *lex fori* as closely as possible. See in this sense Renaud, § 9, note 17.

weight of the evidence is affected by what its law regards as defects.²¹ It cannot be said, as it would be said in the case of a proof all taken in the same country, that such evidence may not be looked at. Such strictness is only justifiable in cases in which it may serve to compel the observance of certain forms. But just as little can we be forced to accept as good evidence depositions of witnesses taken abroad, which are destitute of all the safeguards which our legal theories require to make the trustworthiness of the witness manifest.

The right of being timeously informed of a diet for proof, and the right of being present at that diet as a party, is, as a right of a party to the action, to be tested by the law of the place where the principal suit depends, and not by the law of the place where the proof is taken.^{22 23}

The question of the admissibility of some particular evidence is simply a subordinate part of the question as to its effect as evidence. Certain kinds of evidence are rejected, where by anticipation they are regarded as untrustworthy and misleading; and it may quite well be that the law of the court should leave this point for the judgment of the opposite party, conferring on them the right, *e.g.* of objecting to particular witnesses, or of rejecting their evidence. Thus the law of the place where the evidence is taken has nothing to say on this subject. It may, however, refuse to allow certain witnesses to be sworn for fear of perjury, and any such consideration entertained by his own public law, would, of course, be binding upon the judge to whom application is made to take evidence.

INCOMPETENCY OF CERTAIN EVIDENCE IN PARTICULAR CASES.

§ 395. But the difficult question on this point, which often arises, is not whether we are to select the law of the court in which the suit is dependent or that of the place where the proof is taken: the question frequently is whether the law of the place where a contract was made is not to have precedence over both. There can of course be no doubt that,

²¹ See the instructive judgment of the court at Lübeck already referred to, and Fiore, *Eff.* § 231.

²² See Trib. at Antwerp, 29th Aug. 1873 (J. ii. p. 215); C. of Turin, 19th Sept. 1872 (Rev. vii. p. 198). Clunet approves of the former decision.

²³ We may see, from what is said in the text how incorrect the provision of the German *Civilprozessordn.* § 334, is, although the commentary by Struckmann and Koch curtly asserts that it is in conformity with general legal principles as to the recognition of procedure law. The paragraph was originally copied from the Hannoverian Code of Procedure of 1850, § 231, into that of Würtemberg of 1868, § 439, and then into that of Bavaria of 1869, § 335. It runs thus: "If evidence taken by a foreign official is conform to the law recognised in the court where the suit depends, no objection can be taken to it by reason of its defects according to the foreign law." This would make it, *e.g.* incumbent on a German judge to treat as valid an oath, which was taken abroad in the form prescribed by the German *Civilprozessordn.* and was absolutely null by the foreign law, imposing not an iota of criminal responsibility on the party who emitted it. The same would hold good, under the like circumstances, of a document drawn or attested by a judge who, by the law of the place where it was drawn or attested, was absolutely incompetent.

The Imperial Court (i.) on 8th May 1880 (Dec. ii. No. 100), in connection with the case of an oath taken before a foreign notary, laid down the sound proposition, that it was

if the law of the court in which the process depends holds certain evidence to be incompetent under all circumstances, this rule must so far be unconditionally applied.²⁴ The rule which formerly prevailed,²⁵ and which still exists in the law of England and in that of the United States, was simply that the *lex fori* must govern generally all questions as to the competency of evidence. But questions of that kind²⁶ are not the questions which most commonly arise. The point which most commonly arises for determination is in cases in which the kind of evidence in question is admissible as a general rule by both systems of law, but is by one of them excluded in exceptional circumstances, *e.g.* in disputes as to subjects of great value. The law of France²⁷ accordingly regards the *lex contractus*,

sufficient to observe the foreign form. There is a peculiar view advanced by the commentators on § 334, that this proposition may be drawn from its provisions *per argumentum e contrario*, although the simple truth seems to be that this paragraph sanctions the exclusive application of the law of the court in which the suit depends. Still more remarkable, however, is the appeal which is made, on the suggestion no doubt of the introduction to the German *processord.* to § 85 (2) of the German statute on bills (*Wechselordnung*), in my opinion a very sound enactment. This § 85 deals with an endorsement put upon a foreign bill in this country. If it were intended to regulate a similar case in the law of procedure, we should have to provide: "Proof taken in this country is not invalidated by the fact that we find upon the paper which contains the report of it, that there is recorded a foreign proof, which is invalid by the foreign law."

Least of all, however, can we assent to the final proposition maintained by Struckmann and Koch, that proof taken in a form which is not in consonance either with the law of the court in which the suit depends or with the law of the place where it is taken, may yet be regarded as satisfactory on the principle that the court is unfettered in its estimate of evidence (*Civilprocessordn.* § 259): the judge cannot apply his mind to evidence that is taken in improper form.

²⁴ This is recognised by Smits, *Diss.* cited *infra*, note 28.

²⁵ See *supra*, p. 57, and P. Voet, x. § 8; Bouhier, chap. 21, Nos. 205, 206; Hert, iv. 67; Hommel, *Rhaps.* ii. obs. 409, No. 10; Reinhardt, *Ergänzungen zu Glück's Pandekten*, i. 1, pp. 32, 33; Mittermaier, *im Archiv. f. d. Civil Praxis*, 13, pp. 300-316; Gunther, pp. 743, 744; Kori, iii. p. 12; Linde, *Lehrbuch des Civil. Proc.* § 41, note 6; Walter, *D. Privatr.* § 44; Oppenheim, p. 377; Schäffner, p. 205; Unger, p. 209, note 193; Burge, i. p. 24; Wheaton, i. p. 118; Story, § 635e; Wharton, §§ 752 and 769; Foote, p. 353; Menger also (i. § 13), who allows the *lex fori* to give the rule in all questions of evidence. (The reason he assigns for this, viz. "that any other theory upsets the unity of the process and the course of justice for the parties to it," is a mere *petitio principii*, which cannot hold its ground against the necessities of commerce and international intercourse.) See judgment of the Supreme Court of Appeal at Wiesbaden, 20th May 1851 (Seuffert, xi. pp. 451, 452); of the Supreme Court at Berlin, 3rd May 1845 (Decisions, vol. xi. p. 375); of the Supreme Court at Stuttgart, 7th Dec. 1830 (Seuffert, viii. p. 312), 13th June 1833, and 25th Sept. 1858 (Seuffert, viii. pp. 257, 258); of the Supreme Court of Appeal at Darmstadt of 11th May 1856 (Seuffert, xi. p. 302); opinion of the Dean of the Faculty of Advocates in Scotland [John Inglis, afterwards Lord President of the Court of Session] in the Decisions of the Supreme Court at Berlin, vol. xxix. p. 383, note; Judgment of that court there quoted.

²⁶ *E.g.* questions as to the inadmissibility of private memoranda in writing, or of *testimonium de auditu*.

²⁷ Bald Ubald, in L. 1, C. de S. Trin. No. 94; Molinæus, in L. 1, C. de S. Trin.; Mascardus, *Concl.* vi. Nos. 198, 199; Christianæus, *Decis.* i. decis. 283, No. 14; Boullenois, ii. p. 459; Pardessus, No. 1490; Massé, No. 274; Fœlix, i. § 233, p. 452; Heffter, § 39, iii.; Laurent, viii. § 20; Aubry et Rau, i. § 31, note 77; Bonnier, *Traité des preuves*, ii. § 928; Asser-Rivier, § 81; Haus, §§ 135, 136; Duguit, p. 91; Weiss, p. 449; Despagne, § 213; C.

or, to put it more generally and more correctly, the law to which the substantive legal relation in question is itself subject, as regulative of this question. If we qualify this proposition by saying that the evidence must be admissible by the *lex fori in abstracto*, we may safely admit²⁸ that the rule of the French law is right.²⁹

The meaning of such a rule of law is this: a legal transaction of the kind in question which is not established by the necessary documents, or by the witnesses required, shall not be capable of being founded on in an action, or urged as a plea in defence in any other way than by being admitted by the opposite party, or unless there shall be a fiction of such admission under certain conditions.³⁰ The incomplete invalidity of the transaction is in some measure of the same character, as a transaction which will not found an action, but with regard to which no claim for repetition will lie, if in spite of the defective form both parties have acted upon it. It differs, however, from such a case in this respect, that while a transaction which cannot competently found an action may be pleaded in defence, on the other hand, even if such a transaction be admitted by the opposite party, it never can have the effect of carrying with it a judgment in favour of the pursuers.

de Cass. 24th Aug. 1880 (J. vii. p. 480; Böhm, *Rechtshülfeverh.* § 19, note 5. But as regards the law of Italy, see Esperson (J. xi. p. 176), and as regards obligations, the express provision of the *Codice Civ. Italiano*, § 10 (2); "*I mezzi di prova delle obbligazioni sono determinati dalle leggi del luogo in cui l'atto fu fatto.*" To the same effect the law of Spain (Torres Campos, p. 281). See, too, art. 131 of the Spanish-American Treaty of 1878 (*Zeitschr. f. d. ges. Handelsr.* vol. xxv. p. 550).

²⁸ Smits' dissertation on *International bewijsrecht* (p. 4) proceeds generally on the principle that evidence, apart from the question of the form in which it is taken, is an *annexum* of the substantive legal relation.

²⁹ The Institute of International Law adopted at last, in 1877 (see Ann. ii. p. 44), these rules, which originally were Asser's, but were modified in the second paragraph:—

"(3.) *L'admissibilité des moyens de preuve (preuve littérale, testimoniale, serment, livres de commerce, etc.) et leur force probante seront déterminées par la loi du lieu où s'est passé le fait ou l'acte, qu'il s'agit de prouver.*

"*La même règle sera appliquée à la capacité des témoins, sauf les exceptions que les Etats contractants jugeraient convenable de sanctionner dans les traités.*"

The last paragraph is meaningless: it fobs off the difficulty which it should have settled, on to possible treaties. Asser had proposed to enact "*sauf les exceptions que les états contractants jugeraient nécessaire de sanctionner dans l'intérêt de l'ordre public.*" This clause missed the point also. With the principle of *ordre public*, in this subject as in others, one can prove very little or as much as is desired. The Institute had forgotten that a distinction was to be drawn between incompetency *in abstracto* and incompetency in a particular subject.

V. Bulmerincq (p. 231), who was not in accord with the resolution of the Institute, proposes to test the admissibility of evidence by the *lex fori*, but the effect of it by the *lex loci actus*. It seems to me that such a distinction cannot be accepted literally; but perhaps he indicates the same distinction as I have taken in the text.

³⁰ If, in spite of the omission of the form, a reference to oath is admissible, as by the provisions of the Code Civil, arts. 1341 and 1358, the defender, if he refuses to take the oath, is bound by the judgment, because of a fiction that he has admitted the debt; if he refers it, he is also bound, because he has admitted it, subject to the oath of the pursuer. To a different effect, too, judgments of the Supreme Court at Stuttgart, 25th Sept. 1858, and 11th June 1833 (Seuffert, xiii. pp. 257, 258).

It is plain that in such a case the question is not one as to the weight of evidence in the true sense—i.e. as to whether the judge is persuaded of the truth of the alleged facts by the materials laid before him—but is rather one as to the form of the transaction and the consequences that attach to the neglect of that form. This is obvious from the fact that failing an admission by the defender, the pursuer must lose his action, even although far stronger evidence than that which is required should be tendered—e.g. instead of a private document, ten witnesses who with one voice speak to the agreement of the parties.³¹

To decide according to the *lex loci actus* is the only way to meet the justifiable expectations of the parties, the *bona fides* of their transaction. If in country A certain legal transactions cannot be proved by witnesses, every one is entitled to expect that no obligations, or at least no obligations beyond a certain amount, will be laid upon him by means of vague testimony, which may have been entirely misappreciated by the judge. If, on the contrary, country B admits proof by witnesses in all questions, then every contracting party may rely upon it that one who has once given his word, no matter in what shape, is bound by it.³² Even the question whether a party has the right of challenging a witness is in such cases, on a sound view of the law, to be determined not by the *lex fori*, but by the law which governs the substance of the legal relation in question.³³ [The rule of English and Scottish law is very distinct, that all questions of the admissibility of evidence must be determined by the *lex fori*. "The law of evidence is the *lex fori*, which governs the court. Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it," per Lord Brougham in *Bain v. Whitehaven and Furness Junction Railway Co.* 1850, 3, H. of L. Ca. p. 19.

³¹ The provisions of the Code Civil in reference to this subject seem to me to be quite distinct; for by art. 1348, 4, if the transaction is once embodied in a proper documentary form, but the document is lost by accident, proof in the ordinary form may be adduced. Burge concedes that as an exception the *lex loci contractus* should determine whether written evidence is necessary, and Story, § 636, proposes that testaments should be proved according to the *lex loci actus*, a theory which is explained by the fact that the English law speaks of the proving of a testament, and not of its forms, even when it is dealing with the regulations as to the latter. (This is consistent with the peculiar procedure in ecclesiastical courts as to dispositions *mortis causa*. Cf. Felix, i. p. 445, note 3.)

³² So again the *lex loci actus*, and not the *lex fori*, must determine how far it is competent to contradict, by proof of the intention of parties, any legal relation embodied in a formal writing. Proof which is so appropriately named by Bentham "pre-arranged" proof, rests in a certain sense on the will of the parties, or at least upon some law which takes account of what parties generally desire. See Brocher, *N. Traité*, § 112 (p. 283); Esperson (J. xi. pp. 251, 252); Fiore, *Effetti*, § 180. Menger, p. 154; Hellmann, *Lehrbuch*, p. 31; Böhm, *Rechtshülfeverf.* p. 149, take a different view. Lammasch, p. 370, attempts a middle course, and seems to expect that controversies on this head will be got rid of by treaties.

³³ Smits, *Bewijsrecht*, p. 26.

If a commissioner wrongly admits or wrongly rejects evidence, *i.e.* does so contrary to the law of the court from which the commission issued, the result may be that the whole deposition will be suppressed. Taylor on Evidence, § 512. This would hold true of commissions issued to foreign courts as well as to individuals, but the rule must be very sparingly enforced. Otherwise grave injustice might be done, for how is the foreign commissioner to know our rules of evidence ?]

PROOF OF STATUS.

§ 396. Similar considerations must regulate the proof of questions as to family relationships; it is in such cases that it is specially true to say that questions of proof are not unfrequently really questions as to the existence of the substantive fact;³⁴ we must dispose on the same principles of any question as to the effect in evidence of "*possession d'état*,"³⁵ and in considering the weight to be given to documents connected with civil status, we must start from this point of view, viz. that every civilised State, if it allows such matters, occurring within its own dominions, to be recorded at all, will take care to have them recorded in such a way as that they may deserve to be relied upon, and that records of this kind ought to be recognised as valid evidence all the world over,³⁶ if their genuineness be once established. Parties will in very many cases be unable to provide themselves with any other evidence.

PUBLIC RECORDS AND DOCUMENTS. AUTHENTICATION. WITNESSES.

§ 397. As a general rule, we must admit official documents drawn up in some other civilised country³⁷ as good evidence. Nor can we make any distinction if such a document contains something which is beyond the sphere of the direct observation of the senses of the attesting official. We must assume that he has sufficient means at his command, in respect of his local experience, to satisfy himself of the truth.

³⁴ Duguit, p. 98, and the decisions given in J. i. p. 305; so, too, Ct. of Martinique, 18th May 1878 (J. v. p. 507).

³⁵ Brocher, *N. Traité*, § 41. Proof of marriage in accordance with foreign rules of law admitted by French courts (Trib. Seine, 14th March 1879 and 15th March 1883 (J. vi. p. 544, and x. p. 392). See Wharton on extracts from church records as evidence, §§ 759 *et seq.* Pradier-Fodéré, J. vi. p. 269. Corrections, too, of entries in such book, made by order of officials charged with the superintendence of them, must bear faith in a foreign country upon the principles stated in the text. We have nothing to do here with the principles which regulate the recognition or non-recognition of judgments in actual litigations. The certified copy issued by the official or the notary himself, who drew up the original, makes faith in any foreign country in accordance with the *lex loci actus*. C. Palermo, 25th March 1887 (J. xiv. p. 757). Code Civil, § 47: "*Tout acte de l'état civil des Français et des étrangers fait en pays étranger, fera foi s'il a été rédigé dans les formes usitées dans le pays.*"

³⁶ Haus, *Dr. p.* § 135; Duguit, p. 62.

³⁷ Smits (p. 45) proposes to test the value of a ship's log as evidence by the law of the flag, and the value of an average report by the law of the place where it was drawn up.

This *Publica Fides*,³⁸ attached by the courts of all countries to documents issued by officials within the limits of their own jurisdiction, rests upon an universal law of custom, without which there could scarcely be any regular intercourse among the inhabitants of different States. We assume that every civilised State will take care that its officers do not give any false testimony as to documents executed by them or in their presence. This doctrine of law cannot, however, be referred to the rule "*locus regit actum*:" the notion of the headship of the emperor, and the derivation of all jurisdiction from him entertained in the Middle Ages, has contributed to it, and so, too, and in a substantial degree, has the general custom of putting officials on oath.³⁹ Every circumstance tends to show that the rule "*locus regit actum*" has more probably, on the other hand, arisen from the general recognition of the doctrine of *Publica Fides*.⁴⁰

Before any *Publica Fides* can be given, of course the authenticity of the deed must be proved. Since the seal and subscription of the public officials are not sufficiently well known beyond the limits of their own country, this is effected by legalising the document by affixing the great seal of the sovereign⁴¹ from whose officials the document proceeds, or by an attestation of its genuineness from the ambassador or consul of the State in which it is to be used;⁴² the latter is the ordinary rule of procedure. But in cases of necessity there are other ways in which evidence may be led—*e.g.* by witnesses⁴³—and in adjoining States no particular proof of authenticity is required.

The proper position seems to be to commit the question, whether any special authentication is necessary, to the discretion of the judge.⁴⁴ The

³⁸ Cf. Merlin, Questions, *Vo. Authentique (Acte)*, § 2. Fœlix, as cited; Massé, No. 269; Püttlingen, § 124; Code Civ. arts. 47, 170, 999. Field, § 666, "Full faith must be given in each nation to the public acts, records, and judicial proceedings of the tribunals of every other nation."

³⁹ Fœlix derives it from the rule "*locus regit actum*," ii. p. 201.

⁴⁰ See above, § 118.

⁴¹ This as a rule proves itself. Story, § 643.

⁴² It depends upon the organisation of the officials of each State, and the agreements which have been made by one State with another, whether any other officials of a State must authenticate the documents issued by inferior officials and notaries before the diplomatic representative will authenticate them, and if so, which officials. See Fœlix, i. pp. 434, 435. Püttlingen, as cited.

⁴³ Story, §§ 639-641.

⁴⁴ See judgment of the Sup. Ct. at Berlin 23rd Oct. 1855 (Striethorst, Jahrg. 1856). The instructions given by the ministers of justice and of foreign affairs, on 22nd March 1833, rest on this principle. Renaud, *Wechselrecht*, § 7, note 18. In England, no special authentication of documents from foreign admiralty courts is required. They are held to be courts of the law of nations, and their records obtain faith everywhere. But since these courts derive their authority from some particular Government, the true reason probably is that documents and records of this kind are often produced before admiralty courts in England, and therefore the seal and subscriptions are so well known, that to prove them would be a useless formality, and one that would impede commerce.

The German *Civilprocessordn.* § 403, provides: "The court must determine, on the circumstances of each particular case, whether a document, which bears to have been drawn up by a foreign official, or by some person belonging to a foreign country who is invested with *publica fides*, must be accepted *de plano* as genuine. Authentication by a consul or an ambassador of the Empire will be sufficient to prove its genuineness."

circumstances and extent of the intercourse which the two States enjoy with each other must determine the question. Besides, there exist conventions between many States dealing with the point as to how far any authentication is necessary.^{45 46}

The qualifications of documentary witnesses, and their number, are to be determined by the *lex loci actus*; unless, besides the form which that law requires, it may be competent or imperative to observe at the same time the form which is prescribed by some other system of law under which the legal transaction falls. The question here is a question as to the form of an instrument, or the requirements of a document as a probative instrument; but it is the law of the court where the process depends that must decide as to the credibility and competency of other witnesses.⁴⁷

By the principle of the equality of foreigners and natives in the eye of the law we find that, in so far as the contrary is not expressly enacted, the former are as capable as the latter of being documentary witnesses.⁴⁸ (The provisions of the Roman law to a different effect, by which none but a *Civis Romanus* can be a documentary witness, rest upon the inequality of Romans and strangers in the eye of the law at that time.) Besides, any other view would be highly unpractical. One might easily be mistaken as to whether a particular person was a citizen of the country, and thus lawsuits might arise as to the validity of a document—if citizenship were necessary for the witnesses—which might often be prejudicial to the citizens of that country, which proceeded on any such selfish and narrow view. French practice attempts to meet this danger, but in doing so falls into illogical procedure, and is in the habit of recognising “putative” nationality as sufficient.⁴⁹

NOTE SS ON § 397. FOREIGN JUDGMENTS AND REGISTERS.

[The general rule in England and Scotland is that foreign judgments authenticated according to the law of the country from which they proceed will be received in evidence (Phillimore, §§ 913, 914, and *Savage v. Hutchison*, 1855, 24 L. T. N. S. (Ch.), p. 332; *Dickson on Evidence*, § 1319). That they are so authenticated must, unless they are documents proceeding from

⁴⁵ As regards Austria, see *Vesque v. Püttlingen*, § 120.

⁴⁶ Authentication is simply an external form. It may therefore be given with a retrospective operation, if the law *e.g.* requires some probative instrument as a condition precedent to another act. So App. Ct. at Modena, 9th May 1876 (J. v. p. 55. See Dubois, *ibid.* p. 59).

⁴⁷ *Fœlix*, i. § 235, p. 458, allows the *lex loci actus* to rule generally; and so, too, *Demangeat and Pardessus*, No. 1490; *Massé*, No. 275, and *Schäffner*, pp. 205, 206, take the opposite view. *Wharton*, § 769, takes a different view, but admits an exception if the *lex rei sitæ* requires a certain number of witnesses.

⁴⁸ French law as a whole is of a different tenor, relying on the distinction between *droits civils* and *droits naturels*. See *Massé*, p. 32; *Gand*, § 154, and as regards practice, J. ii. pp. 117, and 192.

⁴⁹ Cf. *Dubois*, *Rev.* viii. pp. 492, 493, and *Laurent*, iii. § 353.

some foreign court with the forms of which our judges are familiar, be proved *e.g.* by the certificate of a notary or by the British Consul at the foreign place (*Disbrow v. Mackintosh*, 1852, Ct. of Sess. Reps. 2nd ser. xv. p. 123). A similar judgment was pronounced in the House of Lords so long ago as 1771 (*Sinclair v. Fraser*, 2 Pat. App. 253).

By the statute 14 and 15 Vict. c. 99, § 7 (Lord Brougham's Act), which, however, applies to England alone, copies of proclamations, treaties, Acts of State in foreign States and colonies, and judgments of proceedings in and documents deposited in foreign or in colonial courts, may be proved in English courts by examined copies or by copies certified, (1) in the case of proclamations, treaties, or Acts of State, by the seal of the foreign State, (2) in the case of the judgments or proceedings of foreign courts, or of documents deposited there, by the seal of the foreign court or by the signature of the foreign judge.

By the Extradition Act, 1870 (33 and 34 Vict. c. 52), §§ 14 and 15, foreign warrants, depositions, and convictions, shall be deemed to be duly authenticated if they purport to be signed by a judge, magistrate, or officer of the foreign State, or are certified to be true copies by such judge, magistrate, or officer, and if they are authenticated by the oath of some witness, or by the official seal of the minister of justice, or of some other minister of State.

Extracts from foreign registers are admitted if authenticated according to the law of the country of the register by an official person (*Phillimore*, § 913; *Wharton*, §§ 760 and 763; *Dickson on Evidence*, § 1321). Again, if the court is not familiar with the method of authentication employed, it will have to be proved to its satisfaction that the proper formal method had been followed. The court will not grant a diligence for the recovery of foreign registers or public documents in public custody in a foreign country. It will, however, grant a commission to examine the custodian, who will depone to the entries in his books as correct (*Maitland*, 1885, Ct. of Sess. Reps. 4th ser. xii. p. 899). A certificate by a notary public, as a person holding a *munus publicum* known to public law, would probably be accepted as a sufficient guarantee of the correctness of extracts from documents in public custody in a foreign country, or from a foreign registry.

VALUE OF BUSINESS BOOKS AS EVIDENCE.

§ 398. The *lex fori*, as a general rule, will determine the value of business books⁵⁰ as evidence.⁵¹ If, however, the law under which the contract

⁵⁰ The law of the place where the books are kept must determine primarily whether they are or are not properly kept. J.P. Court at Groningen, 19th January 1885 (J. xiv. p. 244).

⁵¹ Judgment of the Supreme Court at Berlin, 3rd May 1845 (*Decisions*, ii. p. 375); Judgment of the Supreme Court of Appeal at Darmstadt, 13th May 1856 (*Seuffert*, xi. 303). [Extracts from business books made and authenticated according to the law of the place where the extract is made will make faith in Russia (*Claile v. Roubleff*, 1877, Senate of Moscow, J. viii. p. 189).]

which these books are adduced to prove stands, gives them greater weight in evidence, the parties must allow the courts of a foreign country to give them the same weight; and if there is no common law for the contract (*e.g.* when it is concluded by letter), the law of the domicile of the pursuer or defender, according as this or that may be the more favourable to the defender, takes the place of the *lex loci contractus*. According to the opinions of several writers and the judgments of several courts, the *lex fori* alone determines the weight of business books as evidence;⁵² in the view of others, the *lex loci contractus* will settle it.⁵³ I believe that, by the intermediate view taken above, I have made it possible to solve the controversy.

We have already discussed the *exceptio non numeratæ pecuniæ*, the effect of which in international law must also be determined according to the principles of evidence upon matters of contract.

The question whether one party can tender an oath to another on a matter of contract, must, in so far as the *lex fori* sanctions oaths generally in other cases, be determined by the law to which the substantive legal relation concerned is itself subject.⁵⁴

Onus Probandi AND PRESUMPTIONS.

§ 399. Questions as to the *onus probandi*—apart from the most general of these questions upon which there is practical agreement in all civilised States,⁵⁵ and on which therefore we need not here spend any time—are not so much questions of procedure as questions of substantive law. The law determines this or that legal relation on the footing that no substantial modification of the state of facts which it assumes can be shown to exist. This is recognised most markedly in the law of contracts. The assumption

⁵² Mittermaier, as last cited; Schäffner, p. 206; Unger, p. 209; Walter, § 44; judgment of the Supreme Court of Appeal at Wiesbaden, 20th May 1851 (Seuffert, ii. pp. 451, 452); Supreme Court of Appeal at Darmstadt, 13th May 1856 (Seuffert, ii. p. 302). Wharton, § 766.

⁵³ Jason Mayn, in L. 1, C. de S. Trin. No. 23; Massé, No. 272; Pardessus, No. 1490; Fœlix, i. § 238, p. 46; Savigny, § 381; Guthrie, p. 322; Holzschuher, i. p. 81; judgment of the Supreme Court of Appeal at Cassel, 6th Dec. 1827 (Seuffert, i. p. 135, No. 132). Asser-Rivier, § 94; Phillimore, § 662. See, too, resolution of the Institute of International Law, *supra*, note 29. Petrushevecz, p. 92, § 210; Smits, *Bewijsr.* p. 37. The last-named author contradicts the view taken in the text, but he forgets (1) that the application of the law which is more favourable to the defender is simply a consequence of the general principles which necessarily govern the law of obligations (see *supra*, § 250), and (2) that if the *lex fori* or the usage of the court gives faith to business books, it is *de facto* impossible to limit the amount of credit that is to be given to them, once they are produced in evidence, in accordance with the limitations of any foreign law. It would be different, of course, if by the *lex loci contractus* business books were altogether inadmissible in evidence, or were a kind of evidence to which one of the parties could object.

⁵⁴ Massé, ii. § 775; Bonnier, i. § 935; Smits, p. 34.

⁵⁵ The older German law of procedure, *e.g.* contains principles which are at variance with the prevailing view.

of what are called the *naturalia negotii* is simply an assumption of what must be supposed to be the case, unless proof is forthcoming of some intention of the parties to a different effect. In other words, the law says, "if any one alleges that a different intention existed, it is for him to prove it."⁵⁶

We must deal on the same principles with *presumptiones juris*. They are simply special provision for particular sets of circumstances, particular legal relations, or they deal with the *onus* of proof in these circumstances and relations. We may express our meaning otherwise thus. A presumption of that character involves a provision of law that the legal consequences which properly belong to one state of facts shall be attached to some other state of facts: the result is that the state of facts which really exists is rejected as being inconsistent with those which are necessary to support the legal conclusion. If, for instance, there is, in relation to a claim of succession, a presumption that B survived A, that implies that, as far as regards this claim, the true state of facts—viz. that both died simultaneously—must have the legal consequence attached to it which belongs to the case of B's survivance; this latter condition of facts cannot, *ex hypothesi*, be capable of being shown to be the true state of the fact.⁵⁷ If, again, for

⁵⁶ Although I decided in my first edition in favour *simpliciter* of the *lex fori* (see to the same effect Menger, p. 154), I expressed myself in the fourth edition of v. Holtzendorff's *Rechtencyclopädie* (p. 713) just as I have done in the text. By Asser-Rivier, however (p. 713), I have apparently been misunderstood: these authors, like myself, declare against the *lex fori* (see now, too, Böhm, *Rechtshülfeverf.* p. 150). As to the substantive character of legal presumptions, see Unger, *Oester Privatr.* ii. p. 580: "The law of procedure can only tell us that, if we are dealing with a legal presumption, the person in whose favour it is, is free of the burden of proof: if the question be whether there is or is not a legal presumption in the case, we are thrown back on substantive law." The German Imperial Court (i.) determined (Dec. vi. No. 127) that the principles which must regulate the *onus* are no part of the law of procedure, but are identical with the rules of the substantive law which regulates the particular legal relation under discussion. The authors of the introduction to the German *Civilprozessordn.* are of the same mind. (See Seuffert, on § 255 of the *Ordnung.*) As a matter of fact, simple enactments, shifting the *onus* of proof, may introduce economical modifications of legal rights which are of the most extensive operation: e.g. if trading agents are made liable for losses in the business.

Judgment of the Sup. Ct. of App. Lübeck, 30th December 1859 (Seuffert, xiv. No. 148; Unger, pp. 154, 155, in favour of the *lex fori*).

⁵⁷ Fœlix, i. § 237, p. 460, applies the *lex loci contractus* in the case of presumptions which relate to contracts. So, too, judgments of the Supreme Court at Berlin, 26th September 1849 (Dec. vol. xviii. p. 146), and 17th October 1854 (Striethorst, 15, § 123). Both judgments deal with a presumption in horse-dealing existing at the place of contract. In the latter it is said: "By common law, presumptions are not mere rules of procedure, but imply principles of substantive law." Cf. such presumptions as those of the Code Civil, art. 1402: "*Tout immeuble est réputé acquêt de communauté, s'il n'est prouvé que l'un des époux en avait la propriété ou possession légale antérieurement au mariage ou qu'il est échu depuis à titre de succession ou donation.*" Here the mutual rights of the spouses, and of the creditor to the property which is in the possession of the spouses, are fixed.

See, in the sense of the text, Brocher, ii. p. 71, and *N. Traité*, p. 291. Laurent (viii. § 47), Weiss (p. 951), and Smits (p. 27), in general approve of the application of the law, which rules the legal relation itself, the two latter with special reference to the *presumptiones hominis*.

instance, the law creates a presumption in favour of the legitimate birth of a child, that constitutes a rule of family law that cannot be distinguished from a substantive enactment: the law will treat the child as legitimate, unless it is made manifest by plain evidence that it is illegitimate.

It is, no doubt, entirely different with *præsumtiones hominis*. These are simply general conclusions based on experience, and in many cases on psychology. If it were proposed to limit the judgment of the court in which the action is pending by any foreign law, that would be to deprive it of the right of forming a judgment on the evidence. The application of the *lex fori*, or of the practice which has grown up about it, will not in such cases disappoint any just expectations of the parties, founded on the *lex loci actus* or *contractus*: such conclusions as these are subject to constant modification and development even within the same territory.⁵⁸ It would, as a matter of fact, too, be almost impossible to compel any court to come to a conclusion in this way upon evidence according to the views of it entertained by some other court in another country, *i.e.* in certain circumstances to be untrue to its own convictions or beliefs on the matter. The differences of opinion which we find existing upon the subject of presumptions is perhaps really due to the fact that these two kinds of presumptions are not distinguished, as they ought to be, one from the other.

ACTION PENDING ABROAD AND AFFECTING THE PROOF IN OUR COURTS.

§ 400. If the court has, as undoubtedly it has, the power of sisting procedure in some pending process until some criminal proceedings that are connected with the civil action, raising the same concrete questions, are disposed of (cf. *e.g.* German *Civilprozessordn.* § 140), then in a sound view the same thing may happen with reference to criminal proceedings dependent in a foreign country. The point here is not the binding force of the foreign criminal sentence, but the clearing up of matters of fact, an object which may be achieved through the procedure of a foreign court just as well as through the procedure of one of our own courts.⁵⁹

V. Bulmerincq, without making any special reference to the *præsumtiones hominis*, refers questions of *onus* and presumptions to the head of substantive law.

Wharton, § 782, is for the *lex fori*: Laurent, however, makes an erroneous application of the rule that presumptions should be tested on the principles of substantive law, when he proposes to test the presumption of *filiation paternelle* by the *statut personnel* of the mother. The question simply is, whether the child has any rights according to the law of the father's family.

⁵⁸ Weiss takes a different view (p. 951), in opposition to Brocher, *N. Traité*, p. 291, who, however, represents the sound theory.

Bonnier, *Traité des Preuves*, ii. § 934, comes to exactly the opposite conclusion, for he holds that the *présomptions simples* alone are uncontrolled by the *lex fori*. In the *présomption légale* he can see nothing but an unconditional command addressed to the judge, and so, he concludes, the *lex fori* is the only law that can be applied.

⁵⁹ See decision of the Sup. Ct. of Austria, 14th Feb. 1882 (J. xiii. p. 462).

Besides, the decision of a foreign court must be awaited by a court in this country, if the law of this country regards the decision of some other court,—*e.g.* in matrimonial matters the court of the domicile or the nationality of the spouses,—as prejudicial in the technical sense, and that court happens to be a court of some other country. In such cases, according to the sound theory, the foreign judgment operates without needing any special declarator of its validity or process for rendering it executory, since all that it decides is an incidental or preliminary point in the action which is dependent here, and does not propose to enlist directly in its service the executive forces of our country.⁶⁰

[If there is a want of power in the court in which the principal process depends to deal with some incidental question, which nevertheless must be determined before a just judgment in the principal suit can be reached, then process will be sisted till the foreign court, which has power to determine the incidental question, does so. But if there is power in the principal court to determine all questions, then "*judex tenetur impertiri judicium suum.*" See *Phosphate Sewage Co. v. Molleson*, 1876, Ct. of Sess. Reps. 4th ser. iii. (H. of L.), p. 77, a case of a claim in bankruptcy which depended in the court of a country other than that in which the main process was being carried out.

On the plea of his *alibi pendens*, see *infra*, § 473, and note.]

B. THE PARTIES AND THEIR LEGAL REPRESENTATIVES.

TITLE TO SUE AND NECESSITY FOR EMPLOYING QUALIFIED PRACTITIONERS.

§ 401. The *lex fori* governs the legal relation which is involved in a *lis* or process, and this relation again determines what are the rights of the parties as such. Hence it follows that all the rights of the parties as such are dependent upon the *lex fori*. This will regulate in the first place the question whether a particular person can appear at all or not as a party (*e.g.* in cases where the law of the court recognises some general rule whereby foreign juristic persons¹ are refused a *persona standi in*

⁶⁰ See Despagnet, § 249. The same force must be conceded to the judgment of a foreign court upon a criminal process in this country. See Trib. Corr. Seine, 9th Dec. 1879 (J. ix. p. 189). See, too, German Criminal Code, § 172. "Adultery shall be punished with imprisonment of the guilty spouse, if the marriage is dissolved in respect of it." In such a case a foreign decree of divorce may be taken into consideration.

¹ According to the view held in the United States (Wharton, § 737a), subjects of hostile States, in the absence of a special indulgence, have no right to sue, so long as the war lasts. This is in contradiction to the legal theory received in Germany and France, and to the principles of modern laws of war (see Laurent, v. § 67), since war is carried on only by the sovereign powers of the two States. To be logical, it would be necessary to forbid payment of debts due to the subjects of hostile States, so long as the war lasted. Indeed, Wharton says (§ 497): "All contracts made by the citizens of one country with the citizens of another country, when the two countries are in a state of public war, will be adjudged void." It would be absolutely impossible to carry out any such rules in wars upon the continent of Europe at the present day: they would interfere with the conduct of the war itself.

judicio, a rule which seems to us to be altogether unjustifiable). The *lex fori* will in the same way determine whether a party can take part in the process personally, or whether he must avail himself of the services of some legal adviser who holds a license to appear in the court. But in this, as in other cases, the law which must primarily determine the question may commit the decision of some prejudicial point to another law, and from the nature of the subject that must be the case with regard to questions of capacity to sue, in so far as that title is merely one aspect of general legal capacity and capacity to act. Since the foreigner has in general the same legal capacity in matters of private law as our own citizen, and since nowadays every one has legal capacity, juristic persons having at least capacity to sue (see *supra*, § 105), the practical result is that in questions of capacity to sue we need not consider anything more than the capacity to act,² and that is a thing that must be determined, not by the *lex fori*, but by the personal law of the party concerned. This rule³ is recognised even by those⁴ who in other respects maintain that the *lex fori* must be applied almost without exception in matters of civil procedure. Unfortunately in § 53 of the German *Civilprozessordn.* this rule has been set at defiance in a manner for which there is no justification.⁵

² See German *Civilprozessordn.* § 51. "A person who can bind himself by contracts has capacity to sue and be sued."

³ See Fœlix, i. § 33 *ad fin.*; Mittermaier, *Archiv. für civil Praxis*, xiii. p. 303; Schäffner, p. 204; Wetzell, *Civilproc.* § 43, note 24; Renaud, *Civilproc.* § 9, note 8; Wach, *Civilproc.* § 47, No. vi. Judgment of the Sup. Ct. at Wolfenbüttel, 20th Jan. 1858 (*Zeitschrift für Rechtspflege im Herzogthum Braunschweig*, 1858, p. 81). "The question whether a father is bound to allow himself to be sisted in a process for his daughter, who is *in familia*, must be determined by the law of their domicile.

See, too, Sup. Ct. of App. at Jena, 15th Dec. 1831 (Seuffert, xiii. No. 181); Kiel, 31st May 1856 (Seuffert, xv. No. 94); Berlin, 6th Oct. 1873 (Seuffert, xxix. No. 210).

⁴ Menger, p. 140; v. Canstein, *Lehrbuch d. Geschichte u. Theorie d. Oesterreich. Civilprozessordn.* i. (1879) p. 291. Story, § 77, and Wharton, § 698, do not express themselves quite distinctly. Even English law will determine according to the *lex domicilii* a mandate given by the party at that domicile.

⁵ "A foreigner who has not capacity to sue by the law of his own country is held to have that capacity, if the law of the court in which the process depends invests him with such capacity." It has been attempted to draw an analogy, which is quite inapposite, between this question and that raised by § 35 of the introduction to the Prussian *Allgem. Landr.* and by § 84 of the German statute on bills. What may perhaps in all cases be allowable in contracts, and especially in contracts by bills, may very well not be justifiable in the law of process. If we proceed logically to follow out § 53 of the *Civilprozessordn.* we should require the court to reject the claim of a guardian to appear in Germany, if his ward, who was a minor by his own law, was major by the German law, when he proposed to institute a process on behalf of his ward, or at his own hand to appear to defend his ward's interest or to assist him (cf. Gaupp, *Civilprozessordn.* i. pp. 180, 181). Struckmann and Koch propose to allow him a right to appear with his ward: I do not understand how that can be done, if the German court is to ignore the position of the guardian altogether. Undoubtedly the recognition in a foreign country of any judgment pronounced against the ward in such a case would be met with difficulties, and thus the German suitor, whose special protection and convenience were intended to be secured by the provisions of § 53, might very probably suffer prejudice, if he should try to execute his judgment abroad: all the trouble and expense of the process in Germany would have been thrown away. But § 53 will give us absolutely no certain guide

It is a necessary inference from the proposition that capacity to sue and to be sued is ruled by the personal law of the party, that this other question, viz. whether a person who has in himself full capacity to act, *e.g.* a juridical person—a *commune* (*Gemeinde*) it may be—needs special authority to carry on a suit, must be determined also by his or its personal law. This is true also of the authority of any legal representative of a person, who in himself has no such capacity, *e.g.* the authority of a guardian to conduct a process.

In dealing with the subject of contracts in the way of trade (*supra*, § 142), we found it necessary to advocate a certain respect for the *lex loci actus*, and to make certain exceptions from an exclusive application of the personal law in these matters. But in questions of capacity to sue and to be sued, we cannot admit that there is any reason at all for any such modification of the general rule. Actions are not legal transactions which are hastily and summarily gone about. In these matters we have plenty of time and leisure to inform ourselves as to the capacity of our adversary. In summary processes, *e.g.* arrestments, our course must generally be regulated, to begin with, by a superficial enquiry, which in a certain sense is merely provisional. In such cases, accordingly, circumstances may require that a person should be held to have capacity to sue and to be sued, although by the law of his own country he has no such capacity, and will require to supplement his own capacity by the approval *e.g.* of his guardian. On the other hand, the court in which the action depends will not pay any regard to limitations which the personal law of the party imposes upon him as a condition of certain steps of procedure, limitations in regard to references to oath or compromises. General incapacity to act is a fact that must necessarily attract attention at the outset of an action; such minor limita-

in determining a question which may very likely arise and be of practical importance, viz. what is to be said of a mandate to sue given by a foreign guardian in such a case in a foreign country? The foreign law should of course determine all questions as to the validity of a mandate given there: but the logical inference from § 53 seems to deny this, and the ward could at any moment he wished make an end of the conduct of the suit by his guardian. Wach, (p. 549) recognises that difficulties may arise in consequence of § 53. In my opinion this provision, which the majority of the Imperial Commission on Justice celebrated as an international step in advance, is simply one of these abuses of what seem to be purely theoretical principles for ends that are alleged to be practical, but are in reality most impractical, which often find so much favour. Apart from the unsoundness of § 53 in principle, much difference of opinion prevails as to its true interpretation, as is often the case with enactments which are faulty in principle (see Wach, p. 548; Böhm, *Rechtshülfeverfahren*, i. p. 62). *First*, does the rule apply to foreigners domiciled in the German Empire? *Second*, does it sanction in the case of the foreigner the principle, which has not obtained much recognition generally in Germany, that capacity to sue and to be sued is dependent on citizenship and not on domicile? *Third*, does the rule apply to Germans who are not domiciled within the jurisdiction of the court, and who have a personal law at variance with the *lex fori*? The first and second questions I should answer in the affirmative, the third in the negative. We must, however, decide rather on the words used than on any general principle. But § 53 will make it imperative to apply the provisions of § 51 to foreign married women and children. Substantive rights of the husband and father cannot be affected by suits conducted by the wife or child (see Wach, p. 554). See Böhm's *Rechtshülfeverf.* i. § 8 *ad fin.* on the whole subject of § 53.

tions, on the other hand, are easily overlooked. Besides, steps of procedure which have the same names in different systems of process have very different effects as matter of fact. This would be a sufficient reason for denying effect to them beyond their own territory. The *bona fides* of international intercourse would be defeated if we allowed them to have any such effect.^{6 7}

PLURALITY OF PARTIES. *Legitimitio ad causam.*

§ 402. The *lex fori* must undoubtedly regulate primarily the competency of associating a number of persons as pursuers or defenders, and also the right of persons, other than the original parties, to join in the suit (*intervention*). But still it will often be necessary to appeal to some substantive foreign law to tell us whether there is such a community of rights among a number of persons as to entitle them to sue or to be sued together, or whether there is a legal interest which justifies us in sisting new parties.

The question whether the pursuer has a good title to make the claim in question against the defender, apart from its objective existence—*i.e.* *legitimitio ad causam*—is dependent upon the law to which the legal relation in question is subject. In particular, the *lex fori* will not decide whether the pursuer must make his claim in his own name and right, or as an assignee; that question depends for its solution purely upon whether it is possible to transfer to other persons the right itself which is in dispute, or only the privilege of exercising it.

RIGHTS AND DUTIES OF THE PARTIES AS SUCH TOWARDS EACH OTHER.

CAUTION FOR EXPENSES. RIGHTS OF THE POOR.

§ 403. The mutual obligations of the parties, in so far as they arise from the suit, are to be determined by the *lex fori*; so, too, is the obligation to make good the expenses of process, to find caution for expenses,⁸ and to produce documents.⁹ Foreigners and citizens stand on the same footing on these matters.

⁶ On the other hand, Gaupp, *D. Civilprocessordn.* i. p. 181, on the ground that § 53 contains an exceptional provision, which does not admit of being applied by analogy. § 52 of the *Ordnung* itself, however, refuses effect to such limitations in the case of persons who belong to the German Empire, "if they have a general capacity to sue and to be sued, or if the law of the court requires no special authority to be given."

⁷ The question of the capacity of a bankrupt to sue and to be sued will be discussed below, under the law of bankruptcy.

⁸ P. Voet, x. § 8; Schäffner, p. 202.

⁹ Lammasch, p. 391, is wrong in holding that this last obligation of parties is, like the obligation of third parties to produce documents, regulated by the law of the place of residence. The duty of the party has no connection with the *imperium*. The difference in the presumptions arising from failure to produce in the case of a party or of a third person (*D. Civilprocessordn.* § 392), shows the impossibility of treating the two cases alike in international questions.

An exception, however, which is very widely recognised,¹⁰ is the exception as regards the obligation to find caution for expenses. Although the law does not now, as a rule, require a pursuer, who is a citizen of this country, to find caution, it does give the defender right to demand such caution from a foreign pursuer. The practice in France has laid it down that the right to demand that a foreigner shall find caution belongs to the *droits civils*,¹¹ which no one but a French subject, or a person domiciled by the license of the Government in France, can exercise.¹² But the special obligation laid upon foreigners to find caution, which exists in almost all countries, in spite of the equality established between foreigners and natives in all other legal relations, rests simply upon the fact that the foreigner can more easily withdraw himself from the execution of the sentence of the court, and put the defender in a specially disadvantageous position, which is remedied by requiring caution.¹³ The fact which is most strongly pressed as showing that it is a special privilege of natives to require caution—viz. that a foreign defender needs not to find caution, although he may cause expense to his opponent just as much as a pursuer, and withdraw himself as easily from diligence for its recovery—is to be explained by the naturally advantageous position of the defender. It would obviously outrage all feelings of justice to allow judgment to go against a foreigner just because he was not in a position to find caution.

The result is that a defender who is a foreigner must have the same right to demand caution from another foreigner, who sues him in our courts, as a native defender has. This is the view of the German *Civil-processori*n., according to the interpretation of it which is generally

¹⁰ See Phillimore, § 890, on the general recognition of this rule. It is unknown in Austria (v. Püttlingen, p. 405). Review of the different legal systems in Gerbaut, § 123.

¹¹ See the Arrêts du Cour de Pau, 13th December 1836 (Sirey, 36, 2, p. 362); Cour d'Orléans, 26th June 1828 (Sirey, 28, 2, p. 193); Félix, i. p. 291; the judgment of the Court of Cassation of 15th April 1842, reported there at p. 294; and Gand, No. 325. [C. de Nancy, 14th June 1876, J. v. p. 264; C. de Douai. Auckaert v. Delmoities, 1877, J. iv. p. 142. No length of residence will give a foreign defender, who has no Government authority to live in France, the right to require caution from a foreign pursuer.]

¹² But whereas in Germany and in France citizenship determines the question, it being always understood that in France a foreigner with a domicile licensed by Government is on the same footing as a Frenchman, the English law requires every person who is permanently resident abroad to find caution, so that *de jure* there is no distinction between citizens and foreigners (Piggot, p. 185). Domicile rules in the United States. Conversely, a citizen who is domiciled abroad is not required either by the law of France (Gerbaut, § 137) or by that of Germany to find caution. According to a judgment of the Court of Celle, 5th November 1881 (Seuffert, xxxvii. No. 149), even the acquisition of another nationality will not give rise to the obligation; it is only the loss of German nationality on the grounds recognised in German law that will do so.

¹³ The foreign pursuer will not, however, be free of the obligation to find caution, if the judgments of the court where the suit depends are executed in the country to which he belongs. Gerbaut, § 41; C. de Paris, 24th February 1877 (J. iv. p. 38). Foreign sovereigns, ambassadors, and foreign States, are subject to the obligation. Against them it is more difficult to reckon on execution than against individuals. Gerbaut, § 46.

received;¹⁴ the opposite view prevails in the law of Belgium and in France.¹⁵

Since the object in view is in truth the security of the defender,¹⁶ which is thought to be imperilled by the fact that the pursuer is a foreigner, it matters not that the claim on which the action is founded was originally a claim competent to a native of this country, if it is being pressed at the present moment by a foreigner, *i.e.* some foreign assignee, in his own name.¹⁷ So, too, one who loses his citizenship and becomes a foreigner *pendente processu* will be liable to find caution;¹⁸ as, too, every foreigner must be who may eventually be liable on his own account in payment of expenses. Accordingly, a foreign pursuer is not exempt by the fact that he has others, citizens of this country, joined with him as parties to the action;¹⁹ there must, to relieve him, be some one responsible for the whole expenses of the action.

On the other hand, it is quite immaterial that a person should in point of form only be described as pursuer. We must rather look to the question whether in point of fact the person concerned seeks to acquire something for the first time,²⁰ or to alter some existing legal relation, not merely to affect some relation which has just been brought into being by some preliminary process, or, at the least, proposes to ask for special legal recognition of some state of circumstances in which he stands, or of some document in which he is interested. An example may be found in actions of declarator (see *D. Civilprocessordn.* § 231). Accordingly, a person who is an appellant, or who takes advantage of some exception, is not bound to find caution. Nor is one who asks for the loosing of arrestments in security used against him, or makes a motion for that purpose, or as a defender resists the arrestments of things in the hands of third parties or of outstanding debts.²¹ The person who is liable is the pursuer in the first instance, or the person who lays on an arrestment.²² Where a party comes into an action, the point for consideration is whether he is sisted on the

¹⁴ Cf. *e.g.* Gaupp, i. p. 314; Seuffert, Comm. § 102, No. 3. The same rule holds in Brazil.

¹⁵ Cf. Ct. of Douai (J. v. p. 264); Trib. Civ. Pondicherry (J. vi. p. 552); Trib. Civ. Anvers, 28th December 1878 (J. viii. p. 70); Trib. Civ. Gand, 7th May 1871 (Dubois, Rev. iv. p. 150); C. de Liège, 12th February 1880 (Rev. xvi. p. 145). But to the opposite effect see Demangeat on Fœlix, i. pp. 271 and 296; Massé, p. 336, note 1; Haus, § 110.

¹⁶ It is true that by degrees most modern legal systems have adopted the formal qualification of citizenship as their rule. Thus we have no further concern with domicile. Accordingly, an obligation to find caution will not be created merely by leaving the German Empire. Landgericht Halle, 22nd December 1883, *Zeitschr. f. deutschen Civilprocess.* viii. p. 506.

¹⁷ Gerbaut, § 51.

¹⁸ See the express provision of the *D. Civilprocessordn.* § 103.

¹⁹ Gerbaut, § 49.

²⁰ Gerbaut, § 53.

²¹ See Gerbaut, § 53; Trib. Seine, 22nd Jan. 1876 (J. iv. p. 142), and 7th Aug. 1879 (J. vi. p. 541). See, too, Clunet, J. vii. p. 393. On the other hand, the tenant who demands something from the lessor which he is withholding, is liable in caution.

²² Cf. Fœlix, i. § 190, and the French judgments cited there. Francke in the *Zeitschr. f. deutschen Civilprocess.* iv. p. 524; Ct. of Köln, J. vii. p. 252.

side of the pursuer or on that of the defender.²³ On the other hand, actions of reduction and restitution recognised by the *D. Civilprocessordn.* seem to be actions²⁴ directed against a state of circumstances which is ruled by some judicial decree, and in such cases it is no reason for exemption that the party was a defender in the preliminary process. The pursuer of a counter action is not bound to find caution, provided that his claim in that action can be represented simply as the contradiction of the claim made by his adversary in the original action. But he will become liable to find caution if the original action is thrown out or withdrawn, and the counter action left pending; or if the conclusions of the counter action go beyond those of the original action, or if it rests upon some legal relation that has no affinity to that on which the other action proceeds, and in the latter case there is a prospect of additional separate expense. Even a demand for execution of a foreign decree, which is according to the German procedure and English law stated in the form of an action, makes the pursuer of it liable in caution. But execution *per se* proceeding on the ground of some title obtained in this country is not an action, and does not involve finding caution.²⁵

It is possible that in no very remote future the whole obligation to find caution for expenses will disappear. It is already gone in Italy. By the German *Civilprocessordn.* [§ 102 (1)],²⁶ the foreign pursuer is free from any such obligation, if by the law of his country a German is not obliged to find sureties. In a large number of recent treaties,²⁷ the contracting States have done away with all such requirements by reciprocally guaranteeing "*accès libre et facile auprès des tribunaux.*"²⁸ As a matter of fact, a defender may suffer just as much from a groundless action raised against him by an insolvent native of his own country, from whom no caution is required, as he can from a foreigner. The Institute of International Law (Zurich Resolutions of 1877, Ann. ii. p. 44) expressed itself in the same

²³ Gerbaut, § 60, and Gaupp, *Civilprocessordn.* i. p. 314.

²⁴ So, too, Seuffert, *Deutsche Civilprocessordn.* § 102 (n. 2); Struckmann and Koch, § 102 (n. 1). If one resists execution he is in truth pursuer upon a real right. See Trib. Seine, 16th June 1880 (J. vii. p. 392). But one who asks for execution of a foreign judgment is pursuer in the sense we have laid down. See Francke, x. p. 104.

²⁵ Gerbaut, § 62, p. 56.

²⁶ According to the conceptions of this statute it is not enough, if the German as such, or as a foreigner, is not required to find caution in the other country: the requirement is that the German pursuer shall be absolutely free from any obligation to find caution in like circumstances. Caution may then be required, if in the foreign State in question it may be required from the subjects of that State itself. (Cf. Struckmann and Koch on § 102 of the *Civilprocessordn.*) This is a step beyond the requirement of reciprocity, for which so much may be said in international law. But it may perhaps be supported in respect that there may be a statutory obligation in a State that caution should be found, which although not in form confined to foreigners, is worked so as to affect foreigners for the most part.

²⁷ See v. Bulmerincq, p. 230. In some treaties the obligation to find caution is only dispensed with if persons have been admitted to the benefits of the poor's roll.

²⁸ See Gerbaut, § 97, and the Franco-Spanish treaty of 7th Jan. 1861, dealt with by the Trib. Seine, 23rd Nov. 1880 (J. vii. p. 575), and Clunet, *ibid.*

sense as these modern treaties;²⁹ as also does Gerbaut (§ 102), who has treated this question perhaps as thoroughly as any one, both from the point of view of positive law and of legislative expediency.³⁰

Justice requires, too, that the benefits of the poor's roll should be extended to foreigners. To refuse poor foreigners such privileges (*assistance judiciaire*) may be a direct denial of justice. In modern treaties, reciprocal admission of the subjects of the contracting powers to the benefits of the poor's roll is often conceded.³¹ But this must not be used as an argument for maintaining that foreigners cannot claim admission to that roll except through treaty provisions.

NOTE TT ON § 403. CAUTION FOR EXPENSES. POOR'S ROLL.

[In England, a plaintiff may be required to find caution if he is beyond the jurisdiction of the court, unless that absence is merely temporary; and it would seem that such caution may, in the discretion of the court, be required even in cases where the defender is also a foreigner. By the law of Scotland, a foreign pursuer "is required to provide a mandatary resident in Scotland, to be responsible to the Court for the conduct of the cause, and to the opposite party for expenses in which the mandant is found liable" (Mackay, Practice of the Court of Session, i. p. 458). This rule is applicable even to a Scots pursuer resident abroad, or leaving Scotland during the dependence of the suit. If he is resident in England or Ireland, he is not required to do so, unless there are some other circumstances than his absence from Scotland that render it proper he should do so (Lawson's Trs. 1874, Ct. of Sess. Reps. 4th ser. i. p. 1065). The order to sist a mandatary is entirely in the discretion of the court, and the considerations in respect of which such orders are made seem to apply none the less forcibly in cases where the defender as well as the pursuer is a foreigner (*D'Ernesti v. D'Ernesti*, 1882, Ct. of Sess. Reps. 4th ser. ix. p.

²⁹ "L'étranger sera admis à ester en justice aux mêmes conditions que le régnicole."

³⁰ By Franco-Belgian law no caution is required in commercial matters. The decisive consideration, however, is not whether the process is or is not actually dependent in a commercial court, but whether the question on its merits is or is not substantially a commercial one (Braun, J. viii. p. 405).

By the German *Civilprozessordn.* the following exceptions, in addition to the case of reciprocity in the foreign court, are recognised:—

"(2.) Cases connected with bills or instantly verifiable by documents;
 "(3.) Cases of counter actions;
 "(4.) Cases which are instituted in consequence of a public requisition to do so;
 "(5.) Cases arising out of claims the foundation of which is in some land register or register of incumbrances kept by a German official."

³¹ *E.g.* Treaty between France and Austria of 14th March 1879 (J. vii. p. 611), and between France and the German Empire on 20th Feb. 1880. Both of these treaties also release persons admitted to the poor's roll from obligation to find caution for expenses.

In Austria, foreigners are always admitted to the poor's roll if there is a guarantee of reciprocity. See Starr, *Die Rechtshülfe in Oesterreich*, p. 19.

655). An impecunious pursuer will, in certain circumstances, be required to find caution, even although he be a Scotsman.

The benefits of the poor's roll in the courts of Scotland are not confined to Scotsmen (cf. *e.g.* Flynn, Ct. of Sess. Reps. 4th ser. ix. p. 909.]

MANDATE TO CARRY ON AN ACTION.

§ 404. The *lex fori* must of necessity be used to interpret, in all questions connected with the process, the effect of a mandate specially given for the purpose of carrying on an action, even although that mandate should have been given abroad by a foreigner. The mandant knows that the mandate must be made effectual for the court and for his opponent, as well as for his own mandatary. Thus the mandatary is empowered to make a compromise with the adversary, if that is one of the powers with which the *lex fori* invests a mandatary.

The rights and duties of legal advisers with a licensed position, and of procurators in a suit, will be regulated, as far as questions with foreigners are concerned, by the law that is recognised at the seat of the court where they hold their position. Although the representation of the parties, and the introduction of legal advisers into an action, rest in every case upon a contract, the powers of solicitors and advocates really rest upon a license conferred by the State, and in some respects may well be compared to a public office. No party need contend, therefore, that he may settle the cost of his representation by such persons in any other way than is sanctioned by the law that prevails at the seat of the court: parties subject themselves to the dues there exigible.³²

POSITION OF FOREIGNERS IN ARRESTMENT PROCEEDINGS. CLAIMS OF DAMAGES ON ACCOUNT OF THE USE OF ARRESTMENTS.

§ 405. In procedure connected with arrestments, the favour which at one time was shown to citizens, and the disadvantages to which foreigners were put as such, are now gradually disappearing.³³ Unless there is an express enactment to the contrary, the foreigner may use arrestments against a person on exactly the same conditions as a citizen can do so. It is not the quality of an opponent, as foreigner or native, that gives the

³² As a matter of fact, the taxation of an account for services rendered can only take place before the court where the solicitor or advocate has done his work. See Ct. of Paris, 15th June 1875 (J. ii. p. 435).

³³ Formerly there were many such cases. Cf. *e.g.* Spangenberg in Linde's *Zeitschr. für Civilr. u. Proc.* iii. p. 431, for the old law of Hanover. Peck, *de jure sistendi*, c. 1, 2. The so-called "foreigner's arrestment" was only competent to citizens. Judgment of Sup. Ct. of App. 26th October 1842 (Heuser, Ann. i. p. 88). On the new state of affairs, see, as regards France, Fœlix, i. § 162, and J. v. p. 380. For Italy, Gianzana, ii. § 255.

right, but rather the fact that the assets of his property are likely to be withdrawn from the jurisdiction, or may be so withdrawn.³⁴

It is, too, the *lex fori*, and not the law of the party's domicile, that must decide upon obligations of reparation for the unwarrantable use of any step of procedure, especially, for instance, an unwarrantable use of arrestments.³⁵ It is quite obvious that we are here again dealing with a subject that must be referred to that law. One who desires to have the advantages of any course of procedure, cannot refuse to take upon himself any disadvantages that may eventually turn out to be associated with it.

C. JURISDICTION OF THE COURTS.

JURISDICTION IN RESPECT OF SUBJECT MATTER. COMPETENCY OF THE LEGAL REMEDY.

§ 406. The essentials of the composition of the court, and questions of jurisdiction of the different courts of the country in respect of subject matter, *i.e.* questions as to what kind of court has to decide this particular claim, must plainly be fixed by the *lex fori*. The point simply is, which of the machines of that State which is to take up and decide the matter, is the one by which the decision is to be given? In such a matter, the sovereign power of the State cannot submit to any instructions from a foreign law.

Thus, for instance, the foreigner who at home has certain privileges in particular suits, or in all, cannot claim these on that account in a foreign country.¹ But till modern times special privileges were often granted to foreign nobles, if in both countries the nobility enjoyed somewhat similar privileges.

Accordingly, it looks at first sight as if the competency of the legal remedy, *i.e.* the question whether the courts are to decide at all in this or that matter, must in the same way be determined by the *lex fori*, and by it alone.² But after more careful consideration we find that we must hold

³⁴ See German *Civilprozessordn.* § 797 (2): "It is to be held a sufficient ground for arrestment, if the judgment has to be executed abroad."

³⁵ See Ger. Imp. Ct. (i), 20th September 1882 (Entsch. vii. No. 116, p. 380); but this decision rested on the consideration, which, in my opinion, was wrong, that the question was one as to the consequences attached by the law to the trespass on the rights of another which had been committed, and that the law of the place where this trespass had been committed must decide.

¹ Fœlix, i. § 126. Parties have no right to appeal to arbitration, unless that be specially arranged between them, although that may be the rule according to the law to which the legal relation in question is subject (Fœlix, as cited, note 1). It cannot make any difference that a State, by a special commission, has invested some person temporarily with the position of a judge in place of the officials who are permanently engaged in such work.

² See to this effect Imp. Ct. (iv.), 16th September 1886 (Bolze, *Praxis*, iii. No. 37, 1881) The competency of the legal remedy is held to be determined by the *lex fori*, even although the legal relation in question is under the control of a foreign law.

that this question is ruled by the law which determines the merits of the case in hand.³

If the parties are only bound to respect the decision of some non-judicial foreign official, the substantive nature of the claim would be altered by allowing them to have recourse to the courts of another State. But if, conversely, the law which decides upon the substantive bearings of the legal relation in question allows the court to decide such questions, then, if both parties are agreed, or if, by embarking on the contest, they may be held to be agreed, the matter in dispute may be brought before the courts of some other State, even although there may be no doubt at all that this kind of legal remedy would have been excluded, if the question at issue had in its substance belonged to that State, in the courts of which it now is. For the exclusion of the ordinary *cursus curiæ* does not mean that the courts are not under any circumstances to dispose of such questions, but simply that they are not to dispose of such questions among their own citizens. They might be brought into operation *e.g.* even in such questions as specially selected courts of arbitration.

TERRITORIAL JURISDICTION. NATIONALITY OF THE PARTIES. FRENCH LAW IN PARTICULAR.

§ 407. The jurisdiction of the courts of this or that State generally,⁴ and the jurisdiction of the particular courts of a State, must be determined in so far as the court in which the process depends is considered, by its own law. The matter for determination, on the one hand, is what contested questions the State desires to have dealt with by its tribunals, and eventually by each one of these tribunals.⁵ Even although the court should look upon the rule by which its own competency is affirmed as a trespass upon the jurisdiction of the courts of another State, or even as contrary to the principles of public law,⁶ it must still hold itself to be competent, for it owes obedience to its own law. An example of a trespass of the kind referred to will be found in article 14 of the Code Civil, a view in which even French jurists concur: another, as we think, will be found to be involved to some extent in § 24 of the German *Civilprozessordn.*⁷ It is

³ Accordingly, the question whether administrative officials can make arrangements for the education of a child must be decided by the child's own law. So Sup. Ct. of Stuttgart, 25th January 1861 (Seuffert, xvi. No. 57).

⁴ Gerbaut, § 435, gives a view of the rules of competency recognised in a multitude of States, in matters connected with other countries. So does Piggott, pp. 375-551. The latter is very copious as regards non-European countries. See Wharton, §§ 704 *et seq.* as regards the United States.

⁵ On this point there is no dispute. See Asser-Rivier, §§ 68, 69.

⁶ Cf. *e.g.* Daguin, p. 117.

⁷ Provisions of that kind often damage the citizens of the very State which enacts them. No French decree founded on art. 14 of the code will be put into execution by a foreign law.

quite another question whether and to what extent the courts of another State will be bound to recognise a jurisdiction thus assumed. It is also questionable whether it is desirable for a party to make use of such an exceptional provision.

A further question may, however, be started, viz. whether the nationality of the parties should form any substantial consideration in determining questions of jurisdiction, so that the legal system of a country should, as a rule, have to deal only with disputes between citizens or between a citizen and a foreigner, and should have nothing to do with disputes between foreigners; or whether the grounds upon which the law declares the courts to have jurisdiction are to be applicable to foreigners as much as to citizens, excepting always particular classes of cases, in which the peculiar character of the legal claim which is at issue makes it necessary to keep in view the citizenship of the parties. The former view, *i.e.* the view that the courts should not deal with disputes between foreigners, is in principle the view of practical French jurisprudence at the present day.⁸ It starts from the principle that, as a matter of principle, the French courts of justice are under no duty to judge in matters in which foreigners only are concerned; that, as a matter of principle, therefore they are entitled to refuse to entertain any action to which foreigners, and foreigners only, are the parties. But it finds itself compelled, by the requirements of everyday life, to recognise an ever-increasing array of exceptions to this principle,⁹ so that at last the exceptions seem to swallow up the principle. As a matter of fact, it is very difficult to refer foreigners who have been promised the protection of the law, to foreign courts, which may be at a great distance, within whose jurisdiction it may frequently be impossible to find either the person of the defender, or any property of his that can conveniently be taken in execution. The substantive law, which we pretend to guarantee to foreigners, would not unfrequently turn out to be a mere phantom, if such a power, of referring these foreigners to their own tribunals, were exercised.

On the other hand, if the Frenchman brought a fresh action in the foreign country the *exceptio rei judicatæ* might be invoked against him, for he was the person who went to the French court. If there are not assets in France to satisfy the decree, in any case the Frenchman has had his outlay of expenses for nothing.

⁸ See on this subject Bard's work, § 221; Gerbaut; also Féraud-Giraud (*De la compétence des tribunaux français pour connaître des contestations entre étrangers*, J. vii. pp. 137-173, and pp. 226-238); Glasson (J. viii. pp. 105-133) and the illustrations in Weiss, p. 924. This rule of practice (cf. Félix, i. § 149) is connected with the older French doctrine and practice, and is regulated by a judgment of the Court of Cassation of 22nd January 1896. A subsidiary ground on which French courts justify their refusal to entertain suits between foreigners is, that in applying foreign law they are very liable to error. (See against this Demangeat, note to Félix, i. p. 322, and Weiss, p. 934.) But it is not possible to avoid altogether paying some attention to foreign law. Still weaker is the plea that the courts are burdened with too much business.

⁹ *E.g.* the principle is not recognised in commercial questions (C. de Paris, 21st May 1885, J. xii. p. 541) or in questions of interim possession.

On these grounds, more modern French theories are already beginning to throw over the whole of this limitation:¹⁰ in Belgium, by the recent Procedure Statute of 1876, it has been expressly abolished,¹¹ and there has been adopted the principle which prevails in the common law of Germany,¹² in the law of Austria,¹³ of England,¹⁴ of the United States,¹⁵ of Italy,¹⁶ and generally in the laws of most countries,¹⁷ and which has found correct expression in this resolution of the Institute of International Law (the limitation attached to it is explained by the circumstance that in certain cases the nationality of the parties must determine the jurisdiction of the courts):—

“ Dans les procès civils et commerciaux la nationalité des parties doit rester sans influence sur la compétence des juges sauf dans les cas où la nature même du litige doit faire admettre la compétence exclusive des juges nationaux de l'une des parties.”^{18 19}

§ 408. We must not, however, forget that this rule of French law which is thus to be rejected has, in a certain sense, borne fruit for the theory of the law of procedure in international questions. It has led to a more careful consideration of the question, how far it is sound to extend grounds of jurisdiction, which are sustained by the law of any particular country, to suits in which foreigners appear as parties.

This consideration has led to the proposition which, in my opinion, is a sound proposition, that a distinction falls to be made, according as we are dealing, on the one hand, with rules of jurisdiction by which the distribution of different kinds of actions among the several courts of one and the same country is regulated, or, on the other hand, determining international

¹⁰ So Laurent, iv. § 46; Asser-Rivier, § 70; Féraud-Giraud, J. vii. p. 144; Gerbaut, §§ 293, 294; Durand, p. 438; Weiss, p. 934.

¹¹ Laurent, iv. § 37, and Weiss, p. 937; Asser-Rivier, p. 155, note.

¹² The German *Civil processordn.* starts with this principle.

¹³ Menger, pp. 145, 146.

¹⁴ Piggott, pp. 132, 139.

¹⁵ Wharton, § 705. The law of Louisiana is different.

¹⁶ Gianzana, ii. § 80. See Lomanaco, p. 220, for Pisanelli's brilliant defence of this principle.

¹⁷ See Ct. of Luxemburg, 5th January 1887 (J. xiv. p. 674), for a simple application of the ordinary rules of jurisdiction to actions in which foreigners are concerned. See Clunet (J. xiv. p. 676) to the same effect.

¹⁸ From this there follows the proposition, which in my view is perhaps not quite so sound (see Ann. i. p. 126), viz.: “*Les tribunaux saisis d'une contestation, doivent à l'égard de la compétence adoptée par les traités, statuer d'après les mêmes règles qui ont été établies à l'égard de la compétence, par les lois du pays. Ainsi dans les pays où ce système est adopté pour l'application des lois nationales concernant la compétence des tribunaux, ils ne se déclareront pas incompétents d'office, quand il s'agit de l'incompétence ratione personæ.*” These propositions were adopted on the proposal and report of Asser (Rev. vii. pp. 364-391, especially p. 367).

¹⁹ Subjects of a State, with which we happen to be at war, must be admitted all the same to sue and be sued in our courts. See Gerbaut, § 9. It was otherwise in old French law. On the other hand, the decree of 19th Thermidor, in the year 11, directed against the English, was regarded as an isolated exception. See, however, *supra*, p. 872, note 1.

questions of jurisdiction affecting the whole courts of the rival States concerned. This distinction is not of very much importance in connection with English and American procedure, or even for systems ruled by the common law of Rome, for these are all systems of procedure, in which jurisdiction rests upon a subordination of the different classes of actions to the judicial authority of this or that court, which is as natural as the lines of demarcation by which the jurisdictions of different countries are defined. The distinction is, however, of more importance in a series of more modern legal systems, in which one jurisdiction is piled upon another, so as to give every single court within the State an extravagantly broad sweep of jurisdiction.²⁰ Now, although it can never be a matter of indifference, it may not be a matter of vital importance, whether a defender must, according to the pursuer's pleasure, submit to the jurisdiction of this or that court among the many courts of one and the same State, since all of them are guided by a legal system which does not vary very much, according as this or that court administers it, and they are all subordinate to one and the same supreme court of appeal. But it is a different affair, if an extended jurisdiction is conferred upon a court in connection with matters which must, in whole or in part, be ruled by foreign law, and of which it can be said with good reason that they should be handed over to a foreign judge, who will decide them by the rules of a foreign legal system.²¹

Of course, the dangers of a palpable excess of jurisdiction become more pronounced, if the pursuer is not required to establish beyond all doubt the competency of the jurisdiction which he has invoked, where the defender does not answer the citation, or if such failure to answer is held to be, as most authorities think it is, *e.g.* by § 296 of the German code of procedure, an admission by the defender of the competency of the court, and the right to dispose of the suit is thus made to depend upon fictions which do not justify it. Any such maxims are, even in the domestic intercourse of a

²⁰ See below as to the encroachments on the true limits of jurisdiction sanctioned by French law. But the German code of procedure itself has (§§ 12-36) adopted a complete specimen catalogue of jurisdictions.

²¹ Curti (p. 10) says very truly that the rule "*actor sequitur forum rei*" should have a higher force given to it in international questions than in domestic questions. In such a case, the defender has a double interest not to be compelled to defend himself before a foreign judge, under the dominion of a foreign law, at a distance from the centre of his business and family connections, against a suit brought in that court, it may be, from malicious motives. But a glance at the positive systems of jurisprudence will show that that rule is very often neglected in international affairs, owing to a distrust of the administration of justice in foreign countries.

The praise, however, which Curti bestows on the German code of procedure is undeserved. It is true that it does not expressly extend to foreigners the grounds of jurisdiction which are sufficient against German subjects: but the extravagant catalogue of jurisdiction which it contains, and the provisions as to the jurisdiction over persons who have no domicile in the German Empire, combined with the system of actions of declarator, are sufficient to prejudice that leading rule to a serious degree.

great State, matters of serious concern; but no objection can, of course, be taken to them on grounds of public law. The State may lay on its subjects the duty of making a provisional appearance before courts that are incompetent to entertain suits against them. But, on the other hand, it is difficult to see how the State can cite a foreigner, who has no property in the country, and who does not reside there, or do business there. For the source of jurisdiction really rests at bottom on the subjection either of a person, or of property belonging to him, to the sovereignty of the State.²² The tendency of French practice is undoubtedly in the direction of resisting in some degree encroachments of this kind upon the sovereign rights of other States, so far as that can be reconciled with the text of the French code of procedure.²³

[NOTE UU ON §§ 407, 408. JURISDICTION IN ENGLAND AND SCOTLAND.]

[The courts of England and Scotland recognise no peculiar right in their own subjects to sue before them to the exclusion of suits between foreigners, provided that there is present some ground of jurisdiction upon which they can proceed—*e.g.* in England personal service upon the defender, in Scotland arrestment of his goods *jurisdictionis fundandæ causa*. We shall discuss more closely, *infra*, what are the grounds on which jurisdiction may be founded; at present we need only note that if these conditions are satisfied, the defender is not entitled to plead that both he and the pursuer are of foreign nationality or domicile, nor will the courts of the countries named take *proprio motu* any such objection; in Scotland, however, the plea of *forum non conveniens* may be advanced in such cases, and will be sustained if the court is satisfied that the case will be more conveniently disposed of elsewhere. But that convenience must be distinct and preponderating, otherwise the court will proceed to adjudicate on the question, in conformity with the doctrine laid down by Inglis (L. J. C.) in *Clements v. Macaulay*, 16th March 1866, 4 M'P. 593: "It must never be forgotten, that in cases where jurisdiction is competently founded, a court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which the suitor comes to ask. *Judex tenetur impertiri judicium suum*." This maxim is at the bottom of the doctrine advocated in the text.]

²² Vattel, ii. chap. 8, § 103. Huber, *de foro competente*, § 28: "*Summa regula fori est hæc, quod actor forum rei sequitur. . . . Cujus ratio non tam est quod reus sit actore favorabilior . . . sed quod necessitas vocandi et cogendi alium ad jus æquum, nonnisi a superiore proficisci queat, superior autem cujusque non est alienus, sed proprius rector.*" Story, § 539 *ad fin.*, remarks: "No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."

²³ See below as to the extravagant extent of art. 14 of the Code Civil.

II. PROCEDURE IN THE COURT OF THE LEADING JURISDICTION SUBMITTED TO THE CONSIDERATION OF A FOREIGN COURT.

A. ASSISTANCE TO BE GIVEN BY FOREIGN COURTS IN MATTERS OF CITATION AND LEADING OF EVIDENCE.

DUTY TO GIVE ASSISTANCE? DUTY TO GIVE EVIDENCE AND OPINIONS ON QUESTIONS OF LAW. DUTY OF THIRD PARTIES TO PRODUCE DOCUMENTS.

§ 409. Following up what was said in § 391, we have now to answer the question, whether and under what conditions procedure in the court in which the principal process is dependent will be recognised and have effect given to it by a foreign court. This involves the question, to what extent the courts of one country should assist those of another country or co-operate with them.

According to a usage among nations, which is universally recognised, the courts of one country will carry out commissions of investigation (*Commissions rogatoires, literæ mutui compassus sive requisitoriales*) for the purpose of collecting information for the courts of another country as to suits depending there, in so far as the demand for investigation does not encroach upon the sovereignty of the State upon whose courts the demand is made.¹ The duty which Roman law in later times imposed upon its courts to a certain extent, a duty, therefore, which was incumbent upon the officers of one and the same State, to assist each other, was extended in the Middle Ages,² when all jurisdiction in every country was referred, in theory, to the same sources—viz. the jurisdiction of the Emperor and the Pope,—to the courts of different States; and, although, except where treaties existed, there was no complete international obligation such as would justify force in the case of a refusal to comply with it, no State, supposing its neighbouring State complied with the obligation,³ could

¹ Mittermaier, *Archiv. für die Civilistische Praxis*, 13, p. 308; Massé, Nos. 281, 282; Fœlix, i. § 240, p. 463; Günther, p. 743; J. H. Böhm, *Jus. Eccl. Prot.* ii. 27, § 56; Heffter, § 39, ii.

² Cf. e.g. Bartolus, in L. 15, D. *de re jud.* 42, § 1, No. 8; Paulus de Castr. *ad L. ult D. de jurisdic.* ii. 1.

³ At one time it was customary to insert an *assertio reciproci*, or demand for similar services, in all returns to such requisitions. Now it is not customary actually to make such a demand. Now that the functions of the sovereign authority are so much more subdivided, the judge as a rule can give no such undertaking. The proper course is, not to demand reciprocity as a condition of giving the assistance, but, if reciprocity is refused by the other State, to use the weapon of retaliation.

refuse to fulfil this moral obligation, which was essential for friendly intercourse.⁴

International treaties on this matter are, nevertheless, desirable since they transform the imperfect obligation of public law into a complete obligation.⁵ It may be, in these matters, as in others, that a treaty which is badly framed will work mischief when it is set in operation.

In the case of requisitions which are concerned with mere matters of information or "instruction," e.g. the hearing of evidence, or the making of an inspection, the judge to whom the requisition is addressed is not called upon to enquire into the jurisdiction of the court from which the requisition proceeds, or into the merits of the question at issue: he has only to consider his own jurisdiction, and the competency of the act which he is asked to do.⁶ The ascertainment of the truth is the object of the act which he is asked to perform, and this can prejudice no one, and cannot involve any invasion of the proper jurisdiction of the court, provided always that right is reserved to the witness to refuse to answer incompetent questions, and that the parties have a legal interest in the ascertainment of the truth.⁷ It is a convenient course, and one that is often

⁴ See Wetzell, *Conf. proc.* § 88, note 11, and the exposition there given of the old practice in Germany of making no real distinction between requisitions by foreign courts and requisitions by other native courts. It would have been difficult to carry out any such distinction in respect that the connection of different States which owned the same sovereign was often very loose. The constitutional law of the German Empire, §§ 157-160, regulates merely the assistance which one German court is to give to another. The treaties of each of the subordinate States, or the treaties of the Empire, as the case may be, regulate such questions with foreign countries. The *Code de Commerce* contains only some formal directions as to the shape of the requisitions to be addressed to foreign courts. General international usage affirms that it is not necessary that the court should be bound, or be empowered by a public treaty or any special legislative authority, to give such co-operation. See Wharton, § 724 (Belém, *Recherches*); *Recherches*, p. 161; Weiss, p. 942; Asser-Rivière, § 85; Foa, § 225; and v. Martens, "p. 347," seem to lay it down that a court may decline, if it pleases, to carry out a requisition from a foreign court. But such a thing could hardly take place. It is plainly a mere matter of form whether the court can satisfy the requisition directly, or must be moved to do so by an advocate practising before itself. A statute of the United States of 1863 has much simplified the execution of requisitions within the territory of the United States. It is sufficient simply to produce the letters rogatory to the district judge of the place where the witness resides, and to show that his testimony is material to the party desiring the same. The judge will then issue a summons for the attendance of the witness just as he would do in a matter depending before his own court. The only condition is that the State from which the requisition proceeds shall be at peace with the United States. Foa, *supra* § 225; Wharton, *supra*, at § 418. See Lammash, p. 134, on the express obligation which several more modern codes (e.g. *Conf. proc.*, Art. 845-847; Code of Procedure for the Netherlands, art. 40) impose on their courts to satisfy foreign requisitions. See, too, Asser-Cohn, p. 31. The laws of the German Empire make no provision on this subject.

⁵ Many such treaties have been made in recent years, see e.g. the Franco-Swiss treaty of 1842.

⁶ See resolutions of the Institute of International Law for 1877, Ann. II, p. 150: "Le tribunal a pu, à communication, sur réquisition, sans délai et y satisfait après l'avis donné." *Id.*, *de l'authenticité des documents*, 19, *de la preuve testimoniale*, 10, *de la preuve par écrit*, 10, *de la preuve par écrit*, 10. See, too, Lammash, p. 135.

⁷ It may be contrary to the rules of procedure to take proof. But this is a matter solely for the determination of the judge who issues the requisition, not for the judge to whom it is addressed. See Wetzell, § 48, d. 2, and d. 1 *et seq.*

followed in international intercourse, that the court to which the requisition is addressed, if it should itself have no jurisdiction, should of its own accord refer the matter to the official of its own State, who has in its opinion jurisdiction to deal with it. For it is very likely that errors may prevail in a foreign country as to the extent of the jurisdiction of particular officials, and to send the requisition back again to the court from which it came would cause useless expense and mischievous delay. At the same time, intimation should be given to the court from which the requisition proceeded.⁸

Again, in my view, the judge, to whom a requisition is presented, does not need to enquire as to the jurisdiction of the court from which it proceeds if he is asked to serve an action upon some one, the result being, if the order which is to be served upon the party is disobeyed, that he will merely be placed at some disadvantage in the suit, but will not be directly compelled to obey. For if the person so served does not comply with the order he will simply suffer some prejudice. He is not warned that he must and may defend himself, while it is for the court from which the requisition proceeded to subject him to the disadvantages in the suit with which it threatens him, *e.g.* that it will hold him confessed, or find him liable in expenses; and this it may do after advertisement in the newspapers. But the judge to whom the requisition is addressed does not, by serving the summons on a party, place himself under any obligation to put into execution the judgment which may thereafter be pronounced by the foreign court.^{9 10}

Of course, the judge on whom the demand is made is not competent to give a judgment on the merits of the action (*cf.* Wetzell, § 38, note 44), and just as little to give one upon the obligations of the parties in matters of procedure, the penalty attaching to which is to be set at a disadvantage in the process; but he may determine the rights and obligations of third persons whom he calls into the process—*e.g.* the obligations of witnesses

⁸ See the resolutions referred to in note 6: "*En cas d'incompétence matérielle, le tribunal requis transmettra la commission rogatoire au tribunal compétent, après en avoir informé le requérant.*" The only objection that can be taken to this resolution is the limitation of it to the case of incompetency *ratione materiae*. There may very possibly be errors as to the local limitations of the jurisdiction of different officers, and there is no reason for excluding that simple remedy if such errors should occur. It must not, however, be made competent to transfer the requisition to the officials of any other State.

⁹ *Cf.* Gesterding, *Ausbeute von Nachforschungen über verschiedene Rechtsmaterien*, ch. ii. p. 325; Felix, i. § 242, p. 464 (Wetzell, § 38, p. 326, is of a different opinion); Leonhardt, vol. ii. on the 29th section of the Hanoverian Ordinance on Procedure. The service of the citation, in so far as it threatens mere disadvantages in the process, is simply a communication of a proclamation of the court of procedure, and an undertaking to make this proclamation publicly known.

¹⁰ Wetzell, § 38, seems to hold that a requisition may be refused, if the judge to whom it is addressed is himself competent. In cases where information or "instruction" is asked, we cannot agree with this view. Lammasch, p. 384, is in agreement with the text. The Franco-Swiss treaty, too (arts. 20, 21), does not make the service of the writ dependent on any examination of the contents of the writ itself, or on the competency of the court that issues it.

who are called, and the fees due to them; while he is not called upon to decide the rights of parties to take exception to a witness.¹¹

The obligation of third parties to give evidence, or skilled opinions, or to produce documents, is to be determined not by the law of their domicile, but by that of their place of residence.¹² [See case of *Burchard v. Macfarlane*, *supra*, p. 858.] The question at issue here is one of public law, and concerns an obligation of public law of an universal character, arising out of actual residence in the territory of the State; and as a foreigner cannot plead in this country the privileges accorded to him in his own country, he must on the other hand be placed at no disadvantage in this country because he is a foreigner. Thus the witness need only take the oath which the law of his place of residence prescribes, and can refuse to answer on any point on which that law does not force him to reply. And, unless there be a treaty which lays down a different rule, and is binding upon him as a subject of one of the States in treaty, no witness can be compelled to appear before a foreign court to give evidence; for the obligations of witnesses are to be construed strictly, and a journey to a foreign country cannot be treated in the same way as a journey to another court in this country. An exception, however, may be made to this rule in cases where demands of the kind are made upon courts situated on the frontier, where a journey into the other plainly does not involve any greater difficulty or disadvantage to a witness than a journey to any tribunal of his own country; but, of course, the witness must be kept perfectly *indemnified*. But the citation to appear before a foreign court may always be refused if the witness can show that he will be compelled to answer there questions which the laws of his own country would excuse him from answering.¹³ Indeed, much may be said for the proposition that if a witness obeys a citation from a foreign court, he enjoys—apart from any provision of a public treaty to a different effect—a *salvus conductus* to that court, so that he shall not be compelled to depone any further than he is compelled to do by the law which governs the citation which he has obeyed. It is plain that this rule will conduce to the appearance of the witness before the court which is to determine the cause—a result often much to be desired in the interests of truth.

WHAT LAW MUST THE JUDGE ON WHOM THE DEMAND IS MADE
OBSERVE AS REGARDS FORM?

§ 410. We have already said that the judge, upon whom the demand is made, must give absolute obedience to the rules which his own law

¹¹ Cf. *Sup. Ct. at Jena*, 31st August 1820 (*Seuffert, v. note 318*).

The German *Civilprocessordn.* leaves it to the judge who is executing the commission to exercise a compulsiator on the witness.

¹² Wharton, § 729; Asser-Rivier, § 82 *ad fin.*; Mittermaier, pp. 310, 311, proposes that the law of the native country of these persons should rule, but has in view merely the ordinary case that these persons are residing at the seat of their domicile.

¹³ Wharton, § 728, to the same effect.

prescribes on matters of form. But may he not, if he is asked to do so along with these rules, observe others, to the observance of which the law of the court in which the process is dependent attaches importance, in so far as it may be possible to do so without doing violence to any absolutely imperative or absolutely prohibitory laws, and without doing violence to the ideas of propriety which prevail in the territory of the judge who is executing the commission?¹⁴ This question must undoubtedly, in accordance with international practice, be answered in the affirmative.¹⁵ All the more must it be so answered, as in not a few cases it may be very doubtful how far the form and the substance of the step of procedure in question can be distinguished, while the rule is plain that form must be ruled by the law of the judge who executes substance by that of the judge who issues the commission. The attack which Bülow¹⁶ has very recently delivered against this position is unfounded. The judge who executes the commission is, in his relations to the request made by some foreign tribunal, by no means confined to what he could do by consent of parties if the matter were entirely one belonging to the country where he sits. The question here is not one as to the whims or desires of private persons; it is a question as to the weight that may be given in fairness to the fact that the courts of a foreign State may have views different from ours as to some indispensable requisite of legal procedure, and our object is to prevent substantial justice from being defeated by an adherence to the letter of the law.¹⁷ Thus, for instance, there would be nothing to prevent a court, in a country where oaths are administered without reference to any particular religious confession, administering an oath with some addition of that kind, if a foreign court particularly requested that that should be done. The court in which the suit really depends, must, as we have already said, determine how far such an addition is essential for the determination of the question raised in the suit, and accordingly the party, whose oath is to be taken, has to consider whether he will acquiesce in this demand.¹⁸ On the other hand, a demand that a person should emit at his place of residence an oath in some form, which would involve, according to the views that prevail in that country, an unwarrantable depreciation of the character and credibility of the

¹⁴ Such a request by a foreign court may, however, also be refused if compliance with the request would involve an unreasonable burden upon the court to which it is addressed.

¹⁵ See Heffter, § 39, ii.; Brocher, *N. Tr.* § 171; Wharton, § 730; Fiore, *Effetti*, § 231; Beach-Lawrence, iii. pp. 419, 420.

¹⁶ *Archiv. für die civil Praxis*, vol. lxiv. p. 59. See against this Wach, *Civilproc.* § 19; Struckmann and Koch, on § 1077 of the German *Civilprocessordn.*

¹⁷ In my opinion the court needs no special statutory or customary authority to warrant such compliance, as Wach thinks. The general *comitas nationum*, by virtue of which we may support the legal system of a foreign country, if our own does not suffer thereby, is quite sufficient. We must of course dismiss the idea that the judge of this country acts directly on the authority of the foreign judge.

¹⁸ The tribunal of the Seine, by an arrêt of 9th August 1883, laid down that the party to an action resident in France might, on the requisition of the Appeal Court at Brussels, emit an oath with an invocation of God and the saints, *Felix*, i. § 248. See Massé, § 289, and judgment of the Sup. Ct. of App. at Jena of 10th May 1850 (*Seuffert*, xii. p. 427).

deponent, must be refused *proprio motu* by the judge as an unworthy artifice. An instance of this would be a demand that a caution by a clergyman, a thing unknown to the practice of the court in which the demand is made, should be addressed to the deponent.¹⁹

After what we have said, we need not discuss the proposition that requisitions in matters of voluntary jurisdiction should be complied with, if the native courts have no reason to regard the procedure of the foreign court as an invasion of their own jurisdiction.

B. EFFECT TO BE GIVEN TO JUDGMENTS PRONOUNCED BY A FOREIGN COURT.

1. INTRODUCTORY. OLDER THEORIES.

§ 411. The effect and the execution of judgments pronounced by a foreign court was a subject discussed by the jurists of the Middle Ages.^{1 2} In conducting that discussion they applied—without any hesitation, and without having regard to the different conditions of the courts of the Roman Empire, which were the courts of one undivided State—passages of Roman law, whereby judges are bound to support each the other's authority, to the case of the courts of different States; in this course they were not wholly without some excuse,³ since, in theory at least, up to the beginning of the second half of the Middle Ages, all jurisdiction was in the last resort traced up either to the Emperor or the Pope, and it was thought to be the duty of the *brachium seculare*, and of the judicatories of the Church, to support each other.⁴

But when, as the territorial supremacy of different States was fully developed in later times, these authorities were seen to be inapplicable, the earlier practice which had obtained in the States of the continent of Europe was not without importance. No doubt, it was assumed that in strict law no State could be bound to recognise, still less to carry into execution, the judgments pronounced by the courts of other countries; but it was said that they were in use so to be recognised and put in execution *ob reci-*

¹⁹ See resolution of the commercial Tribunal of the Seine of 29th October 1829 (Fœlix, i. § 248) on inadmissible formalities of this kind.

¹ In this paragraph, when we speak of foreign judgments or the judgments of foreign courts, it is to be understood that the term does not include the judgments of such judicial bodies as are specially established by our State in any foreign country by virtue of public treaties. The judgments pronounced by a consul of our country in its name abroad are judgments of this country, and must be recognised as such. Demangeat on Fœlix, ii. p. 40, note.

² Baldus Ubald in L. 1; C. de S. Trin. No. 93; Barthol. *de Saliceto*, in L. 1, C. de S. Trin. No. 14.

³ Baldus Ubald, cod. No. 20; Barthol. *de Saliceto*, cod. No. 3.

⁴ Cf. Wetzell, § 38, note 31, and the authors and passages from the Canon Law there cited.

procam utilitatem et ex comitate,⁵ provided that the court recognising them had jurisdiction, and the interests of the country to which it belonged—or, as it was more commonly expressed, the interests of the subjects of that country—were not impaired by the recognition or execution. The older writers, however, do not lay it down quite distinctly when such exceptions would occur.

But the development of the idea of the sovereignty of the State, which gradually grew up, was calculated to give rise to special difficulties. It was thought that a judgment, as an act of the State authority, was necessarily confined in its operation to the territory of that State, unless the authority of another State and territory made some express provision to the contrary. It is not entirely accidental that the jurisprudence and the legislation of France are the first to hold this theory,⁶ whereas on the other hand German jurisprudence shows several attempts, even before the recent impulse which theories of international law received since the time of Savigny, to reconcile the recognition and execution of foreign judgments with a complete concession of all that is involved in the idea of territorial sovereignty.

Some have sought a foundation for the recognition of foreign judgments in the assertion that any other procedure would imply an invasion of the jurisdiction of the foreign State.⁷ It may, however, be said in reply to this, that to refuse to recognise a judgment pronounced abroad does not do away with it, but merely confines its operation to the territory of its own State, and that we can assign no exact limit to the jurisdiction belonging to different States, since it is not every judgment pronounced in a foreign country that will be unconditionally recognised by another.

Others⁸ simply assert that the sentence of a foreign judge

⁵ P. Voet, *de Stat.* x. c. 14; Huber, § 6; J. Voet, *de Stat.* § 7. When the German Empire existed, the courts of the various territories could, under certain circumstances, be forced to recognise and to assist each other. This compulsitor, resting as it did on the subordination of the sovereigns to the authority of the Empire, has, in the present time, disappeared. Mittermaier, *Archiv. für Civil Praxis*, vol. xiv. p. 84. Cf. Spangenberg, in *Linde's Zeitschrift für Civilr. und Process.* iii. p. 423; Haas, *de Effectu.* § 12; Strippelman, ii. 1, p. 1.

Burge, iii. p. 1050; Wheaton, i. p. 148; Fœlix, ii. § 328; Massé, § 298.

V. Bulmerincq, p. 233, seems to regard the common interest which all States have in the administration of justice as a ground for the reciprocal recognition and execution of civil judgments.

⁶ French practice rests upon the 121st art. of the Royal Ordinance of 15th June 1629, and articles 1223 and 1228 of the Code Civil, "*L'hypothèque judiciaire résulte des jugemens . . . L'hypothèque ne peut . . . résulter des jugemens rendus en pays étrangers, qu'autant qu'ils ont été déclarés exécutoires par un tribunal français; sans préjudice des dispositions qui peuvent être dans les lois politiques ou dans les traités. Les contrats passés en pays étranger ne peuvent donner d'hypothèques sur les biens de France, s'il n'y a des dispositions contraires dans les lois politiques ou dans les traités.*"

So, too, in art. 546 of the *Cocde de procédure*: "*Les jugemens rendus par les tribunaux étrangers, et les actes recus par des officiers étrangers, ne seront susceptibles d'exécution en France, que de la manière et dans les cas prévus par les articles 1223 et 1228 du Code Napoléon.*"

⁷ Vattel, ii. § 350. Cf. too, Puffendorf, *Observat. Juris Univers.* i. observ. 28, § 8 *ad fin.*

⁸ Kamptz (*Beiträge zum Staats-u-Völkerrechte*, Berlin 1815, i. 115-136) takes this view, and appeals to the rule "*locus regit actum*;" Wetzell (*System des Civilprocesses*, § 38). So,

gives rise to a *jus quaesitum*; this is, however, simply a *petitio principii*.

Others, again, assimilate the judgment to a contract: they say that a judgment, resting as it does upon a *quasi* contract, must be recognised just as a bargain concluded in a foreign country would be.⁹ But, although a process might be regarded as a contract under older Roman law, in which the parties by an obligation bound themselves formally to recognise the judgment, and although, too, the effect of a process once instituted, and of the judgment, might even in later Roman law be referred to a quasi-contract, yet this contract owes its origin to a compulsitor which the State permits to be used against the defender; it is to the authority of the State that the validity of the process and of the judgment are in the last recourse to be referred;¹⁰ and it is plain that, in the procedure of modern times, where, if the defender refuses to appear, he is held by a fiction to have become a party to the suit, the theory of an agreement *ex contractu* can only apply if the parties recognise the jurisdiction of some particular court by a real agreement and no mere fiction.

Lastly, in our own times appeals have been made simply to the *comitas nationum ob reciprocam utilitatem*.¹¹ What we have said in general on the principle of the *comitas* is sufficient to show the inadequacy of this theory.¹²

2. THE JUDGMENT OR JUDICIAL SENTENCE AN APPLICATION OF THE LAW TO SPECIAL CIRCUMSTANCES.

§ 412. On the other hand, the following theory, which was enunciated in my first edition, has lately found many adherents.

too, apparently Sup. Ct. of Cassel, 21st Feb. 1854 (Seuff. xi. § 104). See, on the other hand, Muheim, p. 303. K. S. Zacharia (Crome und Jaup. *Germania*, vol. ii. p. 229) sets up two points of view: 1st, that of private international law, according to which nations stand in their natural relations to each other, and recognise no overlord; 2nd, the point of view of public international law, according to which the different States are members of an international body under a common law. According to the former, which he describes as being at present the practical point of view, a foreign judgment will not be recognised; it can only be carried out in some exceptional cases on the basis of the principles which regulate agreements and compromises; or the subjects of a State must have had procedure taken against them in a foreign State according to their own law; or the judgment must be a deliverance upon some act that has taken place in the foreign State. According to the second theory, foreign judgments must be recognised unconditionally.

⁹ Klüber, *Europaisches Völkerr.* 2nd ed. § 59, pp. 75, 76.

¹⁰ Cf. Fœlix, ii. No. 318; Moreau, § 96.

¹¹ Massé, § 298; Martens, *Précis*. § 94; Burge, iii. p. 150; Wheaton, i. p. 148; Wächter, ii. p. 417; Fœlix, ii. § 328.

¹² The theory, which is enunciated in Piggott's comprehensive monograph (see, in particular, p. 15 *et seq.*), is a combination of the two theories to which reference has been made. According to him, the judgment gives rise to an *obligatio*, which follows the person against whom it is pronounced all the world over, and to which, by reason of the *comitas*, effect must be given even in a foreign State. This combination adds, in my opinion, no force to the simple appeal to the *comitas nationum*.

The judicial sentence is most accurately defined as a *lex specialis*, a law for the particular case which is in dispute. In cases where parties are not at variance, the law in general puts a constraint upon the free will of the persons affected, although its operation may be tacit. So, in cases where a dispute arises, the law puts the same constraint upon the free will of the parties by the interposition of the court. This is simply the concrete application of the law in general,¹³ and if it could be ascertained with absolute certainty that it always was in truth an accurate application of it, that in other words the judicial sentence always completely corresponded with the law in the abstract, there could then be no doubt that the recognition of foreign judgments must follow, on exactly the same principles as those which regulate the recognition of the operation of foreign statutes or foreign law upon particular legal relations, *i.e.* the application of the legal rules of other countries. We should plainly have to set up this proposition viz.: "If the law of a particular State rules some particular claim, then the judicial sentence pronounced in that State upon that claim must also be recognised as authoritative."¹⁴ At the same time, we should have to recognise all those judgments, to which the parties have, either by anticipation or after they have been pronounced, submitted themselves either expressly or tacitly, in so far at least as these judgments deal with legal relations, which parties are free to deal with as they please. For, if parties are to have any power of exercising their free will in international relations, they must have it in cases, where they do not exercise it directly, but exercise it by recognising the rule laid down in the sentence of a court.

It is interesting to notice that even some of the older authors, and among them those of the highest reputation, were on their way to the solution of the problem. Burgundus (Tract. iii. *Utrum sententiae excedant territorium?*) is one of them. Just as he divides *statuta* into *realia*, *personalia*

¹³ See, for instance, § 1 of the German Constitutional Statute: "Judicial powers are to be exercised by independent courts subject to the law alone." On the other hand, as a general rule, there is no inclination to advocate the execution of the sentences or proceedings of foreign officials, the reason being that these do not represent purely the concrete will or purpose of the law, but are influenced also by considerations of expediency.

¹⁴ See Wharton, § 671: "It is impossible not to recognise the force of this view. The whole structure of private international law rests on this principle, that whatever is the *forum*, the law by which a case is to be tried is to be that to which, on its merits, it is subject. And the judgment of a competent court is an official certificate of what the law in such country is." So, too, v. Martens, § 82. Similarly Phillimore, § 937; Fiore, *Effetti*, pp. 11 and 73; all these writers lay down directly that there is a legal obligation to recognise the judgments of a competent foreign court. Haus, *Dr. p. n.* 147; Olivi (*Revue générale de droit*, 1887, p. 521), "*nier toute expansion et tout effet extraterritorial à la décision judiciaire c'est suivant nous nier au principal toute expansion extraterritorial des lois nationales.*" According to Olivi, the judgment must give effect to the meaning of the legislator. See Brocher, *Traité Franco-Suisse*, p. 6, "*il existe entre la compétence législative et la compétence judiciaire des rapports naturels et, dans une certaine mesure, nécessaires.*" Calvo (ii. § 860) seems to hold that some such relations exist; he refers to the statute theory of the substantive legislation. The results, however, which he draws from these relations are a little indefinite (see § 860 *ad fin.*): Daguin is the most prominent representative of the theory of *lex specialis* in the most recent times. See, too, Halleck-Baker, i. p. 198.

and *mixta*, so he sets up three kinds of actions in connection with the execution and recognition of foreign judgments—viz. *actiones reales*, *personales*, and *mixtae*. He, too, proceeds from the axiom that the right of legislation and the authority to pronounce judicial determinations correspond with each other in international law. But he throws the question into confusion again by giving an *effectus personalis* to a judgment upon real rights pronounced by some other court than the *judex rei sitæ*; and, on the other hand, by confining the effect of a *sententia*, which imposes some duty of acting or refraining from acting upon a party, primarily to the territory in which it is pronounced, while he proposes that it should not be recognised abroad unless with the concurrence of the judge of the foreign territory, but gives no rules to regulate the giving or the withholding of that concurrence.

Boullenois, who takes the same division as his starting-point (i. p. 601), proceeds more correctly. He recognises not merely judgments upon questions of status, which alone are included by Burgundus in the class of *actiones personales*, but also other deliverances, which compel some personal payment or prestation, pronounced in *foro domicilii* of the defender: he maintains, also, that foreign judgments pronounced by any judge other than the *judex rei sitæ* in *actiones reales* (real actions referring to immoveable estate) are ineffectual in a foreign country; but he takes away the foundation of his own theory by laying down the rule that the recognition of foreign judgments affecting real property in this country is at variance with the sovereign rights of the State; this reason, if it were sound, would not only establish what he desires, but would demonstrate that all judgments pronounced in a foreign country are entirely ineffectual, since all legal relations which it is proposed should bear some effect in this country are thereby amenable to the sovereignty of this State as fully as immoveables situated there. At the same time, in his view the *forum contractus* is without further inquiry recognised in its widest range, whereas the judgment pronounced by a foreign court in a case specially submitted to its decision by agreement of parties is not allowed the force of a final decree, but merely admitted to provisional execution, although the reason of this limitation is not made plain. But, lastly, it is not clear how the *forum domicilii* can rule *actiones personales* which did not take their rise there, but are rather subject to another system of law—*e.g.* that which prevails at the place of the execution of the contract, or at the seat of a previous domicile.

There is, however, no lack of opponents of our theory. They deny the analogy between the *lex generalis* and the *lex specialis* which we say is implied in the judicial sentence. For, they say, the operation of the territorial sovereign authority is far more intense and direct in the case of the judicial sentence, than it is in the case of the general rule of law;¹⁵ or, to put it in a more generally intelligible way, a recognition of foreign legal

¹⁵ See Moreau, § 237.

rules does not, they say, by any means necessitate a recognition of foreign judicial sentences, for it is not so easy to try foreign judgments as to try foreign statutes by the test of whether they rest upon a fundamental principle which we cannot possibly adopt, whether in truth they are not in flat contradiction of our *jus publicum*, or whether they are not the outcome of incapacity or of caprice.¹⁶ If this view prevails, the only course left is the course of pure positivism,¹⁷ and in particular the remedy of international treaties.

But, if it is impossible to set up any general theory as to the recognition of foreign judgments, what is to be the principle on which these international treaties, the only means of salvation, are to be drawn up?¹⁸ Does not pure positivism inevitably lead in the end to unsolved and insoluble disputes? We must then for better or worse try to set up a general theory, and we are all the more inclined to make the attempt, since the arguments of our opponents, which we have just stated, are by no means unanswerable. It is quite true to say that the recognition of foreign judgments implies a certain measure of confidence in the administration of affairs in foreign countries. It is a familiar fact that Christian States have withdrawn their subjects more or less from the judicial jurisdiction of non-Christian States, either by special treaties or by a course of custom. The operation of the general statute law of these non-Christian States upon the subjects of Christian States is much less restricted. Such cases as these are very different, however, from the principle of refusing to recognise any judicial determinations pronounced in foreign countries. For this principle would make us refuse to recognise foreign judgments, even when these dealt exclusively with subjects of the States whose courts pronounced them. We shall see that, for the most part, even those who are inclined to go furthest in denying the authority of foreign judgments, are careful to guard themselves against the full logical results of their own principle in this respect.

The sound theory, that the judgment of the court is the concrete living law, and must logically receive the same recognition as the general statute law itself receives, not unfrequently breaks into view even with those who deny it on principle. See, for instance, Bard, § 240. The phrase used by several French authors *e.g.* in the case of judgments by competent courts in questions of status, viz. the "ascertainment of a fact," a process which they propose to recognise, for the simple reason that the refusal to do so would lead to utter confusion, is simply an instance of the partial recognition of the true principle.

3. DIFFERENCE BETWEEN *Res Judicata*, ON THE ONE HAND, AND EXECUTION ON THE OTHER. NECESSARY CONDITIONS OF THE FORMER.

§ 413. If on principle there is to be no recognition of foreign judgments, there is no room for drawing any distinction between the execution of a

¹⁶ Fusinato, *L'assessorato*, p. 61.

¹⁷ See Wach, *Civilproc.* p. 227, to this effect.

¹⁸ Fiore, *Exp.* § 29, raises this question.

foreign judgment and the simple acceptance of it as *res judicata*.¹⁹ Foreign judicial sentences are to be treated as simple nullities according to that theory. All parties may appear to plead before our courts exactly as if there had been no judgment given in the matter. There are no such things as the *exceptio* and the *replicatio rei judicate*; and another miserable result,²⁰ which is generally overlooked, is, that if execution has taken place abroad under the authority of the foreign judgment, the party against whom diligence has thus been done may raise action for repayment in our courts (a *condictio ex injusta causa*, according to the terminology of the Romans); and he will be successful if our courts take a different view of the case from that which was taken by the foreign court; and then again, if there should be property within the foreign State susceptible of being taken in execution, another action for reimbursement might be raised in the foreign country by the party who had been condemned here. That would be a *circulus inextricabilis* and a war between the judicial system of this country and the other, or all others, to the very serious prejudice of commerce, and all because it is assumed that the judicial system of another civilised country is partial and irregular. Can it really be maintained that it is worthy of the dignity of any State, or that it furthers the interests of any State, to refuse to recognise foreign judgments even in cases where, on the one hand, they are pronounced by the State to which the regulation and control of the legal relations in dispute undoubtedly belong, and where, on the other hand, any judgment by the courts of our State in review of the foreign judgment, and to a different effect, could

¹⁹ So in particular Moreau, § 238, and, as I think, Wach also, p. 227. This is the doctrine of modern French practice. See the copious discussion in Daguin, p. 75.

²⁰ For the sound view see Fiore, *Eff.* pp. 49, 50; also an interesting judgment of the Appeal Ct. at Messina, on 20th August 1884 (J. xii. p. 453), and Clunet's note upon it. He declares the distinction between *res judicata* and the execution of foreign judgments to be in conformity with "*vrais principes en matière de droit international privé.*" Lammasch's theory (Holtzendorff, *Handbuch*, iii. p. 400) is peculiar, and, as I think, indistinct. He confuses the two questions, (1) whether it is essential for the recognition of the *res judicata* that there should be a formal declaration that the foreign judgment is one that is to receive effect, and (2) whether all foreign judgments have the force of an *exceptio* or *replicatio rei judicate* unconditionally. I have never asserted the affirmative of this latter question, as Lammasch seems to think. As regards the former question, his assertion that "no one can lose his right to approach the courts of his country, which are established according to generally recognised rules for the determination of claims such as his, except he be deprived of it by the sentence of some authority belonging to his own country," is irrelevant in this matter. The *exceptio rei judicate* is not a plea which formally bars the suitor from entering the court, it is not a plea which as a rule of process stops the suit—such as a plea would be to the effect that, because a foreign court was competent, therefore the courts of this country were not, a plea which I would never sanction—the plea of *res judicata* is a plea that affects the substance of the claim. Such a plea may quite well be the creation of a foreign authority, and yet necessarily receive recognition from our courts. It will not be disputed that a foreign statute may give rise to such a plea, and a foreign statute is surely a foreign authority. It almost seems as if all that Lammasch desired was that, if in any suit a question as to an *exceptio* or *replicatio rei judicate* was raised on the ground of a judgment pronounced by a foreign court, the judge should not dispose of this point *incidenter*, but that it should be necessary to pronounce a special judgment recognising the validity of the judgment. What profit would the subject of this country take from any such elaboration of procedure?

not attain the practical result which ought to follow from it, because the legal relation in question is, as a matter of fact, exempt from the operation of the sovereign authority of our State in all its leading branches? Does it not approach the ridiculous to refuse to recognise the plea of *res judicata* where the judgment has been pronounced on a question of *status*²¹ in the country to which the parties plainly and exclusively belong, whether by domicile or by citizenship, or to refuse to do so where the judgment deals with a real right in immoveable property, and is the judgment of the *forum rei sitæ*? Has the party to whom we give the right of property in some real property situated abroad, that right as a matter of fact, if the *forum rei sitæ*, and thus the State within whose sphere of sovereignty the property actually lies, does not recognise his right? Is it not a most potent encouragement to *mala fides* if we allow a man, who has of his own accord appealed to a foreign tribunal, or has without objection submitted himself to it, to try his luck anew before the courts of this country upon the very same matter.²²

§ 414. On the other hand, we may, it is admitted, avoid such a judicial war with all its intolerable consequences, if we exclude foreign judgments from execution in this country as a matter of principle, or admit it only in exceptional cases, while, on the other hand, we recognise as *res judicata* the sentences of these foreign courts. It is one thing to deny aid to a foreign judgment, and quite another to upset the condition of things which has actually come to pass in consequence of the foreign judgment. Most authors²³

²¹ It is familiar that even French practice recognises the force of a foreign judgment pronounced in the country to which the parties belong, in what are called "*questions d'état*." Even Moreau sees that he is driven to admit this much. He conceals the contradiction with the help of the phrase (§ 236), "*L'homme importe avec lui ses attributs juridiques*." But legal attributes are not the same as physical qualities; they are brought into being by the very recognition of the operation of statutes and legal decisions. See the discussions in J. ix. p. 176, on the French rules in questions "*d'état*": see J. x. p. 51, on the similar rules of Belgian law. No declaration is required that the judgment should receive effect. See J. viii. p. 99 and Van der Rest, Rev. xvi. p. 143.

²² See Trib. of Antwerp, 31st October 1873 (Rev. viii. p. 494), for the recognition of a foreign judgment in a case of voluntary submission to it. Haus, *Dr. p.* § 153, and Piggott, p. 40. The latter quotes Erle (C. J.): "It would be contrary to all principle for the party who had chosen such tribunal and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal." [Barber v. Lamb, 1860, 29, L. J. C. p. 234.] Gianzana, ii. §§ 146, 147, expresses himself to the same effect; that in the doctrine of Italian jurisprudence. See, too, the judgment cited by Gianzana, of the Court of Cassation at Turin on 30th June 1882, and the exposition there given of the French doctrine.

See, too, Francke, *Zeitschr. f. d. Civilproc.* viii. p. 118.

²³ Wheaton, § 147; Phillimore, § 937: "In some way or other all civilised nations uphold foreign judgments; Piggott, p. 32; Foote, p. 464; Westlake, § 314; Wharton, § 652; Clunet (J. viii. p. 409, and J. xii. p. 453), and especially Weiss, p. 957; Beauchet, J. x. p. 242; v. Martens, § 82 (p. 349); Ct. of Lucca, 4th August 1885 (J. xiii. p. 669). The older French law respected the *chose jugée* in foreign judgments, and so did the older law of Belgium. See the expositions in Haus, § 129 (p. 371). Daguin, p. 46 *et seq.* insists most strongly on the distinction; in support of it he argues that we allow acts of voluntary jurisdiction done in a foreign country to make faith, and that there is a certain analogy between the *publica fides* attaching to such acts and the operation of a *res judicata*. v. Martens, who supports the conception of the

recognise this vital distinction. There is no real force in the argument used by those who take the opposite view, that the simple recognition of the *exceptio rei judicatæ* is in substance execution of the foreign judgment, or may easily pass into it, if, for example, the victor in the first process is made defender in the second, and uses the claim which was litigated in the former action to defend himself in the second action as a *res judicata*. But here it is forgotten that it is not through the operation of the sovereign power of the State that the defender in the second action is placed in that favourable position. But, of course, we must refuse to allow the plea of *res judicata* to have a negative effect, in courts and countries in which all positive effect is denied to it as a basis on which to do diligence or execution, and the party who would otherwise appeal to this positive effect is put at a disadvantage. In other words, if a person brings action upon a claim which was previously disposed of in a foreign judgment, because he cannot obtain execution of that foreign judgment, the plea of *res judicata* cannot be set up against him. If this were not so, the pursuer would be left without any legal remedy, if the defender could succeed in transporting himself and his property into a country in which execution of foreign judgments is unknown. He would be unable either to advance his original claims anew or to use the judgment which he had obtained.²⁴

§ 415. But, if we assume that the view, by which a vital difference is held to exist between simple recognition of the *exceptio* or *replicatio* on the one hand,²⁵ and positive execution of the foreign decree on the other, is correct, that will lead us on to the conclusion that we must not infer, from the fact that a statute provides that foreign judgments shall be accorded execution under certain conditions only, that therefore all these conditions must attend the simple recognition of the *res judicata*. It is quite sound to assume that, in all cases in which execution is accorded, that being the *plus*, there will be recognition of the *res judicata*, that being the *minus* included in the *plus*. But the converse proposition, the negative of the proposition we have admitted, is wrong. It is the old fallacy which so often takes place in attempting to convert a sound proposition.²⁶ In particular, it is foolish to

judgment as a *lex specialis*, remarks: "Thus the recognition of the sentence of a court constitutes part of the duty of every civilised State, just as much as the obligation to recognise the statutes of a foreign country. To refuse to fulfil this duty would be a negation of all private international law."

²⁴ In reference to this particular case, see Francke, *Zeitschr. für Deutschen Civilprocess*. viii. p. 114.

²⁵ Rocco (p. 664) is altogether confused. Not only does he throw recognition of the *res judicata* in itself and execution of the decree into one, but he refuses to give effect to the plea of *res judicata*, because the doctrine of "legal validity" (*rechtskraft*) is artificial. But, among legal doctrines, what are natural, what are artificial? In this matter Rocco's much-lauded work shows retrogression from Boullenois, and even from Burgundus.

²⁶ It is quite true that the majority of German writers of the present day are of an opposite opinion as regards the provisions of § 661 of the German *Civilprocessordn.* They found on a judgment of the Imperial Court. This much-canvassed judgment of the First Civil Division (*Senat*) of 29th Jan. 1882 (Dec. viii. No. 115, p. 385) does not blink the fact that it may seem

associate the recognition of a *res judicata*—putting out of view altogether the execution of foreign decrees—with any other conditions save this alone, that the court, from which the judgment issued, shall be a competent court. To refuse to recognise *res judicata* in cases in which the other State does not show reciprocity, is dangerous and confusing for the legal order and administration of justice in both States, and is not a suitable means of compulsion to use against the non-recognising State. The foreign judgment is just as likely to be in favour of our citizen as against him, and, if it were attempted to confine non-recognition of foreign judgments to cases where our citizen suffers, still succession, assignation, or a process of bankruptcy in which some citizens of ours were interested as creditors, might transform a *res judicata*, which seemed to be a hardship to one of our citizens, into a

a serious matter to extend at once the provisions of § 661, which deal with execution, to the *exceptio rei judicatæ*, which is a part of substantive law; and that all the more as in the memorandum (*motiven*) attached to that section there was no mention of it, while the two things cannot be placed in the same rank. But the kernel of the judgment seems to be, as disclosed in the grounds of judgment, that the recognition of foreign judgments—of course, to a certain extent only—was a purely positive creation of the German *Civilprozessordn.* For “the obligatory force of the judgment is based, not upon the will of the parties, but upon its own peculiar character as the deliverance of the competent organ of the sovereign power. Its authority will in itself extend no further than this sovereign power extends. There is no such thing as any duty laid by public law upon States to recognise or to execute the judgments of other States, apart, that is, from treaty provisions.” The judgment then goes on to say that this recognition exists only as a consequence of more modern developments,” and thus, as regards the *exceptio rei judicatæ*, rests upon the reciprocity “which is inherent in the nature of the thing.” But, in the first place, it is forgotten that even the execution of foreign judgments is by no means a mere creation of modern legislation, that it rests in many countries, and in particular in the territory of the German common law, on a practice of centuries, and that, therefore, the provisions of the *Ordnung* on this head have not by any means taken possession of a vacuum. Again, the argument on the powerlessness of the sovereign power to act in a foreign territory would prove that the statute law of a State could have no effect beyond its own territory, and that the operation of the will of parties must also be limited to their own country. Is it not the case that the will of the parties draws all its obligatory force from the law which declares it to have that force?

We can understand that, as a consequence of this decision of the Imperial Court, the attempt has already been made to begin that conflict of jurisdictions, which is the inevitable result of refusing to recognise *res judicata* altogether, or of recognising it only under the conditions of § 661 of the *Ordnung*. See the case in Blum's *Annalen* (i. No. 74, p. 123), in which a party against whom judgment had gone in a foreign court raised an action for repetition in a German court. The Imperial court (iv.), by a judgment of 30th Oct. 1884, cut short this war, and laid down that even although there was no reciprocity in giving *exequatur* to judgments, a claim of repetition would not necessarily be allowed, because the second judgment, to be pronounced by the German court, would be to a different effect from that pronounced by the foreign court. This latter judgment is sound in fact and practically useful. I cannot discover, however, how to reconcile it with the other.

But still, most commentators follow the former decision. *E.g.* Struckmann and Koch, on § 608, note 10. Seuffert, *ibid.* note 8; Wilmowski-Levi, *ibid.* note 1, and Wach, p. 227.

But see Siebenhaar, p. 626, for the proper view, viz. that the German *Processordnung* did not prescribe conditions for recognising *res judicata* in its 661st section. Francke, p. 112, represents the intermediate view that judgments of condemnation will only found pleas of *res judicata* under the conditions of that section, while judgments of absolutor will give rise to the plea without any such conditions. This intermediate view does indeed avoid some of the surprising results noted in the text, in particular that violation of *Bona Fides*, which consists in allowing the pursuer to put on one side the judgment which he has himself invoked, if it

matter of the most substantial advantage for him. Any selfish restrictions in this matter, which are not strict deductions from legal principles, are very apt to recoil upon the State which sets them up.

We should say that the sole condition for the recognition of a *res judicata*, is the competency of the court in which the judgment is pronounced.²⁷ We must add, as we have already pointed out, that, where we refuse to give a party execution, we must not allow the *exceptio rei judicatæ* to be used against him, when he brings a new action to enforce his original demand.

NOTE WW ON §§ 413-415. *RES JUDICATA* AND EXECUTION.

¶ [The distinction taken in the text between admitting a foreign judgment to execution, and recognising it as a *res judicata*, exists to some extent in the laws both of Scotland and England, the principal practical difference being that execution will not be given upon the foreign decree *qua* decree, it being necessary to raise a new action in the Scots or English courts to obtain their warrant for execution, whereas a *res judicata* requires no process in the Scots or English courts to assert its right to be recognised without examination.

The law of Scotland requires that action should be raised there for execution of a foreign judgment, and the principle on which such actions are determined is thus stated by Lord Jeffrey, in a judgment in which a decree pronounced by an American court was founded on for execution in Scotland. His Lordship found "that the judgment libelled of the Court of Chancery of the State of New York, being a foreign decree, is not of the same authority as a final decree of the courts of this country, and can only

subsequently become his interest to do so. But the theory seems, nevertheless, to be untenable from Francke's point of view. For the *Civilprozessordnung* either intended that the general principles of *res judicata* should remain standing along with § 661, or it did not. If it did, these principles are applicable alike to judgments of absolutor and to condemnatory judgments. If it did not, then the distinction seems to be a juridical phantom.

The question whether the judgment is such as to constitute *res judicata* is a question to be determined exclusively by the law of the State whose court has pronounced the judgment. That follows from the principle laid down in the text. Since the ascertainment and declarator of any concrete legal relation by a judicial sentence must be in accordance with the law to which the declarator and ascertainment belongs *in abstracto* by virtue of general legal principles, this State must also determine what conditions are essential to a determination of the legal relation that shall be valid, except as against special forms of challenge. There is, therefore, no need for any conception of legal validity which shall be universally recognised by all nations as a sound conception. I doubt if such a conception could be arrived at. All we need to ask is, Is the sentence pronounced by the court a sentence which, according to the law of the court so pronouncing it, must at once be assumed in any other process to be a sentence that cannot be disputed? The objection that our law would not give the same force to a similar judgment, and that a foreign judgment cannot have more force than one by the courts of this country, fails. If it were so, we should have to refuse recognition to a foreign judgment, because in its country the judgment of one appeal court was sufficient to make it final, whereas in this country we have two appeals. The guarantees for the validity of any judgment must be looked for in the law to which it belongs.

²⁷ See Ct. of Messina, 20th Aug. 1884, reported by Buscemi in J. xii. p. 453. See also the other Italian decisions there referred to.

be considered as affording *prima facie* evidence of the truth and justice of the claims of the pursuers, but is liable to be impugned on the part of the defenders—not merely by proof of want of jurisdiction in the court from which it issued, or of its having been pronounced in the absence of the defender, or of material irregularities and informalities in the course of the proceedings—but also by proof of its having proceeded on error of fact, or even on error of law, more especially when the law applicable to the case was not the proper law of the country where the suit was tried and determined” (*Southgate v. Montgomerie*, 9th Feb. 1837, Ct. of Sess. Reps. 1st ser. xv. p. 507). In the case of *Whitehead v. Thompson* (20th March 1861, Ct. of Sess. Reps. 2nd ser. xxiii. p. 773), this case was referred to with approval, and it was laid down that a foreign judgment is examinable on grounds, clearly and relevantly stated, going to impeach its validity and its justice. The principle is stated, too, by Erskine, iv. 3, 4, and the only qualification it has received from modern authority is, that the case is not to be retried, but that it is competent to order distinct allegations assailing either the procedure of the foreign court, or the law or facts on which its judgment is based, to be sent to proof. There are not, however, wanting indications in recent cases that the rule in Scotland tends to approach that of England, according to which it is not allowable to refuse effect to a foreign judgment on the ground of error in fact or in law. For instance, Lord Fraser, in the case of *Pattisson v. M'Vicar* (5th Feb. 1886, Ct. of Sess. Reps. 4th ser. xiii. p. 555), doubts whether Lord Jeffrey's *dictum* is not too broadly expressed, and he says “the judgment of a foreign court, of competent jurisdiction, is more than *prima facie* evidence; it is conclusive, and is given effect to.” His Lordship, however, cites no authority for this proposition, and it would seem that the law is more correctly stated by Lord McLaren in the subsequent case of *Gudin* (8th Dec. 1886, Ct. of Sess. Reps. 4th ser. xiv. p. 216): “It may be, and I think is, the law of Scotland that a decree or judgment of the superior courts of England” (the foreign country in that case) “is examinable when founded on for execution in this part of the United Kingdom. But it is to be executed, if after examination it is found to be regular. By examination, I do not understand to be meant a retrial of the cause on issues of fact or law. . . . Instances of such irregularities” (*i.e.* irregularities that would induce the Scots court to refuse effect to foreign decrees), “whether as to jurisdiction, form, or substance, may be figured.” The substance of the decree is thus open to be assailed as well as the jurisdiction of the court that pronounced it, or the form in which the decree is cast. But a retrial of the case is not to be allowed either on issues of fact or law: as regards issues of fact, the meaning of this is plain enough; the judgment of the foreign court is to be treated as the verdict of a jury is treated, and is not to be set aside merely because the court of review would, on a balance of the evidence, have come to a different conclusion. It must have been pronounced in disregard of the evidence led, or some part of it, or facts which are material to the issue must have been excluded from view. As regards errors in law, it is not so easy

to see what his Lordship means ; it may, however, be that what is meant is that, if the foreign court have allowed parties full opportunity of informing them of the law in question, and have applied their minds to the information so given to them, the court of this country will not set aside their judgment, more especially if the law in question be the law of a third country, as to which the court has no sources of information different in kind from those open to the foreign court. In this latter case, the law of the matter becomes a fact to be ascertained by evidence.

If, however, the Scots court were satisfied that a foreign judgment had been obtained by any concealment or misrepresentation, they would after examination refuse to give decree conform (*Wilson v. Robertson*, 1884, Ct. of Sess Reps. 4th ser. xi. p. 893). That principle would, undoubtedly, receive effect as regards a foreign judgment. In the particular case, Lord Rutherford Clark doubted if the court could examine the decree, but his doubt depended on the terms of the Judgments Extension Act, the decree being a decree proceeding from an English court.

But in the converse case—viz. where the foreign judgment, instead of being put forward as a ground for execution, is put forward as a plea of *res judicata* in answer to a demand made anew by a pursuer who has failed to establish his claim in a foreign court, or in answer to one who demands restitution against a sentence pronounced and executed abroad—the foreign judgment cannot be examined. The reason of this Erskine puts thus: “For the defender, in whose favour the decree was given, does not in such case apply to the court for its aid, but, on the contrary, rests entirely on the sentence recovered by him in a foreign court confessedly competent in the cause; and so in effect excepts to the jurisdiction of the judge before whom he is called as having no authority over that court, nor any right of reviewing its sentences” (*Erskine, ut cit.*) So, too, Lord Braxfield, L.J.C., in *Watson* (21st Jan. 1792, Bell’s 8vo cases, p. 107): “A *res judicata* is good all the world over. The courts here would have no right to review this final judgment.” But these dicta do not apply to decrees in absence, and generally a judgment, to claim such effect, must be “regularly and solemnly pronounced.” More on Stair, p. 6.

In England and America, as in Scotland, the procedure by which execution is done upon the judgment of a foreign court, is by raising an action in the English courts founded upon this judgment, just in the same way as if the claim were one arising out of a contract. The foreign judgment must, of course, be such as execution could follow upon in the country where it was pronounced, and must not be subject to appeal there (*Patrick v. Shedden*, 1855, 22 L. J., Q. B. 283, *Paul v. Roy*, 1852, 21 L. J. Chan. 361). The same rule on this latter point obtains in Scotland (*Pattisson v. M’Vicar, ut sup.*). In England, again, to warrant execution of a foreign judgment, the court which pronounced the judgment must have been competent to do so, either as being a court of the domicile of the defender, or of the country of his nationality. That the contract on which judgment was given was intended to be performed in the same foreign

country is "a very material circumstance," but the possession of landed property is not thought to be sufficient to justify a foreign court in exercising a general jurisdiction over the person possessing it. The English courts would not recognise the abnormal jurisdiction claimed by the French courts in all cases where the pursuer is a French subject. There must also have been due citation of the defender, and the judgment must not impinge upon the maintenance of public order or of morality in England. A foreign judgment, when thus obtained in a competent court, unless it has been so obtained by fraud, cannot, as a general rule, be questioned either for error in law or for error in fact. This is true even when the law applicable to the case was English law, and was misinterpreted by the foreign court; and the maxim applies both to the case of a foreign pursuer who comes to England to enforce the decree he has obtained abroad, and to the case of a defender who protects himself in England by pleading a foreign judgment as *res judicata*. The American rule is substantially the same (Wharton, §§ 647 *et seq.*).

By the Judgments Extension Act of 1868 (31 and 32 Vict. c. 54), judgments of the supreme courts of one of Scotland, England, or Ireland will have the effect of judgments of the supreme courts of the other two if duly registered, as directed by the Act, in the other two territories. This enactment applies to decrees in absence as well as to decrees *in foro*, unless when the decree in absence is pronounced in Scotland after jurisdiction has been founded by arrestment.]

4. NATURE OF JURISDICTION WHICH MUST BE RECOGNISED BY ALL NATIONS. CONFLICTING VIEWS. GUIDING PRINCIPLE.

§ 416. The question is, what are the conditions under which a court of law is to be considered to have jurisdiction for international purposes,²⁸ *i.e.* to the effect of entitling its decisions to be regarded as *res judicata*? Judgments are not recognised as *res judicatæ*, unless all enquiry into the facts

²⁸ Judgment by an incompetent court will never produce a *res judicata* in the international meaning of that term. See Norsa, *Rev.* viii. p. 642. Fusinato, pp. 80 and 83. Lammasch takes the peculiar view that the competency of the court is not an indispensable condition of the recognition of the judgment as *res judicata* and of its execution (§ 102, note 8). It is surely an insufficient ground on which to found this completely novel proposition, that the draft of a treaty between the German and Austrian Empires, never actually executed, which in this matter took for a model the unsound practice of the German Empire, contained such a provision. It is wrong, too, in principle to recognise a foreign judgment or to put it into execution, if the foreign court must be regarded as incompetent, just because our courts cannot pretend any claim to exercise jurisdiction in the case (Lammasch, *ibid.* note 10). To prevent encroachments on our own jurisdiction is not the only matter for consideration; the substantial point is that justice shall be worked out, *i.e.* that we shall give legal assistance to the State which, in an international sense, has right to judge. To give aid to a State which has no jurisdiction is to aid a State which was less well able to decide the matter: *e.g.* as if one should aid a French court in a matter which naturally fell to be settled by the English court. It is wrong, then, to refuse aid only when the courts of our country have an exclusive jurisdiction in the matter.

on which the original claim proceeds is excluded, the merits of the case recognised as finally determined, and the only point remaining for enquiry being the point as to whether such a judgment has actually been pronounced.²⁹

The older school of lawyers did not specially discuss this question. They proceeded upon the view that the jurisdiction of a court, founded as it was on the common law, must everywhere be governed by principles that were in substance identical, and that these universal principles were in conformity with the nature of the subject. In modern times, in which positive legislation has created many and various systems of rules for determining jurisdiction, we must make a more searching enquiry.

In the first place, this question may be raised: Is it enough that the courts generally of the country, in which the judgment was pronounced, had jurisdiction, or must that particular court which gave the judgment be found to have had jurisdiction? The answer cannot be doubtful, if we remember that the apportionment of different classes of cases to the different courts of a country, is a matter which must necessarily be left to the discretion of the State to which the courts belong, *i.e.* is a question merely of the domestic law of that particular State. Other States have no interest in the matter except to see that no one of the community of States trespasses upon the jurisdiction of any other by means of the judicial decisions which its courts are empowered to pronounce.³⁰

According to one view, it is sufficient³¹ that the judge who pronounces judgment is competent by his own law. But this is simply to place in the hands of the foreign legislator the power of invading³² each and every legal relation that exists in our land, by regulations as to the competency of his own courts. This theory has found but few supporters; it cannot be reconciled with the independence and unity of different States.

According to another view, the court from which the judgment proceeds must have jurisdiction according to the law of the other State, in which execution or the recognition of the *res judicata* is asked.³³ For a State

²⁹ It is inconsistent with the recognition of *res judicata* that there should be any examination of the proceedings, or that the judgment should merely be recognised as evidence of the justice of the claim, which may be overcome by counter evidence.

³⁰ See Fiore, *Eff.* § 93. He takes a distinction between jurisdiction which will command international recognition and the competency of a court in its own country; Felix, i. § 126; Wach, p. 232, note; Fusinato, p. 85; Lammasch, § 102, note 13; Ct. of Cass. at Naples, 6th Dec. 1866 (Norsa, *Rev.* vi. p. 252); Francke, p. 36; Hellmann, § 125, No. 7. The opposite view, in so far as the German *Civilprozessordn.* is concerned, is represented by Struckmann and Koch, on § 661, No. 6.

³¹ Kori, *Erörterungen*, iii. p. 12. In modern times, the author of the note in J. viii. p. 537, declares himself in favour of this view. The treaty between Austria and Baden in 1853 (cf. Starr, p. 48, and Koch, *Staatsvertr.* p. 65) curiously enough contains a provision to this effect.

³² See, on the other hand, Wächter, i. p. 308, and Feuerbach, in his *Themis* or *Contributions to Legislation*, Landshut 1812, pp. 97, 98.

³³ Feuerbach, p. 94; Wächter, ii. p. 418; Daguin, pp. 104, 105, in agreement with a decision of the French Ct. of Cass. of 27th April 1870. Convention between Baden and Aargau in 1867, art. 9 (Koch, *Staatsvertr.* p. 87).

cannot refuse to another State what it claims for itself. It may, however, be asked whether there are not many rules of jurisdiction which were intended by our lawgiver to apply merely to the relations of the different courts of his own country, and whether we must not refuse to recognise in this country other rules of jurisdiction, which favour the native of the country where they are in use, when they come to be applied in that country to the relations between our countrymen and the natives. To satisfy this theory, both of these questions must be answered in the negative; but that has not been shown, and hardly could be shown, to be the true answer. Besides, we may also note that the rules of different States on questions of jurisdiction are often so broad in their application that it will very frequently happen that the courts of several States will be competent to deal with one and the same claim:³⁴ if, then, one of the parties brings his action in the courts of A, while the other takes proceedings in the courts of B, the result would be an endless series of insoluble disputes.

This result would be all the more certain, since priority could not form an absolute rule of preference, and it could not be maintained that our State had renounced its right of deciding in the particular case, simply because the process had been instituted first in another country. On the other hand, there are circumstances in which any such principle might lead to a real denial of justice.^{35 36}

In the third place, execution might be given if the court was competent both by its own law and by the law of the country in which execution is to be done. This view would be practically indistinguishable from the

³⁴ Actions may often be raised by both parties, and a country, which sets up for itself a rule of jurisdiction similar to the famous or rather notorious art. 14 of the Code Civil, cannot possibly recognise a foreign judgment which derives its jurisdiction from a similarly overstrained rule. (See Trib. Seine, 24th Aug. 1881, J. ix. p. 306.) To do so would be to renounce its own jurisdiction, and would be even something more than such a renunciation. ("*L'étranger même non résidant en France pourra être cité devant les tribunaux français pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.*") See Asser's *Buitenlandsche Vonnissen*, p. 18, in reference to the rules laid down for determining jurisdiction, and the many instances in which the provisions of different legislatures go beyond due limits.

³⁵ If in country A, in which it is intended to enforce the judgment, the courts of the country in which the judgment was pronounced were not considered competent, while the courts of a third State, which again declared themselves to be incompetent, were held to have jurisdiction. Cf. Fusinato, p. 89, and Lammasch in Holtzendorff's *Völkerr.* iii. § 162, note 11.

³⁶ See Menger, p. 184, note 24, and the interesting notice of the Dutch Minister of Foreign Affairs, Gericke van Hercoynen (J. i. p. 159), in opposition to this view. It is a pity that this view, following the precedent of several of the earlier systems of the different German States, has been adopted in § 661 of the *Civilprozessordn.*, which deals expressly with the conditions necessary for the execution of a foreign judgment. It runs thus: "A decree for execution is not to be made if the courts of the State to which the foreign court belongs had no jurisdiction according to the law of the German judge to whom application is made for execution."

Since the question of jurisdiction must be determined on like principles whether we are considering the *exceptio rei judicata* or an application for execution, the 3rd subsection of section 661 must apply to *res judicata*.

second, unless it were allowable to have an enquiry before the court of execution into the limits of the jurisdiction of the court which pronounced the decree as these are laid down by its own law. For this latter court, by judging in the cause, has affirmed its own jurisdiction. But such an enquiry would be unprofitable. The court where the suit depended must necessarily be guided solely by its own law, and the court which is asked to give execution will certainly not be better fitted to interpret these laws.

The only course remaining, then, is to set up rules that shall regulate this matter according to general principles of international law.³⁷ Accordingly, we must hold, following out what has been said above, that this proposition is fundamental, viz. :—

The courts of that State, whose law is to rule the claim made in the action, are the courts that should judge in the case; or, to put it more accurately (see *supra*, p. 80 *et seq.*), the courts of that State, whose law has given to the claim which is now in dispute its final and determinate shape, are the courts that should judge in the case.

This latter definition is preferable, for it would be impossible, and would destroy all the principles of modern international law, to hold that no court might entertain an action, save the court which, in the actual decision of it, was in a position to regard its own law exclusively.

We are very far from asserting that other important but complementary principles should not be associated with this, the leading principle, *e.g.* the principle of voluntary subjection, tacit it may be, to the jurisdiction, as we shall proceed to show. But we must find the root of all rules of jurisdiction in the principle just stated. The Institute of International Law has substantially expressed itself to this effect (Ann. i. pp. 125, 126) by saying that it was desirable to have “*règles uniformes concernant la compétence des tribunaux*,” and that, apart from the *forum domicilii*, which we shall discuss immediately, the recognition of special fora (*fors exceptionnels*), “*devra surtout avoir pour but de faire décider autant que possible par les juges du pays dont les lois regissent un rapport de droit, les procès qui concernent ce rapport*.”

5. THE VARIOUS KINDS OF JURISDICTION TO BE RECOGNISED IN INTERNATIONAL RELATIONS.

LEADING CASES IN OUTLINE. PRINCIPLE OF VOLUNTARY SUBJECTION. COMPETENCY OF THE *forum domicilii*.

§ 417. In questions, therefore, of status and family law, the *judex*

³⁷ See especially Asser, Rev. i. p. 473; Fiore, *Eff.* § 72; Menger, p. 180. See, too, Austrian practice (Vesque v. Püttlingen, § 126, p. 473) and the resolution of the association for the reform and codification of public law, of 12th Sept. 1883 (J. x. p. 564): “*des règles de compétence uniforme doivent être déterminées*.” Decision of the Sup. Ct. of Austria (Menger *ut cit.* under date 2nd July 1857); Fusinato, *Es.* pp. 87, 88. See in Gianzana, iii. § 110, as to the Congress of Milan, and the proposals there made by Alexander.

domicilii will decide; in questions as to things, the *judex rei sitæ*; ³⁸ questions as to obligatory relations will belong partly to the *judex domicilii*, partly to the court of the place of the contract or delict. ^{39 40}

This principle, ⁴¹ however, undergoes two modifications—an extension in so far as the defender may consent to subject himself to the jurisdiction of another court, and a limitation in so far as the pursuer may renounce some particular jurisdiction; but from this option there are of course excluded all legal relations over which the parties have not a full power of disposal.

The acquisition of an actual domicile must count as a voluntary submission of all legal relations that are subject to a free power of disposal to the courts of that country, excepting only real rights in heritage, and such moveables as are permanently attached to any particular place. ⁴² The foreigner who sets the centre of his affairs and of his life as a citizen

³⁸ The *actiones in rem scriptæ*, in so far as they are directed to the delivery of particular articles, give the pursuer a real right, since the true test of a real right is its operation against third parties. These actions are set on the same footing as the *actiones in rem*, under the restriction already mentioned, in so far as the competency of the court is concerned, in the treaties collected by Krug (pp. 40, 41), and in the draft (1859-1861) of a General Code of Jurisdiction in the States of the German Bund. The same rules will apply to actions for division and possession in so far as these apply to particular articles. (Cf. § 15 of the Draft Code, and Krug, as cited.) The draft of the General Code which was worked out by the well-known Nürnberg commission on a commercial code, has been almost forgotten, in view of the much more advanced provisions for legal co-operation, and the clauses of the Imperial constitution and the German *Civilprozessordnung*. But they still deserve attention, since they made an attempt, at that time most praiseworthy, to introduce a closer system of legal co-operation among the German States, preserving substantially all sovereign rights, and on the assumption that different rules of civil procedure existed in the different States. The present rules of the German Empire, proceeding, as they do, on the principle of the unity of the whole Imperial territory, limit the sovereign rights of the individual States in matters of civil process, and assume the existence of one uniform code of procedure.

³⁹ Féraud-Giraud holds that action by one foreigner against another in a French court is inadmissible even in the case of a delict committed in France (J. vii. p. 163). See further discussions there on French practice.

⁴⁰ There is no *locus delicti* with jurisdiction in the case of illegal acts committed on the high seas but not on board of any one ship. Accordingly, the court of the domicile must be held to be competent, or, in actions of damages founded on collisions between ships, the court which the State, to which the ship belongs, points out as the proper court; failing any special provision to a different effect, this will be the court of the port from which the ship that did the damage hails. Fiore, § 87, lays down that the court of the first port in which the ship that did the damage arrives is, in the nature of things, competent.

⁴¹ See Brocher, iii. p. 14; Wharton, § 671, and the authors cited, *supra*, p. 895, note 14, for the principle that the competency of a court may generally be inferred from the applicability of its laws in an international sense. Some deny all connection between the applicability of the substantive law and the jurisdiction of the courts (e.g. Gerbaut, § 295; Filicier, p. 4). But what principle can these authors apply, except one of pure positivism, which is misleading, in view of the differences that exist between different systems?

⁴² The foreigner as a rule does not possess any property at his old domicile. If the pursuer had to betake himself to the court of that old domicile, the debtor would remain untouched in his new domicile if the sentence of the court of one country could not be carried out in the other—would, as a judgment of the Parliament of Paris expresses it, enjoy the property acquired at the expense of his fellow-citizens (Fœlix, i. p. 321). Féraud-Giraud (J. vii. p. 226) lays particular stress on voluntary submission. But see a judgment of the German Imp. Ct. (iii.) of 19th May 1882 (Dec. vii. p. 408).

in another place, thereby recognises the protection which is afforded to him by the law of that place, and the courts that are established there. If he should require the pursuer to follow him to the *forum* of his previous domicile in any action dealing with things that are at the free disposal of the parties, because the case has somehow had its origin there, such a demand, giving no advantage to the defender, but likely in most cases to be troublesome to him, would be declared to be *ex dolo*, and therefore would be refused.⁴³

Conversely, however, if the defender has left his former domicile, or the place in which he came under the obligation in question, or acquired the property which is claimed, and has no more belongings there, the pursuer has no right to appeal to the jurisdiction of that place. He could have enforced his rights sooner, at a time when the defender could have met him there without any inconvenience, and if his right to that jurisdiction was in any peril, he was bound to use arrestments against the debtor or his property: *vigilantibus jura sunt scripta*. But an exception must be admitted in the case of obligations *ex delicto*; the person who has received damage must be allowed some more efficient protection than the creditor enjoys in other obligations which rest upon free will, and is all the more entitled to adhere to that jurisdiction which has once been established, irrespective of whether the person who has committed the delict lives at the place where it was committed, or has property there, as in many cases it is not known till afterwards who it was who did commit the delict. In this case the creditor is absolutely entitled to choose between the *forum delicti commissi* and the *forum domicilii*.

In dealing with persons who cannot point to any domicile, a residence of a certain duration (to be measured by the discretion of the judge), the *residence* of French law, must be allowed to constitute a subsidiary *forum* in place of the *forum domicilii*.⁴⁴ Otherwise there would be many actions which could never be raised against such persons.

JURISDICTION IN REAL ACTIONS. EXCLUSIVE COMPETENCY OF THE *forum rei sitæ* AS REGARDS IMMOVEABLES.

§ 418. The exclusion of the *forum domicilii* in real actions which deal with heritage is justified upon the ground that to assume any voluntary

⁴³ The question may be raised whether it should not be necessary to demand naturalisation or at least an authorised domicile, as Féraud-Giraud thinks is required in France (J. vii. p. 155).

But once we found upon the duty of the State to ensure justice to all who are subject to it in the nature of things, we cannot ask for any further special authorisation by the State. This latter view seems to be gaining ground in France in more modern times. The Italian Code of Procedure, §§ 105, 106, takes *residenza* as well as actual domicile as a ground.

See Trib. Seine, 18th March 1880 (J. vii. p. 191); C. de Bourdeaux, 19th August 1878 (J. vii. p. 586). Laurent, iv. § 30; Gerbaut, §§ 396 and 396 *bis*, who cites Belgian law as a special authority for the sufficiency of an actual *de facto* domicile.

⁴⁴ Cf. judgment Trib. Civ. Seine, 19th July 1879 (J. vi. p. 550), and Clunet, *ibid.*; C. de Pondicherry, 28th August 1869 (J. vi. p. 552), C. de Paris, July 6th, 1886 (J. xiii. p. 328).

submission here is to contradict the modern theory of law, which distinguishes in many important aspects between moveables and immoveables,⁴⁵ and to go against the great and specially important distinctions between the various territorial laws on the subject, while the arguments adduced to support the voluntary subjection to the courts of the domicile in personal actions and real actions directed against moveables, are not in harmony with the nature of the *materia subjecta* in the present case. By aid of this last consideration, and because the owner has divided these things from the rest of his property, we find that real actions, too, concerned with moveables which are permanently attached to some particular place, are only competent in the courts of that place. That this is so with real actions that concern immoveables has been recognised by most authors and in most treaties.⁴⁶

The nature of other moveable things, on the other hand, is such that their owner can, as a rule, settle their situation. As, then, upon the one hand, to require a pursuer, who demanded delivery of moveable property by means of a real action, to raise his action at the place where the thing is situated, would imply the greatest injustice, and would in many cases be nothing but robbery of a good right, since the pursuer could not know where the thing in question was; so, on the other hand, if the defender might be sued in any place where the thing happened to be for ever so short a time, his defence would be greatly embarrassed, and the security of commerce in moveables would be thereby exposed to the greatest risks. Nothing, therefore, is more natural than that real actions for delivery of

⁴⁵ According to Germanic legal theories, a man may unite several distinct personalities in himself by the possession of distinct estates (*e.g.* by feudal and allodial holdings). The so-called *landsassatus plenus*, which is recognised in some countries, but has now been abolished in Germany by the *Civilprozessordn.* § 25 (see Beseler, i. § 65, note 4), is explained to be a legal theory which holds the whole moveable estate to be a pertinent of the land. In older German law the *forum rei sitæ* is exclusive (see Land Law of Saxony, iii. 33, § 4; cf. Suabia, c. 75, § 1, c. 245, § 1, ed. Gengler; and the citations in Wetzell, Civil Process, § 41, note 47), and the Courts of Common Law in England and America still declare themselves of their own accord incompetent if the real estate is not within their jurisdiction. Burge, iii. p. 397; Piggott, p. 132; Gerbaut, § 4; Ct. of Cass. Naples, 28th November 1867 (Norsa, Rev. viii. p. 655); Gianzana, ii. § 71; Féraud-Giraud, J. vii. 145 (absolute incompetency of French courts in real actions, concerned with foreign real property); Glasson, J. viii. p. 123. See, for the exclusive character of this jurisdiction, judgment of the Sup. Ct. of Spain, 23rd October 1879; Torres Campos, p. 286, note. But in questions of competency we must distinguish between real actions and personal actions for delivery of real property (Judgment of the Swiss Fed. Ct. 9th March 1877, J. v. p. 68, and practice in England, *e.g.* Copin v. Adamson, 1874, L.R. 9 Exch. 345; 1875, 1, Ex. D. p. 17; Alexander in J. v. p. 34; Foote, p. 138). To a different effect, Franco-Swiss treaty, art. 5 (Curti, p. 72). The grounds of convenience which recommend the *forum rei sitæ* in the case of an action for the delivery of heritable estate in implement of a sale cannot be pressed so as to make that *forum* exclusive. Actions for possession must necessarily be treated in the same way as actions dealing with property (Curti, pp. 73, 74). The *forum rei sitæ* is also the exclusive *forum* for actions declaring the nullity of registered hypothesis or securities. Trib. Seine, 7th February 1885 (J. xii. p. 437).

⁴⁶ Burge, iii. p. 125; Vattel, ii. § 103; Wheaton, § 86, p. 118; Story, § 543. See, too, J. Voet, in Dig. 5, 1, n. 77; Mevius, in *Jus. Lub.* v. 2, note 5, §§ 3 *et seq.*; the treaties cited by Krug (pp. 40, 41); and the sketch of the laws of the States of the German Bund, § 15.

moveables should be brought at the actual domicile of the defender, and that an exception should be admitted only if the thing is permanently attached to a particular place by the dedication of its owner, or if the pursuer under special conditions—as in the case of arrestments—is entitled to detain them at some particular place.⁴⁷

JURISDICTION BY REASON OF RESIDENCE AND OF ARRESTMENT.

§ 419. Every one, then, so long as he is personally present in any State, is subject to the sovereignty of that State in so far as relates to his person, and so long as he possesses property or makes claim to property there, in so far as concerns that property and these claims. It is, then, not repugnant to principles of international law, that the debtor himself, if he happens to be in the country, should be seized, or his property arrested; and in consequence a judgment be pronounced without the necessity of establishing any other right of jurisdiction, giving decree—in the former case to the amount of caution required for liberation, in the latter to the amount of the value of the goods arrested.⁴⁸ Such a jurisdiction, however, rests upon an actual exercise of power at the moment of detention, and ultimately therefore must be referred to a complete distrust of the judicial system of other States, and to an endeavour to claim for our own jurisdiction, in a onesided and partial fashion, as many suits as possible in which subjects of this country are concerned, and to wrest them from the court which ought naturally, according to the leading principles which we have already laid down, to have the right of decision. It seems right, therefore, to refuse international recognition to such a jurisdiction, even as regards the simple *exceptio rei judicatee*.

⁴⁷ Curti, pp. 70, 71, declares in favour of making the *judex rei sitæ* competent by legislation. Curiously enough he advances the argument of the connection between rules of jurisdiction and the substantive law applicable to the case, which in other subjects he has rejected, and which, in the case of moveables, is not of the same practical effect by reason of the power which the possessor has of changing their position. He also founds on the confusion which may arise from the erroneous application of territorial limitations upon real actions. The Franco-Swiss treaty of 1869 recognises the *forum rei sitæ* for real property only.

⁴⁸ The Nürnberg Draft Code for the Bund (1861) provided in art. 10: "If arrestments have been used in any German State, the competency of the jurisdiction given by the law in respect thereof only justifies the principal action in so far as that process will be able to affect the subject arrested and any property of the arrestee that may be found in that country, and will only be admitted on condition that, if the arrestee when the arrestments were laid on was the subject of another German State, his character as a foreigner did not determine their use."

Accordingly, the jurisdiction established by § 24 of the *Civilprozessordn.* can claim no international validity. It is thus expressed: "In actions for patrimonial claims against a person who has no domicile in the German Empire, the court within whose territory property belonging to the defender, or the subject matter of the action itself, happens to be, has jurisdiction. In claims on debts, the domicile of the debtor is held to be the place in which the subject matter is situated, and if a pledge has been given, the court of the place where it is situated will be held to have jurisdiction." The 14th article of the French Code is still less obviously sound.

JURISDICTION TO LAY DOWN PROVISIONAL REGULATIONS.
SUCCESSION SUITS.

§ 420. We must not, however, mix up provisional regulations with matters of this kind. They are adopted *ex necessitate* to meet emergencies, and not unfrequently are dictated by the voice of humanity, *e.g.* arrestment to prevent an unscrupulous debtor from making away with the property of his creditor,⁴⁹ awards of interim aliment, and temporary decrees of separation of spouses, to protect the wife from ill-treatment by her husband. Every State is competent to pronounce such temporary orders, if the facts necessary to justify them are found in existence within its territory.⁵⁰ Of course, it will not unfrequently be necessary to ascertain some of the less obvious conditions by the test of foreign law, *e.g.* to ascertain the existence of a relationship between the parties.⁵¹ But, except in so far as purely police regulations are concerned, no provisional decree can have any validity after the decision in the main action has been given by the judge who has jurisdiction to do so, and, if the foreign judge who is competent to the action lays down any rules for the interim regulation of matters, these must conversely be recognised in another country. Again, an application for an interim order must be refused, as a matter that properly belongs to the court in which the main action is pending, if the applicant has sufficient time to apply to that court.⁵²

§ 420*a*. Actions for payment and for division of a succession may be competently raised in the court of the domicile of the deceased, in so far as succession is looked upon as an universal succession (see Fiore, *Eff.* § 82). If the succession to real property is treated as a singular succession, then in international questions the competency of the *forum rei sitæ* must be recognised.

QUESTIONS AS TO *Status*. MATRIMONIAL SUITS.

§ 421. The principle of voluntary subjection cannot apply in actions of *status*, or in questions as to the invalidity or dissolution of a marriage.

⁴⁹ See Trib. Anvers and C. de Bruxelles, 14th December 1870 (J. i. p. 83) ; C. de Lyon, 25th July 1874 (J. iii. p. 273). Dubois, *Rev.* iv. p. 151. Gianzana, ii. § 262, cites a judgment of the Ct. of Milan, 13th April 1873, to show that Italian courts may be found to be competent to confirm or to loose arrestments, even although they have no jurisdiction over the main claim. They will not have this jurisdiction if the arrestment was laid on abroad, and merely executed in Italy. Gerbaut, § 328, takes a different view as regards French law. I should incline to hold the Italian doctrine sound and practical.

⁵⁰ Cf. Fiore, *Eff.* § 90. See Torres Campos, p. 281, as regards Spain.

⁵¹ For the competency of Italian courts to lay down interim rules even in matters of status among foreigners, see Ct. of Cass. at Turin, 13th June 1874 (J. i. p. 330). In the same way French courts are competent to award interim aliment to a foreign married woman, C. de Paris, 3rd August 1878 (J. v. p. 495).

⁵² Cf. Trib. Seine, 13th January 1883 (J. x. p. 168) and Sup. Ct. at Stuttgart, 25th Jan. 1861 (Seuffert, xvi. No. 57).

The courts of the country to which the parties belong must have an exclusive jurisdiction. This exclusive jurisdiction in these courts may, no doubt, give rise to serious hardships, if the State to which the parties belong is at a considerable distance, and if their foreign domicile has existed for a long period. This we have already noticed in treating of the marriage ceremony. But still, as a matter of principle, we must hold fast to the doctrine of their exclusive competency,⁵³ if questions of *status* are to be determined by the law of the parties' nationality. Even although the courts of the domicile⁵⁴ should expressly adopt the view that such questions are not to be determined, as Laurent (iv. § 46) says that they should be determined, by the law of the country of the domicile, but by that of the nationality of the parties, still we cannot concede jurisdiction to the courts of the domicile. For fatal misapprehensions of the law must be expected to occur,⁵⁵ and that all the more that in many cases a large discretion must be allowed to the court, *e.g.* in judging of the sufficiency of the grounds of divorce. Another and an entirely separate point is the question whether it would not often happen that in the opinion of the court a coercitive law would prevent the application of the national law of the parties.⁵⁶ The only expedient which would satisfy all requirements would be attained

⁵³ See Fiore. Ct. of Cass. at Turin, 13th June 1874 (J. i. p. 330); on French practice, see Clunet (J. vii. p. 467) and Glasson (J. viii. p. 165).

If we determine questions of *status* and family law not by the law of a person's nationality, but by that of his domicile, of course the courts of the country of his domicile have jurisdiction. This is the view of the English courts (Piggott, pp. 282 and 290).

Laurent (iv. § 46), although a decided adherent of the *loi nationale*, declares in favour of the jurisdiction of the *judex domicilii*, as Glasson does, if no objection is taken to his jurisdiction. But, on the other side, see Brocher, iii. p. 48.

⁵⁴ Although we may deny jurisdiction to our courts in questions of *status* between foreigners, it by no means follows that we shall refuse them all protection from the law, if they have their domicile here. The nature of the thing demands in such a case that the court of the last domicile enjoyed by the party in his own country shall remain competent. (See the analogous provisions in § 16 of the German *Civilprozessordn.* in the case of Germans who enjoy the privilege of extra-territoriality in a foreign country.) But if a competent court is not to be found in the State to which the foreigner belongs, then the court of the domicile will have jurisdiction. It is illogical to hold, as Laurent does, that in the case of authorised domicile the court of that domicile has jurisdiction. An authorised domicile does not confer nationality.

⁵⁵ See Curti, p. 23. Even the Franco-Swiss treaty of 1869 has not, on a sound interpretation of it, submitted family suits to the *forum domicilii*. See, too, Lehr, J. v. p. 247, and in particular Brocher, *Traité franco-suisse*, p. 25.

⁵⁶ If a judgment on the *status* of a person in accordance with the law of the country to which he belongs, or to which the head of his family belongs, is to be recognised at all, it must be recognised with all the effects with which the court that pronounced it has invested it. It must thus have universal legal effect (legal effect *inter omnes*), if the judge who pronounced it has power to give it such effect, even although in the other State, in which it is pleaded, it is not invested with so comprehensive an effect. Moreau (§ 46 *bis*) takes a different view, on the erroneous ground that the foreign decree can have no greater effect than a decree of our own courts. But what is meant by "greater"? The only questions are, What could the foreign decree determine? and that must be settled by the international rules of jurisdiction; and, What did it mean to determine? and that it must itself determine within the limits of its competency. It is irrelevant to say that the legislature in our country has set narrower limits to the judgments of courts in this country.

by following the procedure, initiated by the British statutes of 1859 and 1861 (22 and 23 Vict. c. 63, and 24 and 25 Vict. c. 11) [for the ascertainment of the law in different parts of the Queen's dominions and in foreign countries], of sending cases for opinion to the foreign court (see *supra*, pp. 161, 105, note 30⁵⁷). The necessary actions might be raised in the court of the domicile; this court would determine the points of fact, and the court of the nationality (the most convenient court being that of the last domicile within the country of nationality) would draw the legal inferences arising upon the facts. The court of the domicile would then promulgate the decree with these findings in fact and law. Any such arrangement can, of course, only be effected by means of treaties. The suggestion is, however, compatible with the principles recognised in oral pleadings in civil suits; courts of cassation and revision, *e.g.* the German Imperial Court according to the German *Civilprozessordn.* (and the House of Lords in appeals originating in the Sheriff Courts of Scotland), give their decision upon a statement of facts which is settled before they consider the case by the inferior court, just as, in the method now recommended, the court of the nationality would proceed to consider particular points of law.

The incompetency of the court of the domicile—assuming always that the law of *status* is to be dependent on nationality—in matters of *status* must, however, following out the correct view, which is recognised even in Italy, be treated as an absolute incompetency, and one that cannot therefore be removed by voluntary submission of the parties, or by an omission to plead it. For the non-recognition of the *forum domicilii* takes its rise directly from the impossibility of recognising any voluntary submission in such matters as these. For this reason we must decline to approve of French practice, whereby French courts are empowered to judge even in questions of *status* between foreigners, if no objection to the competency of the proceedings is taken by the defender, who must appear in the case. To this extent we may sanction it, *viz.* that the court should declare itself competent to entertain an action against a person domiciled in its territory, if he cannot show that he possesses any foreign nationality.⁵⁸

In questions of pedigree the nationality of the father, and not that of the child, must rule: even although the father should appear as pursuer, as in the French action *en désaveu* (Cod. Civ. § 312). We must not let ourselves be led astray by the expression that we have to deal in such cases with the *status* of the child.⁵⁹ In truth, the point to be established is whether it does or does not belong to the family of the father.

⁵⁷ The proof will frequently, so far as regards facts, be taken exclusively at the place of domicile.

⁵⁸ Cf. Clunet, J. x. p. 399, and J. vi. p. 467; Féraud-Giraud, J. xii. p. 387.

⁵⁹ Laurent agrees with this conclusion (iv. § 53). He criticises a decree of the French Ct. of Cass. of 6th March 1877 to the opposite effect.

QUESTIONS AS TO PARTNERSHIPS.

§ 422. We need hardly say that in questions as to the rights and duties of a partnership,⁶⁰ always premising that the partnership has a legal existence, the court of the place where it has its seat is competent, and that the proper court to exercise jurisdiction in questions connected with the obligations of a trading firm or trading establishment is the court of the place at which that establishment exists.⁶¹ (See Franco-Baden Treaty of 1846, § 1.)

THE *forum contractus* AND *forum delicti commissi*.

§ 423. No absolutely universal rule can be laid down in the case of obligations arising on contracts, if we found the jurisdiction of the court upon a consideration of what law is to decide the case. But this very want of a hard and fast abstract rule suits the necessities of trade. A hard and fast abstract rule, whether we take the place in which the contract was made, or the place in which it is to be carried out,⁶² as absolutely regulative of the matter, will fail to meet the reasonable expectations of the parties, and will often commit the decision of the case to a court which is absolutely inconvenient for one of the parties, and at the same time will not unfrequently be found to have little or no qualifications for deciding the case speedily, at comparatively moderate cost—*e.g.* keeping in view the proof that is to be adduced and the residence of the parties—and in accordance with the law that is to determine the rights of the question. If an obligation is intended to be performed at the place at which it is contracted, then we may set up a *forum contractus* at that place, as the place at which the whole transaction is to be worked out. Otherwise a *forum contractus* is set up for each of the contracting parties at his own domicile; but, if the debtor in the obligation leaves his domicile, the *forum contractus* set up by reason of that domicile does not cease: with the ordinary *forum domicilii* it is different.

But yet there has been a constant endeavour to set up some universal rule, and since, as we shall see, the effect of such rules has very often

⁶⁰ See Glasson, J. viii. p. 121; Ct. of Algiers, 24th July 1882 (J. xi. p. 191). The French Ct. of Cass. (25th Feb. 1879, J. vi. p. 396) laid down that the *juge naturel du défendeur* in the sense of the Franco-Swiss treaty is the court of the place where the company has its seat in all actions directed against the founders of the company and arising out of its business, so long as it is not in liquidation. Clunet approves of this decision. Curti, pp. 51, 52, does not. We must, however, remember that that treaty does not proceed upon the principle adopted in the text, but in its historical development is traceable to the principle that the "*juge naturel*" is the *judex domicilii* of the defender, a leading principle, to which all other grounds of jurisdiction are exceptions. Gerbaut, § 392, rightly condemns this illogical reasoning.

⁶¹ See Norsa, Rev. viii. p. 649.

⁶² See Fiore, *Eff.* § 83. In actions for average losses, it may well be that as a rule the court of the port of destination should be held to be competent. (Fiore, § 88.) But in such matters we should leave ample room for the free choice of the parties, and we must often infer from special circumstances what their choice is.

been to set up unnatural claims to jurisdiction, the *forum contractus* has, as a matter of fact, been one of the main impediments to international recognition and execution of judicial sentences.

It can easily be understood that in this subject recourse has been had to the deliverances of the Roman law. The theory which at one time was generally accepted, and still is *e.g.* accepted in France, set up, in accordance with these deliverances, the place in which the contract was made as the proper *forum contractus*. More modern doctrines, which now prevail in German and in English jurisprudence,⁶³ make the courts of the place of performance the proper *forum contractus*. The one of these views is just as well founded and just as ill founded as the other.⁶⁴ The law of Rome,

⁶³ Piggott, p. 143. But the necessity of personal service in England puts a different face on things there.

⁶⁴ The Roman citizen in old times could only be sued in Rome in the court of the prætor; in those days there was but one jurisdiction for all Roman citizens, and on that account a *pluris petitio loco* could never arise. In later times, as the citizens of Rome spread more and more over the provinces, and took up trades there, they were obliged to answer in the courts of the magistrates of the provinces. The only persons, however, whom a magistrate could compel to answer in a suit by requiring caution, were persons who either were themselves actually present in his jurisdiction or possessed property there, by means of which a *missio in possessionem* of the creditor could be carried out.

The principle, that it was not lawful for creditors to sue every one who was himself found in the province, or had estate there, in its courts, was first reached in *actiones stricti juris* with a definite place of performance by this means—viz. that an action instituted in any other place than the appointed place of performance was treated as a *pluris petitio*, the result of which was dismissal of the action and loss of the right to recover. How was it, however, with other obligations, where a less strict reading of their terms did not impose such a penalty upon the pursuer? The defender was in this case also formally subject to the official authority of the magistrate, and the same was the case even as regarded *obligationes stricti juris* after the introduction of the *actio de eo quod certo loco*. In my opinion the limit lay in this, that the magistrate did not exercise his power of permitting action or compelling the debtor to answer unless *bona fides* required it. It is an important circumstance, no doubt, for determining whether in the particular case *bona fides* requires the debtor to answer to the jurisdiction, that payment is to be made at that place; but that does not in itself determine the question, since for instance the *forum domicilii* also affects all contract obligations, although payment may have to be made at some other place than the domicile of the debtor. But the principal consideration is whether the debtor was resident for some time in the locality where it is proposed that the jurisdiction over the contract should lie, so that both parties must have held that the beginning and the whole development of their transaction was to take place there. This result is confirmed by the direct authority of the sources of law.

The most detailed passage as to the *forum contractus* is L. 19, D. 5, 1: "*Heres absens ibi defendendus est, ubi defunctus debuit, et conveniendus, si ibi invenitur nulloque suo proprio privilegio excusatur.* § 1. *Si quis tutelam, vel curam, vel negotia, vel argentariam, vel quid aliud unde obligatio oritur certo loco administravit, et si ibi domicilium non habuit, ibi se debet defendere, et si non defendat neque ibi domicilium habeat, bona possideri patietur.* § 2. *Proinde et si merces vendidit certe loco, vel disposuit, vel comparavit, videtur, nisi alio loci ut defenderet, convenerit, ibidem se defendere. Numquid dicimus eum, qui a mercatore quid comparavit advena, vel ei vendidit, quem scit inde confestim profecturum, non oportet ibi bona possidere, sed domicilium sequi ejus? At si quis ab eo, qui tabernam vel officinam certo loci conductam habuit, in ea causa est, ut illic conveniatur? quod magis habet rationem. Nam ubi sic venit ut confestim discedat, quasi a viatore emtis, vel eo qui transvehebatur, vel eo qui παραπλῆι (præternavigat), emit durissimum est, quotquot locis quis navigans vel iter faciens delatus est, tot locis se defendi. At si quo constitit non dico jure domicilii, sed tabernam, pergulam, horreum, armarium, officinam conduxit, ibique distraxit, egit, defendere se eo loci*

besides, cannot be taken as an absolute authority on this matter, since it treats of the jurisdiction of the various courts within the dominions of the Roman Empire, and knows nothing of international delimitation. Savigny, whose general theoretical discussion of the subject still takes the first place, says (§ 370, Guthrie, p. 198) that the place in which the obligation originates is accidental, and unconnected with the substance of the obligation. But there are circumstances in which we may make exactly the same assertion of some place of performance which has been capriciously selected, and that all the more as cases not unfrequently

debebit. § 3. Apud Labconem quæritur si homo provincialis servum institorem vendendarum mercium gratia Romæ habeat, quod cum eo servo contractum est, ita habendum atque si cum domino contractum sit: quare ibi se debebit defendere. § 4. Illud sciendum est, cum qui ita fuit obligatus, ut in Italia solveret, si in provincia habuit domicilium, utrobique posse conveniri, et hic, et ibi; et ita et Juliano, et multis aliis videtur."

The beginning of this passage provides that the heir must answer in judgment in the court where his ancestor could have been required to plead. This is a consequence of the representation of the ancestor by the heir in questions of property. Then it is noted in the first paragraph, that any person may be sued in that place where he has permanently carried on business, upon all obligations arising in that business. The second paragraph lays stress upon the fact that the debtor has been in a particular place for no mere temporary purpose, although it is not necessary that he should be actually domiciled there. One who is on his travels cannot, as a rule, be sued in the different places in which he may make contracts upon his journey. The third paragraph lays down that one who has had a trading establishment in Rome, under the management of a slave, may be sued in Rome; and the last paragraph reminds us that the *forum domicilii* is always concurrent with the *forum contractus*. I will not dispute that as a rule an obligation must be performed where the *forum contractus* is, in conformity with this passage, settled to be. But it is quite conceivable that a traveller, for instance, may intend to repay a loan at the place where he has received it, or that a slave who contracts in Italy may stipulate that his master should give delivery of the goods in the provinces. In my opinion, if it were assumed in the former case or disputed in the latter, that the *forum contractus* was the proper *forum*, the provisions of this passage, which say not a word, save in the last paragraph, as to the place of performance, would be plainly contradicted. We can explain the mention of the place of performance here in this way, that it is specially desired to give still more prominence to the concurrence of the *forum domicilii*, and therefore the words "*ut in Italia solveret*" must be construed as meaning, "assuming also that he is bound to pay in Italy," and the "*ita*" is to be carried back to the preceding paragraph. It is intimated that if a person has come under such obligations, as in the case just cited the slave has, and if we assume also that he is bound to pay in Italy, yet if he has his domicile in the provinces he may be sued in either place. According to the prevailing view, the words "*ita fuit obligatus, ut in Italia solveret*" are interpreted to mean that the agreement to pay in Italy is the condition of jurisdiction there. But plainly the fourth paragraph is in contrast with the preceding paragraphs, in which it has been already shown what considerations should serve to make us remember that the *forum contractus* is not exclusive, but is always concurrent with the *forum domicilii*; it would be quite inconsistent with this, if, after there had been no mention at all of the place of performance in the former paragraphs, this should now be taken as the true foundation of the *forum contractus*.

But if the word "*ut*" should not be taken in the sense we propose, it does not follow by any means as a necessary consequence from this passage, that in every case where payment or performance is to be made in Italy there should thereby be a *forum contractus* established there: for the word "*posse*" very fairly admits of the translation, that it may be the case that a person is bound to answer in two places: it may then be laid down, and that is no contradiction of my view, that as a rule the place of payment is identical with that in which the *forum contractus* is established. Then L. 3, D. 42, 5: "*Contractum autem non utique in eo loco intelligitur, quo negotium gestum est, sed quo solvenda est pecunia.*" Here, then, it is said the *forum contractus* is determined simply by the place of performance. But in my view

occur, in which the place of performance is only fixed some time after the contract is concluded, *e.g.* in sales of floating cargoes.

We can without difficulty figure cases in which this assumption will flatly contradict the intention of the parties. For instance, a person is engaged to accompany another on a journey from Berlin to Paris and Madrid; the days on which they are to arrive at Brunswick, Hanover, Cöln, Paris, and so on, are settled, and it is agreed that he is to receive a stipulated sum at each of these places. Can we say in such a case that the debtor may be sued at any one of these places? And yet that would be the result of the view that is adopted, even although the whole journey should be left unfinished. But it is impossible without force to read into an agreement as to the place of performance a tacit prorogation of jurisdiction even in ordinary cases. For instance, a merchant in Hamburg, who undertakes to make a payment in Singapore through a correspondent there, can surely not be said thereby to indicate an intention to subject himself to

this passage would, without being forced, admit of this translation: "That place in which the contract is concluded is not always to be considered the place of the contract, but that is only as a rule the case if the money falls to be paid there also." This is in full accord with the view I have adopted; for if the whole transaction, from first to last, is intended by the parties to be in connection with one and the same place, it would generally offend against *bona fides* to propose to transfer part of the obligation to another place by appealing to a different *forum*. By the ordinary rendering the jurist is made to say that the *forum* is certainly not established where the transaction is concluded; but this reading does not correspond with the outset of the passage. In Latin, *contrahere* is the exact opposite of *solvere*; the former indicates plainly the beginning, the latter the end of the transaction. If the place of payment were all that fell to be considered, it would certainly have been more natural to speak all along of the *forum solutionis*, and to leave out the *contrahere* altogether.

In the same way I render the passage L. 21, D. *de oblig. et act.* 44, 7: "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit*;" thus: "It may be laid down that every person has contracted in that place in which he undertook the obligation and proposes to make payment" (*in quo se obligavit, ut (se eodem loco) solveret*). Cf. too, L. 20, D. 5, 1; Paulus, *libro lviii. ad Edictum*: "*omnem obligationem pro contractu habendam existimandum est, ut ubicunque aliquis obligatus et contrahi videatur*," where there is no mention of a place of payment. The passage from L. 65, D. *de judiciis*, further says:—

"*Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est; nec enim id genus contractus est, ut et eum locum spectari oporteat, in quo instrumentum datus factum est, quam eum, in cujus domicilium et ipsa mulier per conditionem matrimonii erat reditura.*"

This means that the treaty as to dowry here considered is not of such a kind that weight is to be laid upon the place where it is entered upon; *bona fides* does not require that the husband should have to answer these in actions as to the *dos*. There must then be other contracts in which the place where they originate influences questions as to jurisdiction. If the prevailing view were correct, the cue of the jurist would have been to emphasise the similarity of the contract with which he is dealing to other contracts, instead of holding their differences up to view.

The passages just cited are, with the exception of that from L. 21, D. *de O. et A.*, taken from the Commentaries on the Edict, a circumstance which seems to me to indicate that all the provisions as to jurisdiction have their origin in prætorian law, which again paid special attention to considerations of *bona fides* and equity.

Lastly, Justinian determines, in Nov. 69, cap. 1, the jurisdiction applicable to contracts, by pointing out that, settled as it is, it will facilitate the production of proof in *conventiones* and *contractus* just as in the case of delicts. Can we say that proof as to the execution of the contract will be most easily procured at the place of payment, which may be determined by caprice or pure accident?

the courts of that country, although it may be quite uncertain whether the court there will entertain an action.⁶⁵

But there can be no doubt that, in the obligations *stricti juris* of modern law, we should hold that the place of performance has absolute jurisdiction: in obligations, *i.e.* arising on bills of exchange and mercantile drafts. These obligations demand *parata executio*: it is intended that they shall be met most punctually at a specified time and in a specified place, and therefore the creditor is entitled to require the most summary assistance from the courts of that place. To refer the creditor to any other court would generally mean delay in this summary procedure.⁶⁶

Within these limits, however, the general recognition of the *forum contractus* suits the necessities of trade, and Heusler⁶⁷ has rightly depicted the disadvantages which have been felt in Switzerland, which does not recognise this ground of jurisdiction against the solvent debtor, from the necessity of referring the creditor to the distant domicile of the debtor. Heusler, however, has only pointed out the need for the introduction of the *forum contractus* in Switzerland in cases,⁶⁸ in which there is reasonable expectation that the whole transaction will be worked out within the territory of the *forum contractus*. By one bound, however, he declares that it will be right to introduce the *forum contractus* to the extent to which it is recognised in the German *Civilprozessordnung*.

On the other hand, it is worth noticing that the convention of railway companies for international questions concluded in 1886 at Berne, in § 56, declines to have anything to do with the *forum contractus*, and declares that the *forum domicilii* has a privative jurisdiction in claims of recourse arising out of the carrying trade. In actions brought by the consigner or the consignee, § 27, subsec. 4, declares that the only court which shall have jurisdiction is a court of the country in which the defender's company has its seat. This is no unimportant testimony against the monstrous extension

⁶⁵ Féraud-Giraud (J. vii. p. 226) very soundly remarks that it is only when combined with other circumstances, that the adoption of a particular place of payment can be understood to imply that the parties consent to submit themselves to the courts of this latter place. The example he cites is a case, in which the whole matter was intended to be worked out in France ("Travail de peu d'importance à exécuter sur les lieux et qui doit y être réglé").

⁶⁶ Even according to the law of the *Sachsenspiegel* the *forum contractus* was only recognised in the case of notorious debts, and to a certain extent in the case of cautionary obligations, where the cautioner had to appear in any court to which the principal debtor might have been convened. See Heusler, *Zeitschr. für Schweizer. Recht*, 1871, vol. xxi. p. 23. See Curti, p. 62, in favour of the *forum contractus* to the extent mentioned in the text. The same author says (p. 64): "We shall more readily discover prorogation of jurisdiction in the appointment of a particular place of payment, when we are dealing with obligations on bills than in any other connection." On the history of the *forum contractus* in Switzerland, see Muheim, p. 271, who corrects Heusler's expositions in some respects, and expands them. Thus (p. 273) Muheim remarks: "In accordance with the object it had in view, the *forum contractus* only claims recognition, when the debt was estimated as due at the place of performance.

⁶⁷ *Ut cit.* p. 69.

⁶⁸ Of course, the *forum* in which a company has its seat will be recognised as having jurisdiction over actions *inter socios*, and actions by third parties against the company. That is in accordance with what has already been laid down in § 422.

of the *forum contractus* in modern times, which is entirely unsuited to modern commerce. The *forum contractus*, again, is not recognised as of international validity in the Franco-Baden treaty of 1846 (extended to Elsass-Lothringen by the convention between the German Empire and France on 11th December 1871). In the extended form which might be given to it in accordance with the domestic law *e.g.* of the German Empire, it would be quite excusable to call it a *forum* for international swindling.

§ 424. Older common law practice,⁶⁹ in conformity with the law of Rome and with the canon law,⁷⁰ required, as a condition of giving jurisdiction to the *forum contractus*, that the action should be served upon the defender within the territory of the *forum contractus*, or that the defender should possess property within that jurisdiction. Thus, in most cases, it was impossible to appeal to the *forum contractus* in cases in which the defender was not there. The modern German theory takes the view, that this condition is due to the circumstance that the Roman civil process knew nothing of citation by writing. Accordingly, the defender must necessarily be cited within the jurisdiction of the court, or else the only remedy available was that the pursuer should be entitled to a *missio in possessionem* of the property of the defender which happened to be within the jurisdiction. But now that citations may be given without any limit *per requisitionem*, that condition of jurisdiction is out of place.⁷¹ This modern theory is recognised in § 29 of the German *Civilprozessordnung*.

I believe, however, that it would be right, in the interests of international jurisdiction, to adhere to that special condition as essential to the *forum contractus*. Would it accord with the principles of *bona fides* if the creditor should allow the debtor with his whole estate to leave the jurisdiction of the court in order to raise his action subsequently before a court where the defender would find it much more difficult to maintain his case? ⁷² I believe not, and am all the more persuaded that it is not so, since a widely spread usage has retained that essential condition of jurisdiction in spite of the practice of written citation.

It is interesting to observe that the important Franco-Swiss treaty of 1869, art. 1 *ad fin.* as Curti (pp. 54-56) points out, agrees in its results with the limitations which we have just adopted.⁷³ Since the defender must

⁶⁹ See Wetzell, *System des Civil processes*, § 41, note 81.

⁷⁰ Cap. i. § 3, in vi. *de foro competente*, 2, 2, a passage the meaning of which is not beyond dispute.

⁷¹ So Wetzell, *ut. cit.*

⁷² The Draft II. for the States of the German Bund provided (cf. § 13 of Draft I.): "The jurisdiction of the obligation is in the sense of the statute set up in the courts of the place where the defender has to perform his obligation, if—

"1st, The parties have expressly fixed on this place, in which sense the choice of a domicile to carry out a contract is to be construed; or

"2nd, Failing any such express appointment, the citation by which the process is introduced, or the order of the judge, is served upon the defender within the territory of the court."

⁷³ See Gerbaut, § 237. So, too, in Scotland personal service is necessary to set up the *forum contractus*. See Gerbaut, § 259b, and the answer to the question put by the Institute for International Law in Rev. vii. p. 410. See *infra*, p. 935.

have made the bargain in a foreign country, and at the time the action is raised must be in that country on something more than a mere temporary visit, and as this latter requirement applies to the pursuer also (*si les parties y résident au moment où le procès sera engagé*), those contracts only will be affected, to put the matter generally, which are to be worked out at the place at which they were entered into. For example (p. 59), a Frenchman who has made a commercial contract in Switzerland, and subsequently comes there upon a tour of pleasure, cannot be sued on that contract, but may be sued upon any obligations which he may have incurred to hotel-keepers or carriers in connection with his tour. No special treatment, however, is accorded to commercial bills and drafts in the treaty.

No difficulties can arise in connection with jurisdiction in *quasi-contractual* relations. The analogy of contract obligations must rule.

§ 425. It needs no further exposition⁷⁴ to show that, in the case of a claim arising on a delict, the *forum delicti commissi* must be recognised as having international jurisdiction.⁷⁵ But the same thing cannot be said of artificial extensions of this jurisdiction, or extensions resting on fictions. The jurisdiction is founded in reality upon the subjection of the person who does the act to the law of the place where he is resident: the *forum delicti commissi* is, therefore, merely the court of the place in which the person who did the act, and against whom the claim is subsequently brought, is resident at the time the act is done; it is not the court of the place in which the effects of the act are felt, or in which the injured person is resident. We must not, however, require, as a condition of recognising the *forum delicti commissi*, personal service of the action within the jurisdiction or possession of property there. The *forum delicti commissi* does not rest on *bona fides*: it rests rather upon an undoubted wrong committed by the person against whom the claim is made.⁷⁶

JURISDICTION FOUNDED UPON VOLUNTARY SUBMISSION OR PROROGATION.

§ 426. In my opinion, it is indisputable that a tribunal may competently be created by an express voluntary submission of parties, which must be recognised in international relations in all cases where the parties have free power to deal with the legal relations that are involved.

That submission may take place not only in the course of the action,⁷⁷

⁷⁴ Curti, p. 25. "He who transgresses the legal order of a State, necessarily subjects himself to the jurisdiction of its courts."

⁷⁵ The question is, apparently, not much discussed. See, however, Féraud-Giraud, J. vii. p. 163; Gerbaut, § 316; see Pradier-Fodéré, J. vi. p. 264, with special reference to the jurisdiction of the Peruvian courts. The *forum delicti commissi* was at one time recognised in England: according to the rules of jurisdiction of 1883, the only question now is whether the defender, at the date of the action, is domiciled or "ordinarily resident" within the jurisdiction. Piggott, p. 150. [See below, p. 935.]

⁷⁶ Of course, the recognition of the judgment of the *judex loci delicti* as a *res judicata* does not necessarily involve execution of that judgment. It is just in such obligations as arise upon delicts that some modification is necessary.

⁷⁷ Ct. of Algiers, 23rd May 1882 (J. x. p. 158). In the note the Editor describes this as *jurisprudence fixée*.

but also may be effected by special agreement, defining the jurisdiction of the foreign court.⁷⁸ This is in accordance with modern principles which regulate the validity of contracts.⁷⁹ Of course, however, if a foreign court is made exclusively competent by the terms of the agreement, the agreement as against the pursuer can only be enforced in the court which would otherwise have jurisdiction, if it is understood that the foreign court will decide the case, and that the whole convention shall be held null, as being *contra bonos mores*, if it can be shown to be merely a fraudulent means of throwing difficulties in the pursuer's way.

A prorogation not limited to particular legal questions would, on the principles of both public and private law, in my opinion, deserve to be disregarded, both as being an attempt by a party to withdraw himself from the judicial power of the State to which he belongs, and by reason of the indefiniteness of the interest involved in such a bargain.⁸⁰

The facts of each case must determine whether a prorogation can be implied. The pursuer always submits himself to the court in which he brings his suit, and that without any regard to the reasons which have induced him to choose that court. If, at the time of raising the action abroad, it was not advisable or advantageous, having regard to the possibility of execution, to raise it at home, that does not prevent the renunciation of the native *forum* from being quite voluntary, and that is the only question that needs to be answered; we may also remember that it is entirely unusual in law to take account of the motives for an act, and that to do so must create in practice the greatest difficulties.⁸¹

There seems to be some doubt as to the competency of prorogation in real actions (and the *actiones in rem scriptæ*, which are on the same footing) which concern heritage. I am inclined, however, to pronounce in favour of the prorogation—so far, at least, as concerns those States in which real rights in heritage cannot be referred to feudal principles. The opposite view is at variance with the free rights of parties to dispose of their property, and is in a legal sense only to be derived from the assumption of a right of superiority over particular pieces of heritage existing in the State or its sovereign. This point of view, which no doubt applies to the

⁷⁸ *E.g.* a foreign insurance company may only be allowed to trade on the condition that it shall recognise the jurisdiction of the courts of the country in all contracts which it concludes therein. Sup. Ct. of Comm. of the Emp., June 1874 (Dec. xiv. § 16).

⁷⁹ To this effect Trib. Civ. Seine, 10th Feb. 1886 (J. xiii. p. 324).

⁸⁰ § 20 of the Draft II. of the German Code ran thus: "The jurisdiction of domicile established in one German State (§ 3) cannot, by a voluntary submission (prorogation), be transferred to the courts of another State in its full compass.

"Except in this case, an express or implied subjection to the courts of another country is to be recognised in so far as a prorogation to the court of the other State, if it were a native court, would be admitted by the law of the State in which the defender has his regular domicile.

"A prorogation to the courts of another State is, however, not to be recognised—

"First, if the suit has for its subject a question of *status*, or the constitution, existence, or dissolution of the marriage of one of the parties.

"Second, if the exclusive jurisdiction over heritage, referred to in § 19, abs. 2, is proposed to be transferred by prorogation to the courts of another State.

⁸¹ See Daguin, p. 124.

English *Common Law*, does not, for instance, accord with the common law of Germany or the law of France. Nor does it seem to me that considerations of expediency go far to support the exclusion of prorogation by force of positive legislative enactment. The parties have themselves to blame if they go before a judge who deals with them unrighteously; and the protection which the refusal of the power of prorogation may perhaps be thought to give against imprudence—a desirable object—is, in my opinion, more than counterbalanced by other disadvantages which result from such a prohibition. Rights of third parties and the interests of the State can only be imperilled by prorogation in so far as a suit conducted capriciously in accordance with the *lex rei sitæ* prejudices third parties or the State. And lastly, the judgment, according to the nature of the thing, is only effectual in so far as it confers rights to the real property which are possible according to the *lex rei sitæ*. Especially in disputes as to succession, which, in accordance with Roman law, require, as being disputes about an universal succession, an uniform settlement and treatment, to exclude prorogation for real estate situated abroad would easily lead to complications.

To choose a domicile (*élection de domicile*) is to be regarded as a voluntary subjection of the person who chooses it to the jurisdiction of its courts.⁸²

NOTE XX ON § 426. PROROGATION.

[By the law of Scotland, the essentials for prorogation are, that the parties should consent, either expressly or tacitly, and that the judge should have such jurisdiction as may be a proper or habile subject of prorogation. There can be no prorogation where some other court, or the court of some other country, has an exclusive jurisdiction (Erskine, i. 2, 27 *et seq.*). There can therefore be none in questions affecting heritage. In the case of *Gudin* (1886, Ct. of Sess. Reps. 4th ser. xiv. p. 213) some of the *dicta* seem to affirm that in consistorial cases there may be a prorogation of jurisdiction. As to the circumstances which may be taken to imply consent, see *infra*, p. 937.

In England, where the plaintiff selects a foreign tribunal, he is bound by its decision (Westlake, § 325, p. 347); and if the defendant voluntarily appears, he too is bound. It is a question whether he will be bound if he comes forward, not voluntarily, but to plead in the foreign court in order to save some property in the hands of that court (Westlake, § 326, p. 348.)

ABSENCE OF THE DEFENDER. CONTUMACY.

§ 427. On the other hand, if the defender does not appear, we must hold in international questions that he declines the jurisdiction of the

⁸² So the practice in Italy, *Norsa*, Rev. viii. p. 654.

court.⁸³ Jurisdiction, in order to be valid for international purposes, must not be supported by fictions. We may use fictions to some extent so as to affect prejudicially a man who is in any event subject to the jurisdiction of some of the courts of this country, and with regard to whom the only point of dispute is before which of the various courts of this country his case shall be taken. But we must not work with fictions against a man with regard to whom we are still altogether ignorant, whether he is subject at all to our jurisdiction or not.⁸⁴

Accordingly, where the defender does not appear, the facts upon which the jurisdiction of the court is to be founded—*e.g.* as being the *forum contractus*—are not to be assumed: the pursuer must prove them to the court. If we employ any such provision as that of the German *Civil-processordnung*, § 296 (which in another respect too is faulty), a provision whereby, if the defender is absent, and the pursuer moves the court for judgment by default, he is entitled to obtain decree, all his averments being assumed to be unconditionally admitted, and among them his averments which go to establish the jurisdiction of the court, we deprive the judgment which follows of all claim to international recognition.

JURISDICTION IN QUESTIONS OF SUCCESSION.

§ 428. In so far as the succession is regulated by the last personal law of the deceased, the court of the country to which he belonged must be held to have jurisdiction⁸⁵ in actions for delivery of the succession or of any part of it, as also for division of the succession, and for all claims for legacies or claims founded on the doctrine of collation. But we must also recognise the courts of the last domicile of the deceased as having jurisdiction, since the deceased subjected himself to these courts in all matters over which he had uncontrolled powers of regulation, and the questions to be dealt with in succession law are for the most part mere patrimonial questions.⁸⁶ In so far as any question arises in connection with the

⁸³ To this effect see Gianzana, ii. § 161; Belgian statute of 1876, § 54, subsec. 2: "*L'étranger défaillant sera présumé décliner la juridiction des tribunaux Belges.*" See, too, art. 21 of the Franco-Swiss treaty of jurisdiction of 1869, according to which it is *pars judicis* to declare the court incompetent if the defender is absent (see Martin, J. vi. p. 117). By the English procedure, persons who have been absent from the country for a long time are only cited in exceptional cases. In all such cases there must first be a *causa cognitio*. It has been said that it is "a hardship to bring a man from the antipodes perhaps" [*per* Lord Bramwell in *Great Australian Mining Co. v. Martin*, 1877, L.R. 5, Ch. D. 1], Piggott, pp. 215 and 223.

⁸⁴ A right of suing foreigners before the courts of the country only exists under special conditions. (See Plosz, *Beiträge zur theorie, des klagerrechts*, 1880, p. 86.)

⁸⁵ Ct. of Cass. Turin, January 30, 1874 (J. ii. p. 140), and Fiore, *ibid.* Again, by the 5th art. of the Franco-Swiss treaty of 15th June 1869, questions of succession are, on a sound reading of the treaty, exclusively reserved for the national tribunals of the deceased. Cf. Lehr, J. ix. p. 62. (No doubt the decision of the Court at Lyons of 12th August 1881, which Lehr there criticises, takes a different view. Curti, p. 74, says that it was intended to ensure the application of the law of the country to which the deceased belonged. See, too, the Italo-Swiss treaty of 1868, art. 17, and Curti's observations, p. 108.)

⁸⁶ No doubt, in the division of a succession, the application of the foreign law by the *judex domicilii* will often have its difficulties.

succession to immoveable property,' depending upon the *lex rei sitæ*, the *forum rei sitæ* must no doubt be held to have jurisdiction.^{87 88} Many authorities think it should have a privative jurisdiction. Actions by creditors of the succession may also be raised at the last domicile of the deceased as in a jurisdiction which must be recognised as having international validity. It cannot be that the right of the creditors, often a valuable right, to sue in this *forum* in international questions, should be lost by the debtor's death. No doubt in most cases there will be a *forum contractus* at the debtor's domicile, which, as is well known, was not in Roman law destroyed by the debtor's death.⁸⁹ But the *bona fides* of international law will only allow us to recognise these different forms of jurisdiction over the succession, provided that either the succession has not as yet been completely divided, or in so far as some appreciable part of the estate is still to be found at the last domicile of the deceased. (See p. 910.)

JURISDICTION *propter contingentiam*? JURISDICTION *reconventionis*?

§ 429. The connection which the subject matter of one action may have with another can never set up jurisdiction in the former matter before the tribunal which happens to be dealing with the latter.⁹⁰ The provisions which we find in codes of procedure as to the *fora connexitatis*, as they are called, rest upon considerations of expediency which are more or less capricious and changeable.⁹¹ The principle that a case must not, if possible, be withdrawn from its natural judge, is a principle which must always be recognised in international law.⁹² Thus, then, jurisdiction *recon-*

⁸⁷ In so far as the principle of an universal succession is recognised, no exception can be made even as regards the real estate belonging to the succession. Such an exception is, however, made by the Franco-Swiss treaty (art. 5, subsec. 1). The explanation is doubtful. See Brocher, p. 51; Curti, pp. 93, 94.

⁸⁸ But, on the other hand, creditors of the deceased cannot raise actions as such in the courts of a former domicile, or in the State to which the deceased by nationality belongs.

⁸⁹ See judgment of Ct. of Cass. at Naples of 30th April 1869, and Norsa, Rev. viii. p. 656; Martin, J. vi. p. 123. The court of the domicile must, of course, in such cases apply the national law of the deceased, in so far as nationality is held to rule succession. Provisions like those of § 94 of the Italian Code of Procedure, whereby succession suits are brought where the greater part of the estate happens to be, cannot be applied to the case of foreign successions. The decisions of the Italian courts have affirmed that. But see Gianzana, ii. § 180, and the Italian cases cited by him.

⁹⁰ See Gianzana, ii. § 285.

⁹¹ See a sound and apposite judgment of the Ct. at Nancy of 3rd Aug. 1877 (J. v. p. 142). See, too, a judgment of the App. Ct. at Turin of 6th May 1870, reported by Norsa (Rev. viii. p. 653), and one of the Ct. of Cass. at Turin of 25th June 1870 (Rev. viii. p. 656); see also Trib. Civ. Versailles, 10th Feb. 1882 (J. x. p. 156).

⁹² But a process of "intervention" by means of which a claim is made to something which is the subject of an action between two persons other than the claimant, or to things that have been seized in execution of a decree, is an independent proceeding which is only possible in the court in which the action or execution is proceeding, and operates as a *sist* upon the original process. See Féraud-Giraud (J. vi. p. 172) on the difference between "*intervention*" and "*demande en garantie*," and Demangeat (J. iv. p. 109) on the jurisdiction of French

vention is a kind of jurisdiction that has no claim to international recognition. Even when the counter action presents the other side of the action which is already pending (*e.g.* where one sues upon a contract of co-partnery, and the defender in that action raises an action for the recovery of certain claims arising out of the same relation), if the counter action is recognised as competent in the same court, it implies that the natural rules of jurisdiction are to be neglected. For although the same facts may necessarily form the basis for the decision both of the original, and of the counter action, it will still always be the case that there are two distinct claims. One may frequently be compelled to apply to the courts of a half-civilised State, in order to extract anything at all from some debtor. Must one on that account run the risk of being judged as defender by that untrustworthy court, and acquiesce in the application of its judgment in one's own native country? ⁹³

Forum arresti. IS IT COMPETENT TO ENTERTAIN THE LEADING ACTION?
INCIDENTAL QUESTIONS.

§ 430. The laying on of an arrestment, too, should not in itself found jurisdiction for the main action, which will be recognised in international questions, *i.e.* should not found jurisdiction to determine the claim, in security of which the arrestment is laid on. ⁹⁴ However, as we have already noticed (*supra*, p. 912), it cannot be said to be absolutely forbidden by public law to extend the jurisdiction of the *forum arresti* so as to deal with the main action up to the value of the article arrested, or of the caution that may have been found in lieu thereof, and therefore a *condictio ob injustam causam* will not be entertained in another State, if that be the whole extent to which the jurisdiction of the *forum arresti* is stretched.

The rule is otherwise, too, with incidental points arising in connection with complicated claims, the decision of these incidental points being necessary to the decision of the main claim which is made. ⁹⁵ The decision of these incidental or prejudicial points is not an independent action: we are rather dealing merely with the grounds of judgment in the main action.

courts in *demandes en garantie* against foreigners. In the Franco-Swiss treaty, art. 1, it is expressly said that the "*action en garantie*" shall not have the effect of withdrawing the person bound by the guarantee from the jurisdiction of the *juge naturel* (Curti, pp. 50, 51).

⁹³ The discussion in J. vi. p. 57, and in Curti, p. 44, upon the Franco-Swiss treaty of 1869, comes to a different conclusion. Curti refuses to admit the connection between the substantive law of a case and the rules of jurisdiction. But the greatest danger would lie in a simple recognition, in treaties dealing with international jurisdiction and with the execution of judgments founded on such recognition, of actions *reconventionne*, as a logical consequence, which according to Curti it is. The one contracting State could in this way, by extending the scope of counter actions at its pleasure, withdraw from the courts of the other country a multitude of actions which in their nature fall to these courts.

⁹⁴ See Esperson, J. xi. p. 168; Norsa, viii. p. 655. See, too, the draft of a treaty worked out by Piggott and Paccioni between Italy and Great Britain, art. iv. subsec. 2, given by Asser, *Buitenlandische Vonnissen*, p. 58.

⁹⁵ Giauzana, ii. § 297; Gerbaut, § 397. Gentet, p. 44, is of a different opinion.

JURISDICTION IN ACTIONS OF DAMAGES FOR COLLISIONS AT SEA.

§ 431. Special difficulties seem to arise in connection with actions of damages for collisions on the high seas. Claims for damages arising out of collisions which have taken place in territorial waters, as being claims *ex delicto* or *quasi ex delicto*, fall to the courts of the country in which the damage was done.⁹⁶ In the case of collisions on the high seas, parity of reasoning would require us to pronounce the courts of the country to which the ship, against which the claim is made, belongs to be alone competent, a view which seems to coincide with more modern English practice.⁹⁷ The older rules of maritime law⁹⁸ subjected even foreign ships to the jurisdiction of the nearest harbour of refuge.⁹⁹ This latter extension of jurisdiction is no doubt a result of the theory which looked upon maritime law as an universal law, the same all the world over.¹⁰⁰ But, now that there is so much difference among the maritime laws of different countries, this doctrine can have no claim to international recognition, unless the court which gives judgment expressly declares that it proposes to apply the law of the country to which the ship, against which the claim is made, belongs. On this condition there would certainly be a practical advantage, in respect of the greater facilities for leading evidence, for pronouncing the courts of the first harbour of refuge to have a concurrent jurisdiction with those of the home port.

In many cases, besides, the first port into which the ship, against which the claim is made, runs, will be brought into play as the *forum arresti*,¹⁰¹ and to that extent the rules for that *forum* must be our guide.

⁹⁶ See Walter Phillimore (J. xiii. p. 129) on the English practice. A judgment of the Ct. of Brussels, of 14th Nov. 1871, negatived the jurisdiction of the Belgian courts in the case of collisions in foreign waters. See Haus, *Dr. Pub.* § 108.

⁹⁷ See Phillimore, *ut cit.* See the French judgments cited by de Rossi, J. xii. p. 416, and Fiore, *Eff.* § 87, note 4. See, too, the much discussed decision of the Ct. of Aix of 24th Mar. 1885, in connection with the sinking of the French ship *Oncle Joseph* in consequence of a collision with the Italian ship *Ortigia* (J. xii. p. 286). This decision negatives the jurisdiction of the first harbour of refuge, in the case of a foreign ship.

⁹⁸ See judgment of the English Ct. of Admiralty of 11th May 1881 (J. x. p. 105). [The Leon, L.R. 6, P.D. p. 148.]

⁹⁹ Fiore, without any detailed explanation, pronounces in favour of the jurisdiction of the nearest harbour of refuge to which the injured or the injuring ship runs, because it must be assumed that the parties are willing to submit themselves to this *forum*, which nature presents to them. I can see nothing but a pure fiction in this argument. See, in favour of this jurisdiction, a judgment of the Sup. Ct. of Portugal of 21st June 1880 (J. viii. p. 177). The injured vessel here was Portuguese. There are not many who approve of the jurisdiction of the port of destination. There is not much practical advantage in such a jurisdiction. On the other hand, see Fiore, *ut cit.*

¹⁰⁰ The judgments of the Circuit Ct. of Pennsylvania of 22nd Oct. 1881, of which an extract is given in J. x. p. 402, laid it down that the Admiralty courts of the United States have jurisdiction in the case of collisions between foreign ships even on the open sea.

¹⁰¹ In the decision of 16th May 1876 [*re* Smith, L.R. 1, P.D. 300], reported by Westlake in Rev. x. p. 541, the Sup. Ct. in England dismissed an action, because the ship against which the claim was made was not in an English port. It was not, therefore, at the date of the action, within the jurisdiction of England.

If the view that salvage for services rendered on the high seas should be fixed by the law of the salving ship is to be accepted as correct, then we must concede to the courts of the country, from which that ship hails, a jurisdiction that will command international recognition. Of course, the courts of the country from which the salved ship hails will also be competent; for no one can decline the jurisdiction of the courts of his own country except in matters which pertain exclusively to the *forum rei sitæ*. The English statute, however, of 25 and 26 Vict. c. 63, § 59, requires the consent of the State to which the salved ship belongs, as a condition of the jurisdiction of British courts in such cases, and an order by Her Majesty the Queen in Council proceeding on this consent.

JURISDICTION OF THE COURTS OF SEVERAL STATES OVER THE SAME MATTER.

ACTIONS OF DECLARATOR (*Feststellungsklagen*). ACTIONS OF PUTTING TO SILENCE (*Provocationen*).

§ 432. In following out the rules laid down, it will very often happen that there will be found to be several jurisdictions dealing with the same subject matter, and all of them entitled to international recognition. Thus, for instance, the *forum domicilii* of the defender may claim the same international recognition as the *forum contractus*. In such cases, on general legal grounds, the pursuer has the choice of the various possible jurisdictions; and international law will not allow this choice to be withdrawn from him by the debtor or person against whom a claim is to be made availing himself of some form of process known to one of the States concerned, and turning the natural legal relations of parties upside down, thus making himself pursuer in place of defender; at least, it will not allow it unreservedly. That is, however, the course permitted by § 231 of the German *Civilprozessordnung*, in cases in which a man raises a negative action of declarator, *i.e.* brings an action against a person who can pretend some claim against him, to have it determined that in truth he has no such right against the pursuer of this declaratory action. A judgment founded on such an inversion of the natural relations of parties may claim international recognition, if it is pronounced by the court according to whose law the substance of the legal relation in question is to be determined. It cannot claim such recognition, however, if the jurisdiction of the court is founded upon an unilateral and voluntary subjection of the party against whom the claim is made to its authority. Such jurisdiction, *e.g.* the jurisdiction of the courts of a domicile acquired subsequently to the obligation, is a jurisdiction which the obligant, or person said to be the obligant, cannot dispute, when it is used against him. But he cannot of his own motion deprive the person, who alleges he has claims against him, of his right to resort to a tribunal which is still in existence, by himself having recourse to a jurisdiction which has in the meantime come into existence. For instance, on the general expressions of the German *Civilprozessordnung*, a person who is said to be under an obligation may no doubt raise a negative

action of declarator in the courts of his domicile; he will not, however, by that means be able to exclude, so at least as to command international assent, the *forum contractus* which has been established against him in a foreign country, or the jurisdiction founded in another country upon some special contract stipulation. Any other view would necessarily lead to contradictory judgments in different States on the same subject matter, and in fact to an unpleasant judicial warfare among different States. For instance, in State A, where there is a *forum contractus*, some creditors, belonging to A, raise action; in State B the alleged debtor, who resides in B, raises an action for declarator that he is not indebted to them. It may be, then, that the courts of A will find the debtor liable, while those of B will declare that he owes nothing. There can be no doubt that an action raised by the alleged debtor at the domicile of the alleged creditor, and entertained by the court of that domicile, would be recognised for international purposes as fully as an action of declarator raised in the *forum contractus*; the alleged creditor must submit to the law of his own domicile. In the same way we must deal with actions of putting to silence (*provocationen. actions provocatoires*). In such actions, where they arise on bilateral relations, e.g. where such an action is brought to obtain a decree of the invalidity of a sale, the process cannot be raised, so as to command international recognition, except at the domicile of the defender. The decisions of that court the defender must accept, because the person who brings the action in question could have come into that court in any case, by direct action, to settle the question of the nullity of the transaction, and this *forum* may be presumed to be the most favourable for the defender.¹⁰²

JURISDICTION EXERCISED IN FAVOUR OF NATIVES. SUBSIDIARY RECOGNITION OF THE *forum domicilii*, AND OF JURISDICTION IN THE COURTS OF THE PLACE OF RESIDENCE.

§ 433. There are certain grounds of jurisdiction whereby actions, which would naturally depend before a foreign judge, are brought before a judge of this country, in the interest of natives and subjects of this country. These grounds of jurisdiction cannot, of course, be recognised as having any international validity. We should be justified in using retaliatory measures against such exercises of jurisdiction, an example of which will be found in the French Code of Procedure, § 14.¹⁰³

¹⁰² See Curti, p. 48. I took a different view of these actions in my first edition, § 120. Felix, i. § 189 *ad fin.* recognises only the court of the defender. According to the doctrine laid down in the text, the theory of § 16 of the Draft Code for the States of the German Bund was unsound, viz.: "In actions of challenge (*ex lege diffamari* and *ex lege si contendat*) we must recognise the jurisdiction whose competency to the legal settlement of the principal claim is established by this law, and also the jurisdiction of the domicile of the person challenged."

¹⁰³ See the provision in the Italian Code, art. 105, § 3, as to retaliation in such cases.

The jurisdiction created by § 24 of the German *Civilprozessordnung* can, like § 14 of the *Code de procédure*, make no claim to international recognition, although as matter of form it is

But, on the other hand, the courts of the place of residence must take the position that should be taken by the *judex domicilii*, in the case of persons who have no domicile at all. Not, of course, that we should go so far as to say that such persons may be sued in any kind of action, at any place you please, without further conditions; that would be an injustice: but thus far we should go, viz. to hold that a stay of a certain duration, to be determined by the discretion of the judge—a discretion which will also take into account the character of the action which it is proposed to raise—will be sufficient to found jurisdiction. French law in this spirit recognises the jurisdiction of *résidence*,¹⁰⁴ while in the law of Scotland a residence of a definite duration (forty days) will found jurisdiction in the Scots courts for all personal actions unconnected with questions of *status*.

ACTIONS ON IMMATERIAL RIGHTS (INTERDICTS). ACTIONS TO COMPEL THE PERFORMANCE OF OFFICIAL ACTS. PROOF OF FACTS ON WHICH JURISDICTION IS FOUNDED. ACCESSORY PRESTATIONS.

§ 434. The courts of the country in which claims for interdict founded on the rights of an author, a patentee, or a manufacturer with a trade-mark, are made, have an exclusive jurisdiction in actions touching the existence or validity of these claims, and that jurisdiction will receive international recognition.¹⁰⁵ This is a consequence of the nature of the right of interdict, which is directed against the public generally within a certain specified territory. The general rights of the public in State A cannot in any case be taken away or established by any act of jurisdiction by State B, since there can be no ground for alleging that they have submitted themselves to B's authority. But this exclusive jurisdiction will only extend to actions for the recognition of the existence of a right of interdict, or to actions of delict, which postulate the existence of that right. It will not be recognised for personal actions, which are brought to compel the assignation or the exercise of the right.

The courts of a State, lastly, have a privative jurisdiction,^{106 107} in all actions whereby officials of that State are required to do a certain act, or

not drawn in the interest of Germans solely. But if any piece of property found in the German Empire, or any outstanding claim of debt there, is enough to found jurisdiction at the *locus* of the property, or at the residence of the debtor to the defender against such defender, although he have no residence in Germany, at least for all patrimonial claims, then, if a foreigner has left an umbrella in Germany, or has lent an inhabitant of the Empire a sovereign while on a journey, we may raise action against him for thousands of pounds.

¹⁰⁴ See Gerbaut, § 309, who remarks that, in case of *résidence*, the foreigner who desires to decline French jurisdiction, invoked by another foreigner, must point to a foreign domicile (Paris, 6th July 1886, J. xiii. p. 328).

¹⁰⁵ In connection with patent law, see Trib. Seine, 26th July 1879 (J. vii. p. 100); on trade-mark law, see Kohler, p. 451. But the recognition of the judgment, in so far as it establishes a right of interdict within the State in which the procedure took place, is a logical necessity. Hence Kohler's expression is not quite accurate. He says such judgments are effectual only within the territory. It seems more correct to say that such judgments have a limited application, viz. within the territory.

¹⁰⁶ See Gerbaut, § 411.

¹⁰⁷ On the jurisdiction to declare a foreign naturalisation null, see *supra*, p. 163.

to refrain from doing it. The matter here in question is simply a direct injunction or prohibition to be given to these officials. Thus it is not the court of the country to which the parties belong that will decide, but the court to which the official is subject that will decide whether the official shall or shall not celebrate a marriage. In the same way measures taken by the courts of one country, such as the laying on of arrestments,¹⁰⁸ can only be revoked or confirmed by the courts of that same country.¹⁰⁹

The enquiry into the jurisdiction of the court, by which judgment is to be pronounced, must cover not only the question of law involved, but also the facts on which the jurisdiction depends. The question is always one, not merely of a theoretical delimitation of jurisdictions, but also of the actual practical limits of these jurisdictions, often a very important point for the parties. We shall return to the discussion of this point in dealing with the subject of execution.

Lastly, however, accessory prestations, which emerge when judgment has been given in an action, *e.g.* judgment for the repair of damage caused, will not always be treated by international law in the same way as they would fall to be treated by the law which prevails in the court in which the principal action depends. In so far as they are accessories of that action as matters of procedure merely, they will only be recognised if the other State, in which the judgment is pleaded, agrees in recognising them as consequences of the main claim. Otherwise, jurisdiction to order such prestations must be independently proved, and thus it may happen, that we should have to recognise a *res judicata* in regard to the principal claim (and to put it into execution, as we shall proceed to show), while we should refuse to hold that any valid judgment had been given on the accessory claim, or to give it execution. We arrive at the simple result that the character of the action is to be determined not by any foreign law, but by our own exclusively.

APPENDIX.

EXTENT OF THE OPERATION OF A JUDGMENT. (GROUNDS OF JUDGMENT.)

REDUCTION OF A JUDGMENT (*res judicata*) BY A DECLARATOR OF NULLITY ONLY, OR INCIDENTALLY.

§ 435. The extent of the legal validity of a foreign judgment depends on the law of the court that pronounced it. This must be recognised, both

¹⁰⁸ See Trib. Civ. Villefranche, 23rd December 1881 (J. ix. p. 423). See also Gianzana, ii. § 262.

¹⁰⁹ To determine the question whether a man belongs to the nobility of any country, the only competent authorities are the officials of that country, just as its courts alone are competent in a claim to be a member of some particular family in that country. On the other hand, the courts of this country have no jurisdiction over a foreigner, whose right to a particular title is disputed by a pursuer belonging to this country, on the ground that the sovereign of this country originally gave it to the pursuer's family (see *supra*, p. 217). In the judgment of the App. Ct. at Rome, 24th March 1881 (J. x. p. 75), these points are not kept sufficiently distinct; the inferior court had declared itself incompetent, and, in our view, rightly done so, although the reasons given were wrong.

for the question, what persons are affected by it—whether, by some exceptional means, persons other than the parties are so effected—and for the question, whether the grounds on which it proceeds must be accepted as law, as well as the judgment itself. The limits of jurisdiction recognised by international law must not, however, be transgressed in these matters; if they were, then the judgment could not claim international recognition for so much of its consequences.¹¹⁰ In so far as the extension of the obligatory force of the judgment over third parties is concerned, we reach this result as a consequence of what we have already said as to contingency of actions: as regards the grounds of judgment, we rely on the universal proposition (*supra*, pp. 81, 82) that it does not follow that, because the leading conclusion in an action is subject to a particular system of law, that all the preliminary points, upon which the final decision depends, are subject to that same system, and therefore to the jurisdiction with which that system is connected. A voluntary subjection of the parties, which, no doubt, in our view, enlarges the jurisdiction of the court in all matters that are at the uncontrolled disposition of the parties, is to be assumed, unless there is an unequivocal declaration to the contrary, to apply only to the leading conclusion, and not to the preliminary points.¹¹¹

The law of the court in which the process depended is, again, the only law by which we can determine whether the nullity of a judgment can only be pronounced by means of a special action of nullity, to be brought before the court in which the previous leading action depended, or may be pleaded as an incidental point in another process by way of exception. If the foreign law and the foreign court were, in the view of international law, entitled to pronounce upon the legal relation in question, they alone can say how that pronouncement is to be taken out of the way. The argument that a foreign judgment can in no event stand higher than a judgment of the courts of this country—can have no less and no greater force—is irrelevant, for in applying the *res judicata* of a foreign judgment we do not by any means place it on the same footing as a judgment pronounced in this country: we allow it to receive effect as a judgment, but always as a foreign judgment. It is, of course, possible that in spite of all recognition the contents of the judgment itself may, in spite of the fact that it is formally recognised, deprive it of all validity. It may contain some contradiction that cannot be removed by construction, or it may be directed to the accomplishment of something that is impossible, *e.g.* legally impossible, according to the law of the place in which it is intended to put it in force.¹¹²

¹¹⁰ See C. de Rouen, 23rd May 1873 (Sirey, xiii. p. 233).

¹¹¹ The German *Civilprozessordnung*, § 253, does not in itself extend legal recognition to the grounds of judgment in the sense I mean, *i.e.* to legal relations upon which the decision is founded, but allows the parties, by motion specially made before the close of the proceedings, to obtain an extension of the legal validity of a judgment to these points also. But in a sound view, although that is not undisputed, that does not involve an extension of the jurisdiction of the court. See Wach, *Civilprocess*. i. p. 487.

¹¹² A judgment of the Supreme Court of Appeal at Lübeck, of 30th June 1843 (Seuffert, ii.

NOTE YY ON §§ 417-435. LEADING GROUNDS OF JURISDICTION IN ENGLAND AND SCOTLAND.

[In Scotland, the two leading grounds for jurisdiction are (1) personal presence of the defender within the territory, and (2) the presence of property belonging to him within the territory, either real property, or moveables fixed in their *situs* by arrestment. The most common kind of jurisdiction, *ratione domicilii*, needs no further illustration or explanation, except that it may be noted that the conception of domicile does not demand any Government license; it is constituted by the fact of residence, combined with the intention of residing for an indefinite period; this is the only ground upon which jurisdiction to determine questions of status can be founded, except in cases where the conception of a matrimonial domicile is by some authorities allowed to establish a special kind of jurisdiction. It is, however, now pretty certain that this doctrine of matrimonial domicile is no longer a part of the law of Scotland. In the case of *Low v. Low*, 1891 (Ct. of Sess. Reps. 4th ser. xix. p. 115), it was held that a Scotsman who had married in Malta a Maltese woman, and had lived there for twenty-five years with her, was still entitled to resort to the courts of Scotland for divorce, Scotland being his domicile of origin. It has been said by eminent judges that the domicile required to constitute jurisdiction in questions of *status* must be as full and complete a domicile as is required to constitute a domicile for the purposes of succession (see *Stavert v. Stavert*, 1882, Ct. of Sess. Reps. 4th ser. ix. p. 519). There is at least as much doubt whether any other kind of domicile would found a jurisdiction that would be internationally recognised. At one time the courts of Scotland had held that where adultery had been committed in Scotland, and the adulterer had been served with the summons within Scotland, jurisdiction was founded in the Scots courts to entertain an action of divorce on the ground of that adultery *ratione delicti commissi*. But this is no longer law. (See *Stavert, ut supra*.)

Residence in Scotland by the defender for a period of forty days prior

pp. 317, 318), upholds the competency of pleading a nullity, *ope exceptionis*, in accordance with the law which is recognised at the seat of the court where the *actio judicati* comes to depend, and not in accordance with the law under which the judgment, as to the competency of executing which the question has arisen, falls. The court notes, as the foundation of this judgment, that by the opposite view, if an action was brought in a German court upon some document executed before a French court, the falsity of that document could not be pleaded simply *ope exceptionis*, but must be urged in the form of a French *inscription en faux*, a point which must in certain cases (cf. Code de Procédure, arts. 14, 240, 249) be transmitted to a special court in France; no one could maintain such a view. But in my opinion the analogy between the judgment and the document is not complete; the document does not, like the judgment, establish a legal relation—it only proves it. If any law does not permit the plea of nullity to be advanced in another court *ope exceptionis*, it enacts thereby that the judgment with all its effects shall stand until it is formally reduced. If, then, a third court nevertheless proposes to pronounce the judgment invalid, that is irreconcilable with a recognition of the import of the judgment. On the principle adopted as its guide by the court in the judgment cited above, it fell into the dangerous position of being forced to determine a question by foreign laws of procedure.

to the action also gives jurisdiction to the Scots Courts in all actions arising on contracts, delicts, or *quasi*-delicts, and in questions of bankruptcy: whether this ground of jurisdiction does or does not continue for forty days after the person has left Scotland is doubtful. See Bapty, 1891, Ct. of Sess. Reps. 4th ser. xviii. 843. In certain cases, too, the court will exercise jurisdiction over persons who have been there for as short a time as can be figured, if personal service of the summons be made upon them; this class of cases consists of actions for aliment of a child, for restitution of moveables seized or hired in Scotland, and for the payment of goods recently bought in Scotland for ready money.

Another ground of jurisdiction is thus stated: "In actions on contract, whether for implement or damages, it is enough that the place of implement was in Scotland, although the place of contract was out of Scotland" (Mackay, Practice of Court of Session, i. p. 169). In such cases upon contract, there must, however, be personal service within the territory. An itinerant—*e.g.* a hawker or pedlar—may be convened in any court within whose jurisdiction he can be found (*Linn v. Cassadinos*, 1881, 4th ser. viii. 849).

The Scottish courts will exercise their preventive jurisdiction, by way of interdict, to prevent a foreigner from doing a wrong in Scotland, and will recognise that a foreign court which has exercised the like jurisdiction against a Scotsman, after serving him in Scotland with notice of the proceedings, has done rightly. It may be that it may be difficult to work out the decree by penalties, if the foreigner does not enter the jurisdiction, but that will not affect the jurisdiction of the court of the country where the wrong is threatened (*Waygood v. Bennie*, 1885, Ct. of Sess. Reps. 4th ser. xii. p. 651). A learned and detailed exposition of the principles that should guide the courts of one country, in recognising the decrees of those of another, is there given by Lord McLaren. His Lordship *inter alia* points out that a court is not entitled to exact from a foreign court exactly the same principles of jurisdiction as it itself observes, it is enough if the jurisdiction that has been exercised is "reasonably consistent with general international law."

Mere publication of a slander in Scotland will not, however, give jurisdiction to the Scots courts in a consequent action of damages. To give jurisdiction in such a matter, personal citation would be necessary (*Parnell v. Walter*, 1889, Ct. of Sess. Reps. 4th ser. xvi. p. 917).

So long as imprisonment for debt was competent, it was competent for the Scots courts to issue a warrant against a debtor, who was *in meditatione fugæ*, so that he might be detained in Scotland to answer with his person any judgment that might be pronounced against him. Since imprisonment for debt was abolished, for almost all kinds of debt, this diligence has to the same extent become illegal (*Hart v. Anderson's Trs.* 1890, Ct. of Sess. Reps. 4th ser. xviii. p. 169). It may still be competent in connection with obligations *ad factum præstandum* or taxes due to the Queen, in respect of both of which categories of debt imprisonment may still be used, but it would not obtain international recognition.

A company with a place of business in Scotland may be cited there, but a company which merely does business in Scotland through an agent cannot be cited before the Scots courts (Laidlaw, 1890, Ct. of Sess. Reps. 4th ser. 544).

The possession of heritable or real estate in Scotland places the proprietor thereof under the jurisdiction of the Scots courts, even although he is not personally cited or domiciled there, and although the cause of action is totally unconnected with that property, and even although the proprietors of heritage have contracted to sell it, if the disposition has not been delivered, the jurisdiction of the Scots courts will still remain (Dowie & Co. v. Tennant, 1891, Ct. of Sess. Reps. 4th ser. xviii. 986).

Where moveables are fixed in Scotland—*e.g.* by being *in manibus curiæ*, as the fund in a process of multiplepoinding is, or by being laid under arrestment—then the claimants in the former case, or the owner of the fund or property in the latter case, are subjected to the jurisdiction of the court; this arrestment of moveables founds jurisdiction in the Scots courts in actions arising upon contract, and the judgment that may be obtained in an action so founded is not limited to the amount or value of that which is arrested. The courts of Scotland, also, proceeding on the same principle as has been enunciated in several Belgian decisions, have allowed an action to proceed before them so as to secure the execution of diligence used on the dependence, although the real issue raised in the Scottish action was avowedly not intended to be tried in Scotland, but was already in dependence before the English courts; the pursuer was allowed the benefit of his diligence, although it was used on the dependence of an action which would not of itself have been competent (Hawkins v. Wedderburn, 1842, Ct. of Sess. Reps. 2nd ser. iv. p. 924, and Fordyce v. Bridges, 1842, *ibid.* p. 1334).

“I repeat, I think the dependence of the suit in England of itself gives us full and complete jurisdiction, the defender having property in this country, if there is any end material to justice between these parties, which the entertaining the suit in this country can promote and serve. I think the furtherance of the interests—the securing of the interests involved in that action, can be stated and founded on in this country as an existing civil right, to be protected, promoted, and secured in the administration of justice in this country. . . . I consider the competency of Scotch process in aid, as it is called, of a Chancery suit, or, as I express it, to secure the ultimate rights and the ultimate payment of a party who has a depending action in Chancery, and finds the whole property, it may be, of his adversary in Scotland, to be a matter of clear, plain, and broad justice in the administration of law in regard to a person who has landed property here” (per Hope, L. J. C., in Fordyce, cited *supra*). The diligences of inhibition and arrestment—*i.e.* diligence over both heritage and moveables in Scotland—were used and were sustained in these actions.

The law of Scotland also recognises jurisdiction *reconventionne*. A foreigner, for instance, who lodges a claim in a Scots process of sequestration

for bankruptcy, becomes subject to the jurisdiction of the Scots courts (*Barr v. Smith and Chamberlain*, 1879, Ct. of Sess. Reps. 4th ser. vii. 247). See also Walker, etc., 1886, Ct. of Sess. Reps. 4th ser. xiii. p. 816, and Merchant Banking Co. 1886, *ibid.* p. 1202.

Again, a person who has submitted himself voluntarily to the jurisdiction of the English court was held not to be entitled to oppose the execution of that decree by the Scots courts, in whose jurisdiction he had property (*Gudin v. Gudín*, 1886, Ct. of Sess. Reps. 4th ser. xiv. p. 213). In that case there are *dicta* which seem to go so far as to say that such prorogation of jurisdiction would be upheld even in consistorial actions.

In the case of *Bapty* (1891, Ct. of Sess. Reps. 4th ser. xviii. p. 843), this doctrine of prorogation received application in a case where a person had been apprehended on an illegal warrant, and found caution to appear in the Scottish courts, as a condition being liberated. The cause of action in that case arose in Scotland. There seems, however, some doubt whether a person illegally seized, and maintaining all along the illegality of the seizure, can be said, by agreeing to find caution, in order to obtain liberation, to consent to the exercise of the jurisdiction in the subsequent action.

With regard to the jurisdiction of the court in matters relating to succession, a distinction must be taken between the powers exercised by the court in questions connected with the transference of estate from the dead to a living representative, and the payment of the liabilities of the dead out of the estate situated in the country in which the liabilities are due, on the one hand, and questions relating to continuing administration of trusts set up by will, or by an *inter vivos* deed, e.g. a marriage contract, for the regulation and periodical distribution of an estate.

As regards the former class of trusts, or to speak more technically, executries, the law of Scotland, like that of England, is that the court of the country in which there are assets belonging to the estate, is entitled to appoint the administrator, and to control that administrator, so as to ensure the payment of the creditors situated in that country out of the assets also situated there (*Preston v. Melville*, 1841, 2, Rob. App. 88, *Orr Ewing's Trs.* 1885, Ct. of Sess. Reps. 4th ser. xiii. (H. of L.) p. 1). The leading administration will probably be in the country of the domicile, and the administrator appointed by its courts will, in general, be appointed administrator of any parcels of assets found in a foreign country, but the courts of that foreign country have jurisdiction to regulate the administration, in this sense, of the assets situated within their jurisdiction. In the case of heritable property, too, situated within a foreign jurisdiction, the courts of that foreign country are entitled to assume the administration of it, with the view of imposing on it the burdens it ought properly to bear. The court of the leading administration will sist its procedure to allow the foreign court to exercise this power, if it shall see cause to do so (*Hewitt's Trs.* 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 793).

But, again, if the court of Scotland be the court which has granted administration, that fact will give them jurisdiction over the executors so

vested with the administration in so far as suits by creditors of the deceased, or beneficiaries claiming an accounting, are concerned, and that whether the executors, or any of them, be resident within Scotland or not (Mags. of Wick *v.* Forbes, 1849, Ct. of Sess. Reps. 2nd ser. xii. p. 299. M'Gennis *v.* Rooney, 1891, Ct. of Sess. Reps. 4th ser. xviii. p. 817). The application for confirmation is looked upon as a submission to the jurisdiction. The court has jurisdiction *in personam* in such matters also, so as to entitle them to entertain action against an administrator, who is by domicile subject to their jurisdiction, although there is no estate in Scotland, and no confirmation has been taken out there; but this jurisdiction the court, on the ground of *forum non conveniens*, will not exercise, if the party who invokes it can as easily obtain his remedy in the courts of the country in which there are assets, and in which administration has been taken out (Peters *v.* Martin, 1825, Ct. of Sess. Ca. 1st ser. iv. p. 108. Gillon & Co. *v.* Dunlop & Collett, 1864, Ct. of Sess. Ca. 3rd ser. ii. p. 776. *Ld. Watson in Orr Ewing's Trs. cit. sup.*).

In cases of the second class, *i.e.* cases of continuing administration, the leading test of jurisdiction in the Scots courts is, whether the trust was intended to be carried out in Scotland. One leading indication of this may very well be that the bulk of the estate is invested in Scotland, another that the deed is executed by Scots people, and that the trustees originally nominated were Scots, although they may have gone abroad permanently at the time the action is raised. In the case of Kennedy (1884, Ct. of Sess. Ca. 4th ser. xii. p. 275), the jurisdiction of the Scots court was sustained over one of three trustees on a marriage contract, who was domiciled in England, and who had only been cited edictally, in an action by the beneficiaries for an accounting in regard to the trust funds. The marriage was in Scotland, the home of the married persons there, and the language of their contract was Scots. *Ld. M'Laren* says (p. 282): "Where a trust is constituted in Scotland, and is to be executed in Scotland, the Supreme Court of this division of the United Kingdom has jurisdiction over the whole subject matter of the trust, including in that expression not only the interpretation of the trust, but the duty of making provision for its continuance, and the power, in cases of negligent administration, of calling the trustee or trustees to account." This doctrine was affirmed in the case of a trust for creditors, executed by a Scots tradesman, one of the trustees being resident in England (*Robertson's Trs. v. Nicholson*, 1888, Ct. of Sess. Reps. 4th ser. xv. p. 914). In cases of continuing administrations, it would seem that the Scots courts have also, like those of England, jurisdiction over a trustee found in Scotland, who is avoiding an accounting in the courts of the country in which the administration was constituted or is to be carried out. The plea of *forum non conveniens* may often weigh with the court in such cases, so as to induce them to stay proceedings until the trustee shall proceed to do his duty in the courts of the country to which he pleads that he is alone bound to account, but the plea will not avail to oust the jurisdiction in Scotland or in England, if the trustee

unduly delays to proceed (see *Ld. Watson in Orr Ewing's Trs. cit. sup.*).

In England, the leading ground for the foundation of jurisdiction is personal service within the territory of the court, but in actions where the property or possession of real estate in a foreign country is in question, personal service is not held sufficient to confer jurisdiction on English courts; in actions against a company, service may be made at their principal place of business within the territory. In actions to recover land the defender may be brought into court by posting a copy of the writ conspicuously on the property, and in Admiralty actions *in rem* by affixing the original writ, and subsequently a copy, upon the mainmast of the vessel. Service out of the jurisdiction or territory may be allowed in the case of any defender in the discretion of the judge when the subject matter of the action is land, stock, or other property, situate within the jurisdiction, or any act, deed, or will, affecting such land, stock, or property; or, again, it may be allowed when it is sought to enforce or rescind or otherwise affect any contract, or to demand damages or relief for breach of any contract, which was made within the jurisdiction, or when there has been within the jurisdiction a breach of a contract, wherever it may have been made, or when any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction. In the case of a foreigner, the court will order notice of the writ, and not the writ itself, to be served. The sweeping nature of the jurisdiction thus claimed by the English courts has been exercised in such a way as to create grave hardships to Scots defenders, and will either be restrained by statute, or amended by requiring a more careful examination of affidavits, and consideration of the rights of defenders, by those who have the jurisdiction under their administration.

The English Court of Admiralty exercises, in actions of damages for collision and in actions for salvage, its jurisdiction, and enforces payment of its decrees, without regard to the place where the collision or other act giving rise to the action took place, if it took place on the high seas where the tide ebbs and flows, and without regard to the fact that one or both of the ships concerned are foreigners, unless they are ships of a foreign State used for public purposes. Foreign sailors, too, belonging to a foreign ship, may recover wages due to them while the ship is lying in a British port. This kind of jurisdiction takes its rise partly in the old maritime jurisdiction of the court, and as regards the competency of actions for damages is confirmed by 3 & 4 Vict. c. 65, § 6, and 24 Vict. c. 10, § 7: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." But in order to enforce this jurisdiction against a foreign ship by proceedings *in rem*, the ship must be arrested within British territory, and a collision on the high seas is not an act done within the jurisdiction in respect of which the court can order service abroad upon a defender. Where it is proposed to exercise jurisdiction either *in personam* or *in rem* against a foreign owner of a foreign ship, the dependence of the

suit must be intimated to the consul of the nation to which the ship belongs. It is, however, doubtful if a foreign court would allow execution of a decree *in personam*, pronounced after intimation of this kind, and proceeding upon so comprehensive a ground of jurisdiction; the action *in rem* where the ship is arrested, proceeds upon principles generally recognised, but it may be noted that (*re* Smith, 1876, L. R. 1, P. D. 300) this arrest of a ship is the only form of founding jurisdiction by the attachment of property belonging to the defender which is admitted in England, if we except the attachment used in the city of London, and some other local jurisdictions.

Arrestment of ships in Scotland is, like arrestment of other moveables, a familiar ground for the foundation of jurisdiction. In so far as the decree does not exceed the value of the arrested ship, this ground of jurisdiction would seem to be one that merits international recognition.

There is also known in English practice a writ *ne exeat regno*, a process whereby a defendant may be prevented from leaving England. "The king indeed, by his royal prerogative, may issue his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign ports without license; for this may be necessary for the public service, and safeguard of the Commonwealth" (Stephen's Comm. bk. i. p. 147). See this applied in the case of a defendant who was a domiciled Canadian (*Lees v. Patterson*, 1878, L. R. 7, Ch. D. 866).]

6. EXECUTION OF FOREIGN JUDGMENTS.

DISTINCTION BETWEEN THE EXECUTION OF FOREIGN JUDGMENTS ON THE ONE HAND, AND *res judicata* ON THE OTHER.

§ 436. There is a very deep distinction, recognised almost universally, between the simple recognition of a foreign judgment as *res judicata*, and the execution of it. Execution implies as a condition a special injunction and approval by the authorities of this country, for execution, being a measure of force, can only proceed in the name of the sovereign authority of the country.¹

There must, therefore, before execution in virtue of a foreign judgment can take place, be some procedure, however short,² ending with the necessary approval and order being granted or refused, and allowing some discussion of the reasons for the one or the other.

There is no doubt, however, that, as a matter of theory—and this we must concede to those who propose to deal with *res judicata* and execution

¹ See Constant, p. 36 *ad. fin.* As a judgment of the App. Ct. at Lucca, of 4th Aug. 1885 (J. xiii. p. 669), very properly notes, there is always an act of *imperium* involved.

See, too, Field, § 670. "A foreign judgment cannot be executed in the territorial jurisdiction of a nation, without a judicial enquiry as to its existence, local validity and extent." Durand, p. 462; Despagnet, § 257.

² Durand's discussion at p. 462 is put on this footing: he is justified in attacking, as he does, the French system of revising foreign judgments.

of judgments on exactly the same footing—the material enquiry into the competency of the execution must necessarily embrace the same questions, not more and not less, as those which have to be discussed in questions as to the recognition of *res judicata*.³ But *de facto* it may be quite otherwise. We have seen what a miserable state of affairs must arise in international relations, if *res judicata* is theoretically refused recognition, or at least would necessarily arise, were it not that the sound sense of commercial men would recognise it, in spite of all that theory may say against the recognition,⁴ and did not the adherents of that theory of non-recognition find themselves forced, in order to avoid a war of jurisdictions, to curtail its operation, silently no doubt, but none the less arbitrarily on that account. On the other hand, there is no doubt that much less evil will attend a refusal to execute foreign judgments. It does not involve, as the rejection of *res judicata* does, a positive attack upon the foreign judgment. The result rather is merely that assets, which happen to be within the territory of our State, are not allowed to be taken in execution. It may be that in the particular case these are the very assets which make the judgment worth having. The legal existence of the judgment is not affected, and, accordingly, such a state of things can always be endured. A man who proposes to raise an action, should always take care to do so within a State in which assets for execution are to be found. If a man has taken this precaution, his right to the assets which he has thus taken cannot be disputed in another State merely upon the ground that the judgment, in virtue of which he has obtained satisfaction, was the judgment of a foreign court.

Each State has therefore a freer hand to refuse execution than to decline to recognise *res judicata*. We can see plainly the force of this distinction in practice by looking at French law; in this matter it has to struggle with obscure, one might almost say with reluctant, statutes: still the recognition of foreign *res judicata* is theoretically gaining more and more ground.

Accordingly, considerations other than pure legal logic may operate in the matter of execution. The sovereign power may, *e.g.* proceed on the consideration that confidence cannot be bestowed in the administration of justice in all countries: such confidence is a necessary condition of allowing execution within the territory of our State: execution will thus, it may be thought, require a special treaty, or at least a special statutory authorisation, to cover the case of the particular State in question. Or the State may proceed on the consideration, that its own dignity and its own interest

³ It has been sometimes proposed, especially by French lawyers, to apply the formalities required for the execution of foreign judgments to all acts of voluntary jurisdiction. But this is a mistake. In many cases all that is in question is an act which supplements, modifies, or removes the capacity or representative character of a person. There is, therefore, no question at all of a right. Besides, there are no measures of compulsion directly attached to such acts. See Despagnet, § 245; Weiss, p. 959.

⁴ Recognition, *i.e.* by a court that is competent in an international sense.

require that execution shall only be given if the other State in question gives reciprocity on its side: it may, too, make a distinction according as the foreign judgments to be set in operation are for or against its own subjects.

We pass over in the meantime the consideration of the question whether execution can conveniently and practically be made to depend upon such considerations. They are not absurd or unlawfulerlike, as the theoretical non-recognition of *res judicata* is.⁵ If this or that State makes the execution of foreign judgments positively dependent on such conditions, doubts may arise in the particular case whether these conditions are present or not. Accordingly, keeping in view the existence of positive legislation of this kind, the question of the execution of foreign judgments becomes more complicated than that of the recognition of *res judicata*.

Again, every judgment that is fit to be put into execution is not on that account necessarily of final legal force (*res judicata*): certain objections, too, may possibly be set up against execution, which do not affect *res judicata*, and *vice versa*. These, again, are points which make the question of execution a difficult question from a legal point of view.

Lastly, many writers have concerned themselves exclusively, or at least principally, with the execution of foreign judgments, so that many points, which, if we consider the matter carefully, are of importance for *res judicata* also, have only been discussed in connection with execution. We shall accordingly repeat some of what we might have taken into consideration in discussing *res judicata*. We shall begin with these discussions, but, first of all, we must subject the theories which modern English writers have enunciated as to the judgment itself to criticism.

DIVERGENT THEORIES. EXECUTION ON THE GROUND OF *Comitas*. THE JUDGMENT AS FOUNDATION OF AN *Obligatio*.

§ 437. We must first notice the theory which puts both the recognition and the execution of foreign judicial sentences simply upon the ground of the *comitas nationum*.⁶ What we have said generally of the principle of *comitas* applies here. In its ultimate foundations the whole of private international law is based upon *comitas*, friendly intercourse. But if this friendly intercourse once exists, what is necessarily associated with it, or has historically sprung from it, can by no means be treated as a capri-

⁵ Böhlau, *Mecklenburgisches Privatr.* i. p. 436, expresses his belief that all these considerations may be met by the rule, that the judge has, once for all, a commission to execute all judgments legally pronounced: and that besides an absolutely identical treatment of *res judicata* and of execution follows from the character of the *jus quæsitum* conferred by the *res judicata*.

Böhlau is also of opinion that the execution of foreign judgments can give rise to no difficulties. It is, he thinks, the separation of purely process law from substantive law that does so.

⁶ So, e.g. Wheaton *Dr. international*, ii. ch. 2; Fœlix, ii. § 319; Phillimore, iv. § 929.

cious outcome of goodwill. Piggott, therefore (pp. 5-7), is right in pronouncing against the establishment of our doctrine on any such unstable sentiment.⁷ On the contrary, he thinks that, in the logical treatment and gradual development of the doctrine by the judgments delivered in many recent English cases, he has found a sure foundation for it in the idea of a legal obligation, which the sovereign power of each State creates for the parties who obtain decree from its courts, an obligation which then accompanies them into the territory of other States.

It is, however, easily seen that this theory rests upon a mere play with words, a simple self-deception. We may admit that the sovereign authority of the State can impose an obligation upon a person: does it follow that this obligation must be recognised by other States or must be put in force by them by means of compulsitors? Is it not rather certain that there are such obligations, *e.g.* obligations of military service and obligations arising out of criminal sentences, of which we must say exactly the reverse? Again, an obligation is not an abiding physical characteristic, which really attaches itself to the individual, and follows him wherever he goes. No doubt Piggott (p. 22) requires that the judgment which is to be recognised abroad shall be pronounced by a competent court. But this condition does not improve matters at all; for he gives us no principle on which to base the competency of a court, and we are driven again to ask, how do we come to say that this or that State is competent to lay such obligations as it pleases upon such persons as it pleases, so that other States will enforce them? We can, no doubt, account for this new English theory by remembering that in England the execution of foreign judgments is regarded as the natural order of things; in other countries, the person who is concerned to have the judgment enforced must allege and prove all the necessary conditions for the recognition of the *res judicata* and for its execution: in England, these things are only brought under notice in the form of defences, objections urged by the other side against the recognition and execution.⁸

CONDITIONS OF EXECUTION. COMPETENCY OF THE COURT IN WHICH THE PROCESS DEPENDED. COMPOSITE STATES.

§ 438. The first indispensable requirement for the execution of a foreign judgment is plainly the same as for a *res judicata*, viz. that the court which pronounced the judgment should have jurisdiction.⁹ As

⁷ See, also, Daguin, p. 38.

⁸ See Foote, pp. 543 and 546.

⁹ Every rational treaty which is concluded to ensure the execution of civil judgments must therefore begin by settling what limits of jurisdiction are to be internationally recognised. This is all the more necessary, the more the principles of jurisdiction in the contracting States. I cannot, therefore, assent to the method adopted by Piggott and Paccioni in their draft treaty (Asser, *Buitenlandische Vonnissen*, p. 57). Instead of laying down definite rules for jurisdiction, they leave the question of jurisdiction very much alone, declare that mutual execution

regards the main question, we may refer to what has been said on this subject in connection with *res judicata*. But to some extent I must go over the ground again, in view of cases which have occurred, of such a nature as could only be found in connection with execution, and in view, too, of the discussions of other authors. As we have already said, we need not to enquire what particular court in the foreign country was the competent court, if the courts of this country generally had jurisdiction. But a difficulty may arise from the fact that there are composite States of such a kind that we may often doubt whether part of their territory is merely a dependent province, or an independent country but loosely connected with the principal State. This question is, as a matter of fact, of greater importance, the further removed in point of distance the principal and dependent countries or colony are. But we can give no general answer to this problem couched in abstract terms. The leading point will be whether or not there is one judicial establishment for the different territories of the whole State, with power to regulate the jurisdiction of the courts in each different territory, or to decide questions between them. If, on the other hand, the principal State looks upon its subject territories, or if the constituent territories of one State look upon each other, in this matter of the execution of each other's judgments, as foreign countries, then the jurisdiction of the courts of that particular territory in which the judgment was pronounced must be established. Thus, *e.g.* the judgment of a Scottish court can make no claim for execution, because an English court would have jurisdiction.¹⁰ If, however, there is jurisdiction in the courts of the German Empire generally, then a foreign judge, who is asked to put a judgment of one of these courts in force, will not need to enquire whether the particular German court, from which the judgment proceeded, had territorial competency.¹¹ But still, the State in which the demand for execution is made will not be absolutely guided by the method in which the individual parts of the foreign State treat each other in this matter. If, on some accidental or historical ground, the composite State takes no heed of vital differences, which do in reality exist among its different members, and, in particular, pays no heed to the want of a supreme court to give uniform decisions as to the jurisdiction of the inferior courts, still

of judgments is the rule, and make only isolated exceptions from this rule. I think that such a method will cause no little confusion, just as much confusion has already been caused in Italy from the omission of all mention of international jurisdiction in those articles of the Code of Procedure which deal with the subject of the execution of foreign judgments.

¹⁰ The judgments of English courts are treated in Scotland, and the judgments of Scottish courts in England, substantially as foreign judgments. Burge, i. p. 672; iii. p. 1050; Story, § 54. The Judgments Extension Act of 1868 merely simplifies the form in which execution may be obtained in England, Scotland, and Ireland respectively. See Piggott, p. 358. Sweden and Norway, too, treat each other as foreign countries (Oliverson, J. vii. p. 83). On the other hand, according to Vesque v. Püttlingen (p. 475), judgments pronounced in Cis-Leithanian Austria are put in execution in Hungary without further examination, and *vice versa*.

¹¹ The judgments of German courts are put in execution in all German States alike. *Deutsches Gerichtsverfassungsgesetz*, § 161.

these differences do exist in the administration of justice, and this want of a supreme court is of importance for the State in which execution is desired.

ENQUIRY INTO THE JURISDICTION OF THE COURT THAT HAS GIVEN
JUDGMENT OVER THE PARTICULAR MATTER.

§ 439. Nor need there be any enquiry into the jurisdiction of the court that pronounced the judgment¹² as regards the subject matter of the decree, if only it is made certain that the judgment is recognised as such in the foreign country.¹³ This, again, is a domestic question of the apportionment of judicial powers, as to which each State and its courts must have the most certain means of judging. But we must have before us the judgment of a court of law. Decrees of administrative officials¹⁴ cannot receive execution here. But the title of the official will not settle this question. We shall have to enquire whether the official from whom the writ that is to be put in execution proceeded is independent, and bound to decide solely according to legal rules.

Just as is the case with *res judicata*, the facts, as well as the points of law upon which it is said that the competency of the foreign court is based, must be set before the court when it is asked to give execution.¹⁵ No doubt an unprincipled debtor can easily abuse this right, and in a case *e.g.* in which the enquiry is as to a *forum contractus*, he may involve the court in what will be almost a complete repetition of the whole process,

¹² *I.e.* the court that pronounced the judgment of which execution is asked.

¹³ See Asser, *Buitenlandische Vonnissen*, p. 18. Judgments of the ecclesiastical courts of a State are, in international questions, on the same footing as those of other courts. Casanova, ii. p. 427, thinks otherwise. He proposes to investigate the jurisdiction of the court over the subject matter on constitutional principles.

¹⁴ See Francke, p. 19; Struckmann and Koch on the German Code, § 660, No. 1. A political decree, *e.g.* a law directed against some particular person, is of course never to be executed in another State. See Gianzana, iii. § 29, and the decision of the Court of Paris there cited, so famous in its time (16th Jan. 1836), in the process against Duke Charles of Brunswick. The legislature must not, in order to obtain effect for some foreign judicial decree, overstep the sphere which is set apart for it as its regular, normal department.

¹⁵ Cf. Keissner, J. ix. pp. 32, 33. (See, too, *Zeitschr. für das gesammte Handelsr.* xxvi. p. 556.) So, too, Italian Practice, Ct. of Cass. Turin, 6th June 1871; Gianzana, iii. § 143. See Francke on the German *Civilprozessordnung* (p. 36). Lammasch, pp. 415, 416, proposes to exclude all enquiry into the jurisdiction, so far as matters of fact are concerned, because any such enquiry would land us in the merits of the case. That is, however, no good reason, for the sovereignty of the State must be protected, not only as regards theories, but as regards facts also. Besides, the dispute between the parties on the merits of the case turns, in far the greatest number of cases, upon a different set of facts from those which determine the jurisdiction. Fiore, *Eff.* § 97, goes still further in restricting the enquiry into jurisdiction. All he will consider is whether the foreign court has adopted the correct rules of international jurisdiction *in thesi*; he will not consider whether it has applied them correctly. This view would compel us, on the question of jurisdiction, *i.e.* of the restriction of the sovereign power of this country, to bow to an error of law committed by the foreign court. All attempts to restrict the enquiry are capricious.

for the simple purpose of establishing the jurisdiction. Asser¹⁶ proposes for this reason to hold that the judgment of the foreign court shall be held to establish its own jurisdiction, if there is an international treaty between the two countries, dealing with the matter of jurisdiction. In such a case the court pronouncing judgment would be required to affirm that it had jurisdiction in an international sense, *i.e.* in the sense of the treaty.

But it does not seem to be possible that the courts of one country should place themselves completely at the mercy of the courts of another on the question of law. Absolutely erroneous constructions of the statute, and excesses of jurisdiction, can never be excluded. The experience of the Franco-Swiss treaty of 1869 by no means recommends that in every case judgments of that kind pronounced in the other State should be allowed execution. But, even as regards the question of proof, we must pronounce against Asser's proposal. Points of fact and points of law cannot always be separated with complete certainty: and again, even in questions of fact, we cannot allow the limits of the jurisdiction of our courts to be entirely dependent on the *ex parte* deliverance of the foreign judgment pronounced by a foreign court. It might, perhaps, be laid down that, if there was a treaty to regulate the jurisdiction, the party who demands execution should not be required to allege and prove the jurisdiction of the court from which the judgment proceeded, unless the defender should at once dispute the jurisdiction the moment an application is made for execution. It is, no doubt, difficult to judge whether any such provision would be of very much practical effect.¹⁷

All other defects of jurisdiction may be removed, so far as actions in which parties have a power of arranging matters as they please are concerned, by a voluntary subjection to the court which pronounces judgment. That subjection may be expressed or implied.^{18 19}

This is everywhere the prevailing opinion. Wach (*Civilproc.* § 19, note 20) describes it as an inference drawn from indistinct legal theories: "for," says he, "the legal validity of a judgment is not the consequence of

¹⁶ Rev. i. p. 473.

¹⁷ On the other hand, it is not *pars judicis* to supply any proof on the question of jurisdiction, unless, by the law of the court which is asked to give execution, exceptional provision is made for some such procedure in such matters as matrimonial suits. A judgment of the Ct. of Turin, 6th Oct. 1871 (Norsa, Rev. ix. p. 212), is to the opposite effect. In matters that are under the unfettered control of the parties, they may, in virtue of their powers, give the judgment international validity even after it has been pronounced. The question is then one over which the parties have a power of disposal, and must be dealt with under the limitations which the parties themselves lay down for it.

¹⁸ One who appears in the process and does not object to the jurisdiction has submitted to it. Gianzana, iii. § 113 [Gudin, 1886, Ct. of Sess. Reps. 4th ser. xiv. p. 213].

¹⁹ To the same effect the Italian doctrine (Norsa, Rev. viii. p. 645): so, too, in France, although the foreign judgments are not, in theory, recognised. See *e.g.* Ct. of Paris, 7th Dec. 1885 (J. xiii. p. 715); Trib. Seine, 30th March 1886 (J. xiv. p. 614); so, too, in England (Piggott, p. 32). See, also, Daguin, p. 123; Gianzana, ii. §§ 146, 147; Ct. of Cass. Turin, 30th June 1882. See *supra*, pp. 909, 910.

any voluntary prorogation by the party, or of a submission to foreign jurisdiction." I can only throw back the criticism. The legal validity of a judgment is not founded upon the will of the parties. It rests upon the authority of the foreign sovereign. But the voluntary subjection of the parties may be a good reason why our legal system should recognise the effects of the foreign judgment within our territory. It is reasonable, and favours the security of commerce, that, if we allow the party in other respects to deal with the legal relation in question as he pleases, we should allow effect to be given to a judgment upon it, with which the party has declared himself to be satisfied.^{20 21}

It matters not, as we have already remarked in connection with *res judicata*, what the reasons for this voluntary submission are. Nor does it matter that one of the courts of this country would have jurisdiction over the matter in dispute, if that jurisdiction is not privative. The jurisdiction of the courts of every State, as we have seen in discussing that subject, goes beyond the limits to which the substantive legislation of the State is confined, and that in the interest of commerce and of *bona fides*. Every State must allow this to take place as against itself: it will only check excess, where it claims for itself a privative jurisdiction. Any other view leads to unpleasant results, and cannot in truth be reconciled with the recognition of voluntary submission. Questions as to the recognition of the plea of *lis alibi pendens*, and questions also as to a possible conflict between the foreign judgment and a legally valid judgment of this country, are not disposed of by anything yet said.

FOREIGN JUDGMENTS MAY DEMAND EXECUTION ALTHOUGH NOT FINAL.
POSITIVE PROVISIONS TO THE CONTRARY. CRITICISM OF THESE.

§ 440. Any provisional determination upon a legal relation must be recognised and executed in our country in the same way as that in which recognition and execution may be demanded here for a final determination of any such matter. All the more must this be so, since by mere lapse of time provisional determinations often become final, and, in a strict sense, all judgments that can be assailed in any way at all are merely provisional determinations of the legal relation. Execution of foreign judgments is not, therefore, to be confined to valid and final judgments in the strict sense. Rather is it the case that every judgment which, by the law of the

²⁰ Where there is prorogation there will be no enquiry into jurisdiction, when a judgment, condemning the unsuccessful pursuer in expenses, is to be executed.

²¹ The other grounds of objection taken by Wach (primarily, no doubt) against the recognition of the *exceptio* or *replicatio* have too special a reference to the provisions of the German *Civilprozessordn.* I cannot, therefore, properly criticise them here. Wach's discussions on this subject seem to me in some measure fitted to promote an erroneous treatment of the most difficult questions of private international law, under cover of a mere discussion of propositions of domestic law. The recognition and execution of foreign judgments can never be satisfactorily defined, unless it is preceded by a determination of the international limits of jurisdiction.

court that pronounced it, may be put into execution, must be executed by the foreign court under the same conditions²² under which it would receive execution, if it were a final judgment. The balance of practical convenience, too, recommends this course.

It may indeed happen that the final legal validity of a judgment is made dependent on the possibility of carrying it into execution; in which case, so soon as the defender ceased to possess any subject upon which diligence could be done in the State where judgment was pronounced, the opposite theory would lead to the result that the successful party would altogether lose his undoubted right. But the most cogent consideration of all is that rules of international law can only be associated with facts that are beyond all dispute, or with legal conceptions on which we can say that civilised States are agreed. Now the possibility of executing the judgment, *i.e.* the declaration of the court that pronounced it, that it may be put into execution, is a pure fact, whereas the conception of final legal validity is one that is sometimes disputed, according to the particular territorial law, and one that may be quite differently defined in different territorial systems of law, and accordingly it is in truth a conception that cannot be made available for the purposes of international law. If, lastly, it has been said that we cannot well give execution in international inter-

²² Asser (Rev. vii. p. 389); so, too, resolutions of the Institute of International Law, 1878 (Ann. iii. and iv. i. p. 97), § 3: "*Parmi les conditions sous lesquelles l'exequatur sera accordé aux jugements étrangers par les tribunaux du pays où l'exécution doit avoir lieu, sans révision du fond, on doit stipuler que le demandeur aura à prouver que le jugement étranger est exécutoire dans l'Etat où il a été rendu, ce qui implique la preuve qu'il est passé en force de chose jugée, dans tous les cas où la législation du pays dans lequel le jugement a été rendu, ne considère comme exécutoires que les jugements contre lesquels il n'y a plus de recours.*" Resolutions of the Association, of 12th September 1883 (J. x. p. 564), § 5: "*Le jugement doit être exécutoire dans le pays où il a été rendu.*" Italian practice, see Norsa, Rev. ix. p. 225; Gianzana, iii. § 33; de Rossi, p. 48; Ct. of Rouen, 20th April 1880 (J. vii. p. 59); Trib. Seine, 5th July 1881 (J. ix. p. 530, and J. xiv. p. 673); further exposition of the French doctrine, *ibid.*

The positive provision of the German *Civilprozessordnung*, § 660 (i.), is to the opposite effect. Wach, *Civilproc.* i. § 19, note 31, tries to escape from the obvious difficulty that the idea of legal validity differs in different States, by recommending that we should attain to some universal conception of final legal validity. He understands by the idea what can be no longer disputed or assailed by ordinary legal means, or by any objections taken with the view of prolonging the procedure. What we have to take care of, he says, is whether the foreign judgment can be assailed by such means. But we cannot always answer with certainty the question whether some legal method is or is not a prolongation of the process. But how stands the matter in modern English law? That law knows nothing of the idea of final legal validity in the sense of the German and French doctrine, by which execution is given to such judgments only. Every registered judgment may be put into execution, and this right of execution can only be stopped by the interposition of some legal means, *e.g.* an appeal. Is, then, a judgment, against which it is still competent to appeal to the House of Lords, to be held as of final legal validity in the meaning of the German *Civilprozessordnung*? I suspect that Wach would say that, looking to the rarity of the appeal to the House of Lords, he will on practical grounds pronounce such a judgment to be of final legal validity, and therefore capable of receiving execution in the German Empire. But he gives no legal grounds for any such opinion.

In Spain, none but final judgments will receive execution (Sup. Ct. of Spain, 3rd June 1885, J. xiv. p. 366). [In England no judgment which is subject to appeal will be put into execution. See *supra*, p. 904.]

course to judgments which are not thoroughly well founded—and judgments which are only to be provisionally executed are not thoroughly well founded—it has been forgotten by those who say this that foreign judgments, which are to be executed as such, are not open to be enquired into, so as to determine whether they are well or ill founded; and that, if any such enquiry were to be undertaken, we should be setting up a kind of appeal court to review the foreign judgment. We fall into a sea of troubles if we take up in this spirit the subject of summary procedure, which is so important in international law. Here, no doubt, after judgment further procedure may take place for the purpose of recovering what has been paid in consequence of the summary judgment; this further procedure, however, although it is specially reserved in the summary procedure, only really takes place in the most exceptional cases. If we were to restrict international execution to judgments of final legal validity, all remedies of law in actions on bills would become to a large extent illusory. Wach (p. 230), who follows a strictly logical course,²³ and declares that no foreign judgment pronounced in a summary process should receive execution, himself recognises that this result is unsatisfactory. Does that not indicate that the whole principle, at least as it is adopted by the German *Civilprozessordnung*, is mistaken?

There is more difference of opinion on the question whether an interim judgment should also receive execution in a foreign State.²⁴ In strict logic, we should have to answer, "Yes, in so far as it commands some prestation which can fitly be made the subject of execution." A mere declaration of its own jurisdiction by the court is not a subject for a corresponding declarator in execution; any such procedure would lead to unprofitable repetitions. A declarator of jurisdiction is simply a proclamation by the court that it has the power of pronouncing judgment when the time comes.²⁵

Conversely, the court which had jurisdiction to determine provisionally any legal relation has jurisdiction to recall this provisional determination, and to regulate finally the legal relation in dispute; and that is an exclusive jurisdiction, for the action has once come to depend in that court; and the second set of proceedings, *e.g.* a subordinate suit in connection with the ordinary process of execution brought to determine some illiquid objections that have been remitted for separate probation, is merely a continuation of the first action.²⁶ This was the substance of the provisions of some of the older drafts of a statute for the execution of judgments in German courts.²⁷

²³ This logical course is avoided by Francke, p. 33; he prefers the literal words of the *Civilprozessordnung* to their real meaning.

²⁴ Fiore, *Eff.* § 215; de Rossi, p. 43.

²⁵ See judgment of the Court of Macerata, of 19th February 1866, which is cited by both the authors named in the foregoing note.

²⁶ Cf. de Rossi, p. 92; Fiore, *Eff.* § 101; Asser, *Rev. i.* p. 486.

²⁷ "If in the course of a suit before some court which must be recognised as competent in virtue of this law, in which, by common law, only certain kinds of evidence—*e.g.* documentary

EXECUTION OF JUDGMENTS PRONOUNCED *in contumacem*.

§ 441. According to sound doctrine, judgments *in contumacem* must also receive execution from a foreign court. It is a matter for the law of the court in which the process depends to say whether a sufficient hearing has been given to the parties before it. If we give no effect at all to such judgments, we place a premium upon resistance to a judicature which in itself should be recognised, and thus favour unprincipled debtors.²⁸ It is, however, a different question altogether whether we ought not to require certain guarantees for the citation, on which the judgment in *contumacem* follows, and which in very many cases proceed on mere fictions (see *supra*, § 391, note 2). If, as in the practice of England, the United States, and [in many cases] of Scotland, we make jurisdiction depend on the circumstance that the action was personally served on the defender within the territory of the court, we have all the guarantee we require.²⁹ But, apart from this, the court in which the action depends must determine, by its own law, whether the citation is sufficient (see *supra*, p. 851).

If, however, it is desired to make special exceptions in the case of certain judgments *in contumaces*, to protect defenders against citations which have really never become known to them, such exceptions³⁰ have no point except in cases in which the defender has never appeared at all in the court in which the process depends, or, at least, has never appeared as a party with capacity to sue and defend. If he has answered in any way, it may even be by declining the jurisdiction of the court, then he has

evidence—are admitted, some illiquid pleas should be remitted to a special probation, the courts of the country where the process depends, declared by the law of that country to be competent to such probation, must be recognised as competent to determine questions as to these pleas, in so far as they raise questions as to the withdrawal or recall of the judgment in the former process, or the reimbursement of money paid upon that decree."

²⁸ Of course, however, no judgment, and least of all a judgment *in contumacem*, can be put in force in a foreign country, if it has lost, according to the law of the court in which the judgment was pronounced, the power of being put in force.

See Ct. of Toulouse, 4th Feb. 1886 (J. xiii. p. 332, and Clunet, *ibid.*). App. Ct. of Florence, 19th Aug. 1875 (Norsa, Rev. ix. p. 219). See J. vii. p. 409, on the provisions of the Franco-Swiss treaty with reference to the French *jugements par défaut*, which lose their validity after the expiration of six months.

²⁹ English courts refuse to give execution, if, at the time the action is raised, the defender was neither personally present in the country of the court which pronounced judgment, nor was a citizen of that country (see Piggott, p. 446). This is quite in accordance with the principles of English law as to jurisdiction. A judgment *in rem*, pronounced by the court within whose territory the thing in question actually was at the date of the judgment, will receive effect unconditionally even when pronounced *in contumacem* (see Piggott, p. 252). Execution, too, will be given in the case of a judgment *in personam* in the exceptional case in which parties have subjected themselves expressly to the jurisdiction by means of, to use the French expression, *élection de domicile*. Westlake, Rev. viii. p. 480.

³⁰ But it is not a sound course—although the German *Civilprozessordnung* prescribes it—to make a distinction according as the judgment has been pronounced against a foreigner or a citizen of the State in which execution is asked.

certainly been made aware of the citation.³¹ The definition of a judgment *in contumacem* in that international sense may perhaps be a much narrower one than the exception that is entertained in some territorial systems,³² according to which a judgment may be a judgment by default, if the defender fails to appear in the main action, after putting forward some dilatory plea, *e.g.* declinature of the jurisdiction, which has been repelled.

§ 442. The law of the court in which the judgment was pronounced has also exclusive jurisdiction to determine whether the judgment, and in particular a judgment *in contumacem*, is still in force, or whether it has in any way been recalled or has lost its validity, and whether also it is to be reckoned as a conclusive judgment.³³ The argument that the foreign judgment must simply be placed on the same level as a judgment of a court in this country, and cannot have any greater effect, is an argument that at once suggests itself, but is ill founded.³⁴ The recognition of a decision pronounced by a foreign court rests upon this ground, that our law commits the disputed point to the decision of the law of the foreign judge, or upon the fact that parties have of their own free will subjected themselves to that law. In both cases the judgment must be accepted with all the consequences and effects which the foreign judge intended to attach to it. No doubt, if the law of this country recognises, for the protection of legal order generally, some period of prescription³⁵ applicable to the execution

³¹ See Piggott to the same effect, pp. 458, 459. The allegation of "no notice" is not in itself a good objection to the foreign judgment; see also Norsa, *Rev.* ix. p. 214; Gianzana, iii. § 144, citations "*per proclami*" [edictal citations] are to be accepted according to the law of the foreign court. Ct. of Milan, 22nd Sep. 1879. In so far as a citation is relied on as founding a jurisdiction that is to have international effect, it must be fully examined by the court of execution in the light of its own law, even as regards evidence of the service of it. Italian practice is to this effect, Gianzana, iii. § 141.

³² Even the provisions of the 661st section of the German *Civilprozessordnung* (see note 30) are taken by most authorities as limited to this territory. Cf. Struckmann and Koch; Seuffert, *Civilprozessordn.* § 661, note 6; and Wach, § 19, note 49. I cannot, however, assent to the ground taken by Wach when he says, "We must rise in this connection to some conception which shall include judgments *in contumaces*, whether they are pronounced in this country or abroad. I know of no such conception of a judgment *in contumacem* that has an international effect, and I cannot say how many different territorial systems one would have to compare in order to arrive at any such idea. Least of all is it allowable to make use of any such international conception, if we are to follow a system of pure positivism in this matter of the recognition and execution of foreign judgments."

³³ Ct. of Toulouse, 4th Feb. 1886 (*J.* xiii. p. 332), and Clunet's note, *ibid.*

³⁴ The Ministerial Ordinance of Prussia, of 24th April 1833, reported by Mannkopf, i. 24, § 30, recognises this principle. Cf. judgment of the Rhine Court of Cassation at Berlin, in Volkmar, p. 259: "Judgments pronounced in foreign courts can only be declared capable of execution in this country to the same extent as they are capable of execution abroad. The question, too, whether the nullity of a foreign decree may be pleaded *ope exceptionis* or must be established by means of a special action of reduction in the competent court, must, in accordance with the principles already laid down, be settled by the law of the court in which the judgment was given."

³⁵ Piggott, pp. 202-204, makes here what is in my opinion an entirely unsound distinction between limitations and prescriptions. He proposes to treat the former in accordance with the law of the (English) court of execution, because the foreign judgment must stand on the

of judgments of all kinds, then there is a great deal to be said for the rule, that so comprehensive an enactment must be applied to foreign judgments also. In several States of the North American Union there are special rules of law to regulate the prescription of judgments pronounced abroad.³⁶

EXECUTION OF PROVISIONAL DECREES.

§ 443. Lastly, it may seem open to debate whether provisional decrees, *e.g.* decrees of arrestment, given in one country, can be put into execution in another. The Italian Code (§ 943) assumes that it is universally competent in Italy to put such foreign decrees in force. It is right in doing so, but it does not precisely define the conditions under which it may be done.³⁷ In our view, a distinction must be made according as the provisional decree proceeded from the court which had jurisdiction over the main question, the claim for which security is desired, or from some other court. In the former case, this provisional decree must logically receive the same treatment as any other preliminary decree which may be capable of execution. Of course, it will not receive effect in so far as it would attempt to prescribe the means of execution, which the State, in which execution is to take place, must be allowed to settle for itself; nor would it receive effect in so far as it ran counter to the *jus publicum* of this latter State, is far from unlikely to be the case. In truth, arrestment in security is a kind of execution, but precedent to the judgment; it only, accordingly, ensures the preservation of the object that is in dispute or that is available for execution: it does not make the thing forthcoming to the pursuer, or warrant a sale for his behoof.³⁸ On the other hand, a provisional decree, and, in particular, a decree of arrestment, which does not proceed from the court in which the principal process depends, should not be executed. In this case we have to do with a claim for security which has been independently made. Such a decree can be obtained independently in any place in which, as a matter of fact, a person or a thing that can be affected by

same footing as the English. The true ground of this distinction is the erroneous conception of an extinctive prescription or limitation as a rule of procedure, which is generally adopted in English law.

³⁶ In Arkansas, Columbia, Indiana, Maine, Michigan, North Carolina, Tennessee, Virginia, and Wisconsin, see the exposition in Piggott, pp. 524-528.

³⁷ As to this, see Esperson (J. xi. p. 376). He says that cases of the kind only occur very rarely. See also Gianzana, ii. § 252 (and apparently the Italian judgments cited by him there). He, however, gives no definite principles.

³⁸ There cannot, of course, by any possibility be execution of such foreign arrestments or provisional decrees in any country in which, as in the German Empire, execution is only given to foreign judgments that have a final legal validity. Wach, *Civilprocess*. i. § 19, note 23; Struckmann and Koch on § 661 of the German *Civilprozessordnung*, note 1.

Arrestment, or any other provisional decree, must be obtained in such States according to their own laws (see Wach, *ut cit.*); and, we may add, no rule, by which such questions are in domestic matters referred to the court where the principal suit depends, can be used against the person who asks for such a remedy. [Arrestment of this kind is competent in Scotland, *supra*, p. 936.]

the provisional decree happens to be. Of course, an independent arrestment of this kind can be recalled, or can be renewed for a longer period by the court which originally imposed it. It seems doubtful, however, whether the court, which merely gives an *exequatur* to an arrestment laid on by the court in which the leading suit depends, is competent thus to recall or modify it. The sound decision of this question must be the same as the decision which we gave (see p. 947 *et seq.*) with reference to other objections which may be brought against a foreign judgment that is founded on for execution. Objections arising after the court seized with the principal action has given its deliverance, may be pleaded before the court that is asked for execution, others cannot.³⁹

It is in certain circumstances of the very greatest importance for the pursuer that arrestments laid on by the court where the principal action depends can be executed in another country. We propose to make special application of this rule in the law of bankruptcy.

REFUSAL OF EXECUTION BECAUSE OF THE CONTENTS OF THE JUDGMENT.

ERRORS IN RELATION TO INTERNATIONAL LAW: IN RELATION TO THE LAW OF THE STATE IN WHICH EXECUTION IS DEMANDED: CONFLICT WITH *res judicata*.

§ 444. As regards the contents of the judgment that is to be executed, the first question that arises is whether execution can be refused, if the judgment rests upon an erroneous application of the law. The question must certainly be answered in the negative, if the error in law is in reference to the law of the court which gave the judgment. This court must be presumed to know more upon this subject than the court which is asked for an *exequatur*.⁴⁰ But we must also answer the question in the negative, when the error in question is an error in private international law (in connection with the application of this or that municipal law), or is an error as to the provisions of the law of the country in which execution is sought.⁴¹ If we admit the possibility of refusing execution on grounds like these, we turn the court of execution into a sort of appeal court against the court in which the principal process depends.

We must, in addition, remember that according to the theory which we

³⁹ On this question see Gianzana, ii. § 252. The Ct. of Cass. at Turin laid down on 10th Nov. 1880 that a foreign arrestment which had been allowed to be executed in Italy could not be loosed by the Italian courts.

⁴⁰ See Lord Tenterden's grounds of judgment. [Becquet v. M'Carthy, 1831, 2 B. and Ad. 951.] Piggott, p. 123.

⁴¹ Undoubtedly the most recent English practice and theory recognise both of these propositions (see Westlake, Rev. vi. p. 613; Westlake Holtzendorff, § 310; Phillimore, § 944a; Piggott, pp. 125, 126) [see *supra*, pp. 904, 905]. The defence of "palpable error" or of "gross injustice" is accordingly inadmissible now as against the merits of the judgment. Foote, p. 552. See J. iv. p. 249 [Meyer v. Ralli, 1886, L. R. 1, C. P. Div. 358], for a judgment in accordance with the older theory. See Asser, Rev. i. p. 408, on the Italian practice; de Rossi, p. 58; Clunet, J. iv. p. 250; and Lammasch, p. 427.

Wharton (§ 647), on the authority of Lord Hatherley [in Simpson v. Fogo, 1860, 1 J. and

have adopted the foreign court is only competent in cases in which the legal relation, upon which it has directly given judgment, is subject to the regulation of the law of that foreign State ; or in cases in which the parties have submitted themselves to the judgment of that court, either expressly or tacitly (e.g. by a change of domicile). In so far as the latter is the case, this very submission negatives all possible ground for allowing a review by the court of execution. But if, on the other hand, the court, in its judgment upon a legal relation which is governed by its own law, only erred in its judgment on some preliminary points, a power of review, and a refusal of execution following upon that review, would simply be a criticism of the grounds upon which the judgment was put. If, on the one hand, we abandon the unpractical rule that erroneous application of foreign law can give no ground for the reversal of a judgment in the ordinary course of appeal in the same country ; and if, on the other hand, either courts of law or other properly constituted authorities are bound to give information, on the application of foreign tribunals, as to the law of their country on certain specified points, then, as Lammasch remarks (p. 429), there is no need for any such processes of review, which are contrary to all principle, and interfere with the certain application of the law.

§ 445. But our decision may be quite different, if the terms of a judgment pronounced abroad are contradictory of a final and operative judgment by our own courts, to which the same persons are parties. The question then will be, whether in the case of such contradictory judgments upon the same matter, or it may be in the case of several judgments upon the same matter which are not absolutely contradictory of each other, the law of the court that is asked for execution shall treat the earlier or the later judgment as invalid, and whether accordingly the foreign or the home judgment is valid. If we hold that the *res judicata* contained in the earlier judgment pronounced by our court must be pleaded by the interested party as a ground of action, of objection or exception, in order to make it possible to take notice of it in a subsequent judgment, then the judgment of later date will prevail.⁴² No doubt the theory that a valid judgment by the courts of this country will always prevent the execution of a foreign judgment, has many adherents.⁴³ In reality, however, this view is founded

H. 19], who would refuse execution if the foreign judgment, in defiance of the principles of international law, had failed to apply English law, is of a different opinion, but does not distinctly explain what his opinion is.

Fusinato (p. 65), agreeing with the Portuguese Code of Procedure of 1876, § 1088, would refuse execution, if the foreign court professed to apply the law of the court of execution, but misapprehended it. Lammasch has, however, answered this.

⁴² In agreement with this, Kohler, *Zeitschr. für deutschen Civilprocess*. x. p. 470. According to § 543 of the German *Civilprocessordnung*, the discovery of a prior valid judgment is a ground for reducing the subsequent judgment.

⁴³ Ct. of Paris, 1st Feb. 1884 [J. xi. p. 394] ; Gianzana, iii. § 103, and the judgment of the Ct. of Cass. at Turin, of 18th Sept. 1877, there cited : see, too, J. xii. p. 455, and Clunet, *ibid.*;

on the erroneous argument that the jurisdiction of our own courts must always take precedence of that of the courts of any other country. A judgment of this country cannot, of course, be formally recalled by a foreign judgment: ⁴⁴ but that is not the point here. On the other hand, it will not be admissible to take account of the objection that the judgment which is to be executed is alleged to be contradictory of a valid decision previously given in the foreign court: this is plainly an attempt to institute a new enquiry into a state of affairs which was already in existence when the judgment in question was given (C. de Paris, 19th March 1883, J. x. p. 514).

JUDGMENTS AT VARIANCE WITH THE *jus publicum* OF THE STATE IN
WHICH EXECUTION IS DEMANDED.

§ 446. Again, it is generally laid down that the contents of a judgment must not be at variance with the *jus publicum*, the *ordre public* of the State in which it is to be executed.⁴⁵

This exception, however, needs more accurate definition.

In the first place, it is plain that it is impossible to recognise a right, which is legally inadmissible at the place of execution,⁴⁶ or has necessarily as its object something that is impossible, and is thus incapable of execution.⁴⁷ But in this category we must also reckon the case that the act or the state of circumstances, which it is intended to enforce or to bring to pass by means of the judgment, is one that may not be forcibly brought about by the

also Weiss, p. 964. According to the German *Civilprozessordnung*, the decree giving effect to a foreign judgment will not be interfered with by the fact, that a judgment was previously pronounced in Germany. I should fancy that this is the result of French law also (cf. Carré, *Lois de la procédure civile*, Quest. 739, § 4, note 3), for the *exceptio de la chose jugée* is lost according to French law unless it is pleaded. An antecedent judgment by a foreign court is not treated in French law as an impediment to an *exequatur*. Weiss, *ut cit.* Ct. of Paris, 17th March 1883 (J. x. p. 515); Clunet, J. xi. p. 395.

⁴⁴ On this point an unsound judgment by Trib. Seine, 24th August 1881 (J. ix. p. 306). See Clunet's excellent discussion, *ibid.* p. 308.

⁴⁵ See, e.g. resolutions for the reform and codification of public law, of 12th Sept. 1883, published in J. x. p. 564: "IV. *Le jugement ne doit rien contenir qui soit contraire ni à la moralité ni à l'ordre, ni au droit public de l'Etat ou il doit être exécuté.*" See Moreau, pp. 87 and 157. In France this exception is regarded as a matter of course, even where there is a treaty, if it does not specially reserve it. Italian Code of Procedure, art. 941, § 4: "*Se la sentenza contenga disposizioni contrarie al l'ordine pubblico o al diritto interno del regno.*" See Gianzana, iii. § 169.

⁴⁶ E.g. a right in real property which has been swept away by the *lex rei sitæ*. See, as regards a trust for entail in Italy, Ct. of Cass. Turin, 17th Feb. 1875 (Gianzana, iii. § 171). The exceptions contained in art. 2 of the Brazilian decree of 27th July 1878, refer only to rights which are legally impossible according to the *lex rei*, i.e. the law of Brazil.

⁴⁷ Norsa, Rev. ix. p. 220. We must also include the case of the judgment having in view that some landed property should pass to a juristic person, when the *lex rei sitæ* says that such persons cannot hold real property. See Gianzana, iii. § 171.

law of the country of execution;⁴⁸ whether it be⁴⁹ that this law thinks it right that the free will of each individual should have full play in the matter, or that it looks upon the act as one that is forbidden or at least is absolutely disapproved by morality, and must therefore not be enforced by the law.

The question is, however, whether we should go further, and refuse execution in cases where it is not the act that is now to be enforced that is condemned by the court of execution, but where the legal relation which has been recognised in the judgment of the foreign court is one that the court of execution must condemn. Asser (Rev. i. p. 482) declares himself decidedly against this extension of the exception. He goes on to say that, if international jurisdiction is properly regulated or is defined by treaty, the matter in dispute is subject to the foreign law and to the foreign judge: accordingly, a refusal of execution would be invasion of a territory, which is not controlled by our laws. A refusal of execution, however, is no invasion of a foreign jurisdiction: it is something purely negative, a refusal to give effect to the operation of the judgment in another territory. If the general theory which we have already laid down (*supra*, pp. 96, 97) is correct, then that legal relation which is to be pleaded within our territory, and claims effect there, belongs to that extent to our territory, and is so far subject to the control of our laws. Here it is desired to put the decree in operation in a foreign territory. The question, then, is not to be so easily disposed of, as it would seem to be according to Asser's exposition.

Still, the solution of the question which we have already (*supra*, pp. 96, 97) attempted may suffice. Execution is not to be refused if some legal relation which our law condemns is a condition precedent, or one of the conditions precedent, of that which is sought to be attained by execution within our territory.⁵⁰ It may be refused if the execution which is asked constitutes the real kernel of the legal relation which is thus condemned by our law. In this connection it must be remembered that in some cases the law will not allow action on an alleged claim (*e.g.* because proof in

⁴⁸ The language of the *Civilprozessordnung*, § 661 (2), viz. "if the execution would compel an act to be done which cannot be so compelled according to the law of the German judge who is considering the competency of the execution," includes both of the cases referred to. On this ground it is possible, although the cases will be very rare, that execution will be refused to a judgment pronounced within one German jurisdiction by the judge in another. The German *Gerichtsverfassungsgesetz*, § 159 (2), provides: "An application to a court which has not primary jurisdiction must be refused, if the court to which application is made has not local jurisdiction, or if the act that is required to be done is illegal by its law." See Seuffert on § 661, note 4; Struckmann and Koch on the same clause.

⁴⁹ *E.g.* no one can be compelled to contract a marriage or to return to married life. See German *Civilprozessordnung*, § 774 (2). It leaves the provincial laws which still exist in the German Empire to decide on the latter point.

⁵⁰ Thus, for instance, the son of a Mohammedan, who lived in polygamy according to the law of his own country, is quite entitled to claim in our courts some asset belonging to his father's estate as his heir; and thus we should put in force a judgment of the courts of his country—if indeed we recognised its judgments as judgments at all—ordaining a brother who lived here to give up the article claimed.

such cases may offend public decency, or because claims of the kind, unless they can at once be shown to be absolutely clear, may be abused as a means of imposture), while at the same time it will not refuse to give effect to the same claim if clearly established (*e.g.* by confession). In the latter case, there is nothing to prevent execution being allowed to a claim that has been clearly established by judgment in a foreign country.⁵¹ On the other hand, we should have to refuse execution to a judgment the object of which was the payment of a sum of money which had been promised as the consideration for the performance of some act, which in our view of morality seemed to be immoral, or which was the produce of some game of chance which was forbidden in this country as inconsistent with good morals. The emphasis is to be laid, however, although it may seem peculiar at first sight, on the immorality of the relation. It must not be forgotten, that prohibitions which are purely statutory have, in many cases, merely local reasons to justify them. If in such a case the relation so forbidden must as regards its merits be determined by a foreign law, or if the parties have subjected themselves either expressly or tacitly to the foreign court and its sentence, it would be unjust to refuse to allow this legal relation, which in itself does not deserve any reprobation, to have its course in our dominions to the effect at least of ensuring that a money payment connected with it should be made, and ensuring this by compulsion, if need be.

Those who in somewhat vague fashion, following Brocher, take a distinction between an offence against *ordre public international* and an offence against the *ordre public* of a particular State, and will only refuse to give effect to a foreign judgment when the offence is of the former kind,⁵² are really thinking of some plain breach of moral sentiment.⁵³ We should then formulate the exception somewhat in this way, *viz.* : Execution should be refused, when it discloses itself either as the direct embodiment or realisation of some relation which is undoubtedly counter to good morals according to the theories of morality which prevail in the State of execution, or if by allowing execution we should compel any one to do an act which, according to the law of the place of execution, no one should be compelled to do.

The German Code has already found an imitator in restricting the exception to this latter alternative,⁵⁴ and in truth such a limitation is

⁵¹ See *supra*, pp. 455, 456.

⁵² So Weiss, pp. 960, 968.

⁵³ It is impossible to prevent the conception of immorality, of that which offends *boni mores*, from having an application to legal doctrine. Try as hard as we will to separate sharply law and morality, the former will always borrow some ideas and theories from the latter. The most recent evidence of this is to be found in the draft of a municipal code for the German Empire. § 105 says, "A transaction which is forbidden by law is null, unless otherwise expressly provided by the law which forbids it:" then comes § 106, "A transaction which offends against morals or public order is null." In other places, *e.g.* in § 1227, declaring that betrothal has no binding effect, the draft attempts to separate the spheres of law and morality in a way that is almost mischievous.

⁵⁴ Thus in the Austro-Servian treaty, art. 2 (2), quoted by Lammasch.

recommended at least by its clearness. But it leads to substantial dangers of a serious character. Payment of money, as Lammasch (p. 421) points out, is lawful everywhere: therefore—supposing the other necessary conditions of an *exequatur* are present—execution resulting in such a payment can never be refused within the German Empire, although the foreign judgment may be the most direct realisation of some transaction, not forbidden by any German statute, but undoubtedly stamped as immoral.⁵⁵ As Wharton points out (§ 656), the foreign judgment must not serve the purpose “of overriding any rule of distinctive domestic policy.” This representative of English and American law, which goes so far in the recognition of foreign judgments, proceeds to say that “otherwise all that would be necessary to force the repayment law upon us would be to formulate it in the shape of a judgment.”⁵⁶

Of course, if the defender appeals to the rule thus laid down, we cannot avoid to some extent entering on the merits of the case at the stage of execution. If we remember, however, that we do not propose to refuse effect to any legal relations except those that are, either in themselves or in their immediate consequences, beyond all doubt immoral relations, it will be seen that the grounds of judgment, if stated with the fulness

⁵⁵ Francke (p. 22) thinks that we should consider the object to which the act is directed, as well as the act itself. To make a payment which the receiver may dispose of as he pleases is, he says, in law something distinct from making a payment for a purpose condemned by German law, and in the latter case the German *exequatur* should be refused. This interpretation, the fallacy of which is pointed out by Lammasch, rests upon the erroneous notion that one can *a priori* draw a line between an act and the object of an act. Such a distinction is only possible with the help of some positive enactment, which is altogether wanting here. Its absence would result in a comprehensive enquiry into the whole matter, which would often lead to imposture. Struckmann and Koch's commentary on § 661 (4) says, in reference to the German enactment: “Into this category fall, for instance, the celebration of a marriage, immoral acts, prestations that are obviously of an illegal character, etc. It is not sufficient that the judgment proceeds upon some transaction, on which by our law no action will lie, or which is absolutely prohibited, *e.g.* gaming: the enforcement of the act itself must be forbidden, and its object must be immoral.”

⁵⁶ Fusinato (p. 120) comes very near our rule: he proposes to refuse execution “*quando il risultato a cui questa (l'esecuzione) condurrebbe sarebbe in contraddizione con l'ordine pubblico territoriale o con i principii di moralità o di buoni costumi.*” Lammasch is almost in the same position: he says that the exception will apply “if from the execution a result will follow which will be at variance with some prohibitory law of the State which is asked to give execution.” But these formulas are by no means identical with ours. Fusinato *e.g.* will allow (p. 119) the execution of a judgment for payment of a gambling debt in a country, the laws of which allow no action on a claim of that kind, plainly on moral grounds. I cannot assent to this. But if State A, on purely fiscal grounds, forbids gambling in foreign lotteries, but regards it as legal to make money by lotteries of its own at its own discretion from its own subjects, or at least allows its subjects that outlet for their gambling propensities, it cannot, in my opinion, refuse to execute a judgment, which proceeds upon a similar gaming contract, belonging altogether to a foreign State. Here we are not dealing with what the State of execution considers an absolutely and undoubtedly immoral contract, but merely with a local prohibition bounded by the territory of the State (see *supra*, § 257, note 14).

The resolution adopted by the Institute of International Law at Paris in 1878 (Ann. 3rd and 4th year, i. p. 97) runs thus: “*l'exequatur ne serait pas accordé, si l'exécution des jugements impliquait l'accomplissement d'un acte contraire à l'ordre public ou défendu par une loi quelconque de l'état où l'exequatur est requis.*”

which is required by the law or observed in the practice of most civilised States, will generally satisfy us.

Judgments, however, the object of which is the recovery of private penalties altogether dependent on statute (conventional penalties must be dealt with on the general principles which regulate contracts), are, in my opinion, for the reasons already (*supra*, p. 637) stated, not entitled to receive *exequatur* in a foreign country, any more than judgments imposing public penalties. In the one case, as in the other, the State must be convinced of the justice of the merits of the case in accordance with its own laws. Private penalties, although they may be recovered by civil process, occupy just the same legal position as public penalties. The case is different if the demand can be shown to be a demand for payment of damages, however liberal the estimate of these may be.⁵⁷

On the other hand, it will be a matter of no consequence whether the law of the country, in which execution is to be done, regards the act which the judgment is to enforce as one that belongs to the ordinary methods of execution, or as one that falls beyond these limits, provided it is an act which officials will only perform on the warrant of a valid judgment of a court, and one that can be put into execution. For instance, the case may be one of an entry in public registers, books of incumbrances, where entries can only be made at the express desire of a particular person: the defender is that person, and has been ordered judicially to give his consent to the registration, and according to the law of the State where the thing is to be done (*e.g.* in Germany by § 779 of the Civil Code of Procedure), a judgment to that effect has directly the same effect as an expression of desire on the part of the defender would have. It would, however, be highly dangerous to allow foreign judgments to have such effects, without some special procedure decreeing execution. On the other hand, it would not be possible to deny this effect in all cases to the foreign judgment.⁵⁸

JUDGMENTS AGAINST NATURAL JUSTICE. OBVIOUSLY UNJUST JUDGMENTS. JUDGMENTS OBTAINED BY FRAUD.

§ 447. The theory and practice of common law, which was founded on the older Italian law, established lastly this rule, that no judgment which is affected by a plain nullity should be put in execution by another court.⁵⁹ Although it is quite true that the case particularly contemplated here was the case where the court had no jurisdiction, still, the expression was so

⁵⁷ So, too, Wharton (§§ 4 and 656 *ad fin.*), and the practice of the United States. In England, too, foreign judgments are not executed, if the result would be to give effect to a demand that has its origin in an offence against foreign revenue laws. Piggott, p. 210.

⁵⁸ See Francke (p. 22).

⁵⁹ Cf. Gaill, *Practicae Observationes*, i. obs. 115, §§ 3 and 4; Gesterding, *Ausbeute von nachforschungen über praktische Materien*, ii. p. 315.

general, and the application given to pleas of nullity has been so sweeping, that we cannot doubt that the rule was intended to cover cases in which the ground of nullity lay in the merits of the judgment.

We may set alongside of this to some extent the rule of law which prevails in England and the United States, according to which execution will be refused if the judgment is "grossly unjust," or, as Wharton expresses it, "outrageously unjust," or if it rests on a breach of principles of international or so-called natural law that are recognised all the world over.⁶⁰ Here, too, the rule is generally applied to excesses of jurisdiction (especially in the case of judgments *in rem*) and fictitious citations, which may be presumed never to have come to the knowledge of the person named in them. It cannot, however, be doubted that the law considers it its right and its duty to extend the exception in certain very extreme cases to the merits of the judgment, *e.g.* in cases where the foreign law makes some unfair enactment for the very purpose of prejudicing foreigners, or, it may be, the fellow-subjects of the judge who is asked to give execution.

It may be questioned whether there is either expediency or justice in retaining any such safety-valve as this. It is quite obvious that it involves this disadvantage, *viz.* that it may possibly be abused by persons, who, without any good reason, are anxious to delay execution or to make it inoperative, and also it is plain that the whole exception cannot but be vague and ill-defined. If judgments receive *exequatur* in virtue of some treaty drawn up for that purpose, it will be possible to find in the treaty itself a kind of guarantee against the occurrence of any gross outrages upon justice, since it may be assumed, that no government would conclude a treaty of that kind without first taking some steps to ascertain the state of judicial administration in the other country. If we take the case of the execution of foreign judgments without any international treaty on the subject, then we should have to deal with judgments pronounced in States, which we cannot, indeed, hesitate to treat as civilised States, but in which justice is at times accused of bribery, gross ignorance, or unfairness to foreigners. To refuse to give execution as a matter of principle to judgments pronounced in these countries, if we gave execution to judgments pronounced in others, although we had no treaties with them, would be a sort of insult which possibly, or indeed probably, would elicit measures of retaliation directed against the citizens, and particularly against the judgments of the State that thus refused execution. But, on the other hand, if execution were given and all examination of the judgments—except in the general cases already mentioned—were refused, the courts of the country giving execution would be placed in the very painful position of being forced, at the bidding of a foreign State, to carry into execution an injustice deliberately done to their own citizens. The

⁶⁰ "Contrary to the principles of natural justice." Piggott, p. 169; Wharton, §§ 665, 668. ["Repugnant to natural justice." *Henderson v. Henderson*, 1844, 6 Ad. and Ell. 298. *Price v. Dewhurst*, 1837, 8, Sim. 279.]

only resource is the *via media* of an examination which must of necessity be entirely discretionary. It presents this advantage, too, that, if cases of gross and inexcusable injustice occur, these can be exposed, as they deserve to be, with general profit and approval, without entangling the government of the State in the matter, since the courts of law are independent.

Thus a refusal to give execution may in certain circumstances exercise a very good effect, if the court which refuses it takes a high place in general estimation, and is above all suspicion of national partizanship. But, even in cases in which execution has to be given in conformity with some treaty, we cannot absolutely exclude the possibility of "gross injustice" to foreigners, it may be by means of legislation. We say so because of the ebullitions of national hatred against foreigners, or, at least, against foreigners of some particular nationality, which we have sometimes noticed in very recent times exhibited in the most deplorable fashion. A refusal by independent courts to give execution, because they had discovered some gross injustice which could not under any circumstances be justifiable, or because there had been an obvious offence against clear principles of international law, so far as that was involved in the case, would be an excellent means to bring to reason the people of the country in which the injustice had been done, and, in the long run, the courts which had been carried away by the popular current.

It has, however, often been said in English law and in that of the United States (Wharton, § 654 *ad fin.*), that an allegation of fraud is no objection to execution, if the *dolus* in question can or could have been pleaded before the courts of the State, in which the main action is or was dependent. It cannot be denied that this is a sound limitation, if the *dolus* in question is one committed by the opposite party, or by any other private person; if, *e.g.* the question is one of perjury by the opposite party or by some witness.⁶¹ The matter is otherwise, if the objection is urged against the court itself. Then the presumption, that the *dolus* will be best disposed of in the course of the process depending in that court, no longer exists, and if the party who has been prejudiced is thrown back upon the foreign court, he will be very apt to find that the whole value of the legal protection which he invoked by his objection is zero. Field (§ 668) proposes that this defence of fraud should be dropped altogether. In my view that is going too far.

We must, of course, if the discretionary powers, which are necessarily given in these matters, are to be rightly exercised, have courts which stand upon a high moral platform. If they do homage to Chauvinism, to the unfounded hatred of everything that is foreign, then they may do much mischief in the exercise of their discretionary powers. Such powers, too, are just as little suited for courts, which have no training save in the letter

⁶¹ See Ct. of Florence, 7th April 1869 (Fiore, J. vi. p. 249). An action of reduction (*Rivocazione*) of a foreign judgment is incompetent before Italian courts. See Piggott, p. 110.

of the law, and lose themselves altogether, if they have no express statute to the text of which they can stick.

We can meet any abuse of the process of execution which might arise from frivolous objections, by imposing a substantial fine.

DEFECTIVE GROUNDS OF JUDGMENT.

§ 448. The question whether the absence of any grounds of judgment attached to the foreign decree is a reason for refusing execution to it,⁶² is to be answered by saying that the court of execution must be satisfied, from the grounds of decision of the court that gave judgment, not that the merits of the decree are substantively well founded, but that all the points are established, upon which the formal validity of the judgment, and therefore the possibility of putting it into execution, depend, these points not being subject to a complete and independent enquiry by the court of the country in which execution is asked. In particular, it is not necessary that there should be any finding as to the international jurisdiction of the court; this would be unpractical, since, on the one hand, it is often impossible to foresee whether the judgment will have in any respect to be executed abroad; and, on the other hand, the disputed points in an action should not be augmented unnecessarily by what is often a difficult question, viz. that of international jurisdiction. If we were to require anything more of the court of execution, we should be turning it into a court of appeal from the original court. If the grounds of judgment are too generally expressed, or express nothing, they must in law be considered as if they had not been given at all.

ADEQUATE OPPORTUNITY OF BEING HEARD. CITATION IN THE COUNTRY IN WHICH EXECUTION IS DEMANDED; CITATION BY CONSULAR COURTS. REPRESENTATION IN THE PROCESS.

§ 449. Lastly, is the court of execution bound to enquire whether the defender had sufficient opportunity of defending himself, and was allowed an adequate hearing?

In principle, all such enquiry must be excluded, in so far as it concerns the question whether the defender was properly cited. In cases in which jurisdiction is not itself dependent on the citation, the citation of the party must be tested by the law of the court in which the suit depended, and must therefore be subject to final determination by that court. But, in cases in which citation is necessary to found jurisdiction, it must be made personally on the party or his commissioner or representative, and this is *eo ipso* sufficient to give the defender an opportunity for defending himself.

⁶² For such a refusal, see Gianzana, iii. § 109, and judgment of Ct. of Cass. at Turin, 29th Dec. 1883.

We have, however, already noticed, that on grounds of convenience many positive systems of legislation make use of fictional citations of parties who are absent: if a foreign State allows itself to execute judgments proceeding on such fictional citations, and perhaps upon further fictions still, it exposes itself to the risk of lending its assistance to what may be a gross injustice.⁶³ In reviewing the procedure that has taken place in so far as citation in cases of judgments *in contumaces* is concerned—for in other cases the citation has had effect, and therefore the defender has had an opportunity of pleading—we are simply in some measure reviewing the judgment on account of “gross injustice,” as English law calls it, only that this gross injustice⁶⁴ must be laid at the door of the statute law of the State to which the court belongs, and not at that of the court itself.⁶⁵

Execution has also been refused sometimes where the judgment was *in contumacem*, and there had either been no personal service on the defender, or no service on him in the State in which execution was to take place. In the Austro-Servian treaty (art. 21), as Lammasch notices, provision is made for the case of the defender being deprived, in consequence of other irregularities in procedure, of the opportunity of being made aware of his rights in the process. Lammasch says, quite rightly, that such an enquiry is only permitted because of the exuberant confidence which one necessarily brings with one in concluding such a treaty, in the administration of justice in the other State. As we have already said, in our view it would not be safe to go too far in this happy confiding spirit.

⁶³ This shows still more clearly, how perverse the limitation to Germans of the protective exception contained in § 661 (4) of the *Civilprozessordnung* is. Are we to allow the execution, of what may be presumed to be injustice, upon a foreigner? We might, no doubt, justify a refusal to apply the protective exception in favour of citizens of the State whose judgment is to be executed. Besides, when we have such a provision as this of the German statute, the doubt arises, whether the possession of the character of a German at the time of the judgment, or at the time of the execution of it, is to be decisive. Francke (p. 39) takes the latter view, since the question is one as to extending the protection in question to a German. Others, appealing to the words of the statute, are of opinion that the question is one as to whether jurisdiction was founded by the citation, and that if jurisdiction was once recognised it would transmit against the party's heirs. Lastly, Lammasch thinks that, in order to invoke the exception in question, a man must have been German at the date of citation and at the date of the application for execution. Where the exception is so entirely capricious, it is difficult to find any decision which will be sound in principle. If the object of the statute is to protect Germans, we are concerned with no date save that of the execution, then it matters not whether the German *exequundus* is successor of a foreigner or not. But if what we desire to prevent is an excess of jurisdiction by a foreign court, then the opposite view must be sound. But then the limitation to Germans was wrong.

⁶⁴ According to a judgment of the Belgian Ct. of Cass. of 25th Feb. 1886 (J. xiv. p. 217), the Belgian statute of 25th March 1876—apart from any different provision in treaties—left the determination of the question, whether the rights of the defender had been protected, to the discretion of the court to determine according to the circumstances of each particular case.

⁶⁵ The Ct. of Cass. at Turin on 25th Aug. 1874 (J. vi. p. 292) determined that a foreign judgment *in contumacem*, which condemned the defender simply because he did not appear, without any proof, should not be put into execution, Clunet (J. vi. p. 293) approves this decision. If so, the application of the provisions of § 296 of the German *Civilprozessordnung*, which in my opinion are so absolutely faulty, would be described as an obstacle to execution.

The limitation upon execution which we laid down in § 447 covers this case, and, as we shall show, we by no means entertain a belief in the virtue of State treaties as the only means of salvation in this matter.

In so far, however, as any positive law lays weight upon the fact of citation in the State in which execution is to be given, the citation of any of its subjects by one of its own consular courts must be held equivalent to a citation in the State itself. Otherwise this requirement of citation within the territory could not be satisfied in the case of many of its subjects (*e.g.* if they were beyond its territory in the East). But, on the other hand, there has been no legal citation of a subject of the country in which execution is to take place, if the citation has been made by a consular court of the State in which judgment was pronounced. That is from want of jurisdiction in the consular court, for consulates have never anything but personal jurisdiction, although they have territorial boundaries, and have no jurisdiction over persons who do not belong to the State which the consuls represent.⁶⁶

If, however, an advocate has appeared for the party in the court which pronounced judgment, his commission to do so must be open to examination by the court of execution, before it can be decided that the party has appeared.⁶⁷ Here, again, no fictions or presumptions of foreign law can interfere. The certainty that the advocate had instructions to appear must be established by the law of the court of execution,⁶⁸ as well as by that of the foreign court.

OBJECTIONS COMPETENT BEFORE THE COURT OF EXECUTION.

§ 450. Objections by the defender to the merits of the judgment belong to the court where that judgment was pronounced, if they were available to him before judgment was given. Then the court of execution must refuse to hear them. But, on the other hand, the judgment of the court in which the process depended, sisting execution on any such subsequent objections, or, to put it more accurately, declaring the original judgment to be no longer capable of execution, must be respected by the court of execution, of course assuming that this judgment is properly placed before it. The matter here is not a mere sist of process, which no foreign court would be entitled to impose upon the court of execution: the fact is that the court which pronounced judgment withdraws from the court of execution the basis on which it asked that court to take up the

⁶⁶ See Francke, pp. 40, 41, who in his results is right on both points.

⁶⁷ See Lammasch, p. 426, note 4: Code of Civil Procedure for Italy, § 941 (3). The court will examine "*Se le parti siano state legalmente rappresentate o legalmente contumaci.*"

⁶⁸ De Rossi (p. 89) in this matter proposes to decide according to the foreign law. The court in which the procedure takes place will certainly decide the matter by its own law, and the right of legal representatives, guardian, father, or husband, to appear will be tested by the personal law of those for whom they appear.

case, and in virtue of which alone that court could proceed. On the other hand, objections which arise after the court in which the case depended has given judgment, *e.g.* the objection that after judgment the debt was extinguished by payment or by discharge, must be pleaded before the court of execution.⁶⁹ Such objections are not directed against the deliverance which is embodied in the judgment. But it is alleged that some subsequent legal transaction or legal relation has affected that deliverance, and, according to the view of the defender, affected it so that it may no longer be put into operation. It is plain that on this last question the court of execution must have the decisive voice (see *supra*, p. 80 *et seq.*). If a debtor, who is armed with certain specially cogent documents,⁷⁰ can at once and absolutely stop an official from carrying out a judgment of one of this country's courts in this country, surely the same sort of objection must be recognised in the case of the execution of a foreign judgment, the objection belonging, as it does, to *jus publicum*, and concerned, it may be, with the defender's personal liberty. But even if the defender cannot at once exhibit any such documents, the competency of the court of execution cannot be doubted, upon the general principle already referred to. Although the law of the State of execution refers objections of a certain kind, which have come into existence after judgment has been given, on grounds of convenience to the court in which the principal action depended, we cannot from that circumstance draw any inference as to the way in which a foreign court should in similar circumstances be treated. That provision of the legislature may be quite justifiable in its own country, looking to the subordination of the courts there to each other, and to the different spheres which are assigned to them: *e.g.* if, as in the German Empire at the present time, courts of execution in connection with judgments pronounced in this country, are courts of inferior rank in which a single judge sits, who, as a rule, has jurisdiction to determine no actions except such as are for a trifling sum. But we must attend to the following distinction. Objections which are of such a character, and are so completely furnished with proof of their own validity, that they check the judge who is asked for execution in any possible attempt to give effect to that demand, enjoy this power by reference to and in accordance with the law of

⁶⁹ See Wach, *Vorträge über die Reichs Civilprocessordnung*, 1880, p. 231; Lammasch, p. 435. See, too, draft of the Anglo-Italian treaty by Piggott and Paccioni (Asser, *Buitenlandische Vonnissen*, p. 60). It is rightly pointed out there that the question, whether the judgment has been satisfied, must be determined by the law of the court in which the case depended. Of course, questions as to the intervention of a third party, who claims the property on which execution is to be done, are questions for the court of execution. Francke (p. 81), with special reference to the German *Civilprocessordnung*: Struckmann and Koch, note 2, on § 661 of that *ordnung* and the citations which they give, but especially Imp. Ct. (iv.), 5th February 1885 (Blum. *Ann.* i. p. 381, and Dec. xiii. No. 88). This last judgment proceeds on the analogy of the *actio judicati*. This argument is, however, of no value, except from the point of view of some particular positive local law. It has no weight in considering the general theory, as we shall see. To the same effect as the text, judgment of the Swiss Federal Court, 24th July 1882 (J. x. p. 544).

⁷⁰ See German *Civilprocessordnung*, § 691 (3) (4) and (5).

the State of execution, and regardless of the law which governs the judgment itself. On the other hand, in the case of objections which have not this more sweeping and absolute force, their effect must be determined by the law of the court which pronounced judgment originally, although the judgment on the point will be given by the court of the country of execution. There are indeed claims, the operation of which must not be interfered with by illiquid objections that may have arisen subsequently, *e.g.* by pleas of set-off or compensation which are not liquid. In the case of claims upon bills, this exclusion of all objections, which cannot at once be verified in a particular way, undoubtedly forms part of the substantive law on that subject. On that point, *i.e.* on the import and character of the claim established by the judgment, no law except that from which the judgment derives its validity, can be consulted. If, however, the defender has urged objections against the execution of a judgment in the court in which that judgment was given, its decision must in all cases govern the procedure of the court in which execution is desired. If the objections are repelled, then the decision must be recognised by reason of the voluntary prorogation of the defender, who has challenged the decision. If they are sustained, then the court which has given judgment has withdrawn from its own judgment all claims for execution, *i.e.* it has withdrawn from it the foundation on which execution in a foreign country must necessarily proceed.

How stands the law if, after a judgment, a transference of rights has taken place, either on the side of the successful or on that of the unsuccessful party? Take it that the latter dies, and the process of execution must now, it is said, be directed against some other party as his heir. Does the decision of questions on this point belong to the court which gave judgment, or to the court of execution?

The question has recently been a good deal discussed in German law, and in one case has been answered by the Imperial court⁷¹ to the effect that it must be held that the German court in which the action for execution depended had the jurisdiction. These discussions, however, are concerned merely with the words of the German statute (*Civilprozessordnung*), and have no bearing on the principles of private international law, or on the philosophy of that law.

In accordance with general principles, our answer must be this. The decision is in form simply a determination of a legal relation in which the original parties are concerned. It may be that the result of the decision will affect other persons also, *e.g.* the parties' heirs, but in the formal decision we find nothing that says so. To obtain a formal decree that will

⁷¹ (I.), 7th April 1883 (Dec. ix. Nos. 109, and Seuffert, Nos. 38, 366), and (iv.) 5th Feb. 1885 (Dec. x iii. No. 88). See Wach, p. 231. Struckmann and Koch on § 661 (i.) *ad fin.* of the *Civilprozessordnung*. But yet, perhaps, there may be dissentients who hold that the foreign court which gave the judgment is alone competent. See Ct. of Aix, 13th March 1879 (J. vii. p. 106).

affect them we must have a new judgment, *i.e.* a new process, in which the judgment already pronounced will, of course, hold as law that cannot be disputed against the predecessors who were parties to it, in so far as its character as a judgment is not disputed. In other words, an *actio judicati* proceeding upon the former judgment must be instituted by the legal representative or against him, as the case may be; and it was for this very case that almost all over Germany the practice under the common Roman law recognised such an *actio*.⁷² The judgment, therefore, cannot be directly put in force: it requires the institution of a new action, in which the ordinary rules of jurisdiction must be applied. Thus, for instance, the *forum rei sitæ* will remain competent as it was in the original action, if real property is in question, whereas it is quite possible that an *actio judicati* to compel delivery of a moveable thing may have to be raised in a new *forum*.⁷³

In most cases execution of a judgment will take the shape of a demand for money, and in most cases application will be made for execution at the domicile of the debtor. These things being so, if we regard the action for what the German *Civilprozessordnung* calls the "execution judgment" as an *actio judicati* (see *infra*, § 460), we find that in the majority of cases⁷⁴ our theory will give the same result as that to which the German Imperial Court came. The transference of legal rights which has taken place can receive effect in the process, which has been instituted before the German courts to obtain an execution judgment, and the pursuer need not be relegated to any other court.

The soundness of our general theory cannot be altered by the circumstance that a statute like the German *Civilprozessordnung* (§ 665), where a transference of legal rights has taken place, contemplates a very simple procedure, if this transference can be at once verified by certain selected means of proof, *e.g.* by public documents, or if it is notorious to the court (*Civilprozessordnung*, § 665). If, again, the question of transference comes up, not at a time when the commission to execute the judgment can be discussed, but subsequently, when the execution has begun by pointing and diligence (see *e.g.* Italian Code of Procedure, § 569, 2), the point is no longer whether execution is to take place on behalf of a particular person or against a particular person. The procedure has now become real, it is dealing with things, and the question is to whom the produce of the execution is to go, or who is to bear the burden of it, or who in the further course of the execution will be entitled to exercise particular powers, and to guide it in this or that direction. All these questions, from their very

⁷² Sup. Ct. of App. Berlin, 11th Sept. 1868 (Seuffert, xxiv. No. 295); Sup. Ct. at Berlin, 8th June 1874 (Seuffert, xxix. No. 276).

⁷³ See judgment of Sup. Ct. of App. at Celle, of 9th Feb. 1867 (Seuffert, xx. No. 190), on the competency of a regular *actio judicati* proceeding on a foreign judgment.

⁷⁴ As Wach rightly remarks, it is in practice impossible to carry out completely the theory of sending the case to the foreign courts.

nature, must be pleaded in the court of execution, and must be regulated by its law.

METHOD OF EXECUTION. MEANS AVAILABLE FOR EXECUTION.

§ 451. It is generally recognised that the method of execution, the means of compulsion available, are questions that must depend on the law of the place of execution.⁷⁵ This follows, on the one hand, from the principles already (p. 80 *et seq.*) laid down; for the enforced execution represents the last ramification of the legal relation, and as such belongs not to the legal domain of the court in which judgment was given, but to that of the court which authorised execution. It also, on the other hand, is a consequence of the fact that we have here to do with the actings of the public sovereign authority, which lays hands directly on the property of individuals, and with the restrictions under which these actings are placed in the interests of humanity and of mercy to the debtor.

On this principle, if we find that the court of execution has such-and-such methods of doing execution in the general case (putting aside in the meantime special methods of execution, competent in particular actions, or competent if they are specially mentioned in the judgment), it matters not whether the court which gave judgment knows these methods or not. Thus if the creditor under the ordinary operation of the law in the State of execution has, as a consequence of judgment in his favour, a right of hypothec over the real estate of his debtor (*hypothèque judiciaire* according to Code Civ. § 2123), it is immaterial whether he has such a right by the law of the court that gave him judgment, or whether he was allowed it by the special terms of the judgment.⁷⁶

The opposite view,⁷⁷ which strangely enough was sanctioned by the Institute of International Law, would introduce a distinction, which must in many cases be unfair, between creditors on a foreign judgment and creditors on a judgment pronounced in this country. It might be that the possibility of execution would be altogether denied to the one creditor, if we shall assume that in State A, whose courts pronounced judgment, imprisonment for debt was abolished, whereas in State B, according to older Roman law, it was the most substantial form of execution.⁷⁸

⁷⁵ Story, §§ 556 *et seq.*; Wharton, § 790; Demangeat on Fœlix, ii. pp. 239, 240; Haus, *Dr. pr.* § 156; Belgian statute of 26th July 1871, as to "*contrainte par corps*;" Weiss, p. 971; Brocher, iii. p. 168; Resolutions of the Institute of 1878, No. 5 (*Ann.* 3rd and 4th year, i. p. 98).

⁷⁶ Weiss, p. 971.

⁷⁷ "*Toutefois la contrainte par corps ne doit être applicable nulle part, si elle n'a pas été prononcée par la tribunal qui a rendu le jugement étranger. L'hypothèque judiciaire n'aura lieu que quand elle est accordée par les lois des deux pays.*"

⁷⁸ Foote (p. 517) entirely agrees with us, with particular reference to personal imprisonment; he says: "Persons who contract engage simply to perform their promise; and if they fail to carry out their undertaking, they must submit to the control of any law within the reach of which they happen to be when a remedy is sought."

If, however, according to the law of the place of execution, a particular form of doing diligence is only recognised in the case of particular exceptional obligations, this kind of execution, arising out of the contract, can only be applied if it is at the same time recognised as competent in the kind of claim in question by the law under which that claim itself falls.⁷⁹ If, for instance, personal incarceration is by the law of the place of execution competent in obligations upon bills, but is not recognised by the law to which the obligation upon the bill in question is subject, in such a case this form of diligence cannot be required at the place of execution.⁸⁰

The exclusive application of the law of the place of execution cannot be affected by any regulation which the judgment may contain,⁸¹ and if there seems to be any doubt whether such a regulation is part of the decision on the merits, or merely regulates the method of execution, *e.g.* where the defender is ordered to do some particular act, or, in default, to pay a certain sum of money, then the court of execution must be guided by its own law.⁸² Accordingly, a sound theory will hold that the courts of execution, so far as their own law allows it, are not incapacitated absolutely from granting a *sist* of execution, although an application may already have been made for that purpose to the court which gave judgment, and refused by it.⁸³

Of course, any additions made to the judgment, which are in the view of the court of execution incompetent, will not have the effect of depriving it of validity. It will receive effect, and these additions will be left out of

⁷⁹ Draft II. of the Code for the States of the German Bund, § 29: "Diligence is to be done according to the regulations of the procedure in diligence recognised at the place where it is carried out. If the judgment pronounced in the one State has allowed personal arrest as a means of doing diligence, that can only be enforced in the other under the condition that such personal arrest is recognised there in the same way as a means of execution competent in the circumstances. If this condition does not exist, then it is only the means of diligence authorised by the other State which can be required." Cf. Story, §§ 568 *et seq.*

⁸⁰ Cf. judgment of the Supreme Court at Berlin, 10th July 1860 (Seuffert, xiv. p. 282).

⁸¹ Sup. Ct. of Stuttgart, 29th March 1847 (Seuffert, iv. No. 144), with reference to the competency of attaching an alimentary fund of the debtor.

⁸² The decision of the Ct. of Cass. in Belgium, in the case of Bauffremont (19th January 1882, J. ix. p. 364) rests on this consideration. [The Princess de Chimay, a Belgian, who had married the Prince de Bauffremont, a Frenchman, and had thus acquired French nationality, was separated from him by decree of the French Courts. She became naturalised, after her separation, in Saxe-Altenburg, where a person separated, as she had been, from her husband, is entitled to marry again. Accordingly, she married the Prince Bibesco in Berlin. The Prince de Bauffremont obtained from the French Court a decree of nullity of this marriage, and, subsequently, an order on her to give up the children of the first marriage. Failing compliance with this order, the French Court imposed a heavy fine, and it was to recover this fine that proceedings were taken in Belgium.] The execution of the judgment for pecuniary penalties was regarded as contrary to the *ordre public* of Belgium, and as no legitimate consequence of the refusal of the princess to give up the children. See Gianzana, iii. § 231.

⁸³ App. Ct. of Perugia, 23rd March 1877 (J. viii. p. 540). A French married woman was ordained by the Court of Bourdeaux to return to her husband, although she had pleaded the state of her health. The Italian Court, appealing to *ordine pubblico*, granted a *sist* of execution. Vidal, J. iv. p. 519, declares himself against it. Clunet, on the other hand (J. viii. p. 541), says it is very "*délicate*," and holds that in certain circumstances such a modification of the original judgment would be competent.

account, in so far as they can be separated from the decision on the merits of the question.⁸⁴

The so-called *beneficium competentiae* (*supra*, p. 612) must always be allowed to the debtor in conformity with the law of the place of execution, because it rests on grounds of mercy and humanity. It may also be allowed to him in accordance with the law, which regulates the substance of the obligation, which the judgment is meant to work out.

WHAT COURTS ARE COURTS OF THIS COUNTRY? CONSULAR COURTS.

§ 452. It may at times seem doubtful whether a judgment is a foreign judgment, or a judgment of a court of this country. In a legal sense, judgments pronounced by consular courts set up by the State are judgments of courts of this country, although they actually have their seats in a foreign country.⁸⁵ On the other hand, the mixed courts recently set up in Egypt (*tribunaux mixtes*)⁸⁶ are foreign courts even to those States who furnish judges to them.⁸⁷ The co-operation of a judge of this country is no security against an excess of jurisdiction which may take place in the judgment of a mixed court of the kind.

EFFECT OF THE ACQUISITION, OR SURRENDER, OR MILITARY OCCUPATION OF A TERRITORY ON JUDGMENTS THAT HAVE BEEN PRONOUNCED.

§ 453. The question whether the union of the territory, in which the court that pronounced the original judgment had its seat, with the State in which that judgment is to be executed, does or does not turn what was a foreign judgment into a native judgment, is more difficult. In our view, the distinction between the execution of native and foreign judgments (see *infra*, § 454)—putting aside some more or less capricious limitations,⁸⁸ which have plainly no application to the case in hand—lies in this, that in the case of a foreign judgment the courts of execution have to enquire, *first*, whether the court that gave judgment had jurisdiction; *second*, whether by giving execution they may not work out by force in the territory of their own State a legal relation, which it is considered unlawful to work out at all there, or at least to work out by force; and *third*, in extreme cases, to see that no gross and palpable injustice has been committed in the course of the procedure that has taken place, or in the judgment itself,

⁸⁴ See the draft treaty of Piggott and Paccioni (given by Asser, *Buitenlandische Vonnissen*, p. 61).

⁸⁵ Esperson, J. xi. p. 261; Fiore, *Eff.* § 164; Moreau, § 57; Gianzana, iii. § 37; Daguin, p. 157.

⁸⁶ See v. Bulmerineq in Holtzendorff's *Handbuch*, iii. p. 756. The German Empire in 1875 became parties to the convention.

⁸⁷ See Fauchille, J. vii. p. 457; Moreau, § 71; Gianzana, iii. § 41; Vidal (J. xiv. p. 280) is of a different opinion.

⁸⁸ There are limitations which we use to work upon the attitude of another State to us, *e.g.* by insisting on reciprocity.

either in form or in substance, which cannot be supported. Since none of these enquiries have as yet taken place in the case we have put, it is plain that a judgment which has been pronounced in the newly acquired province must be treated as a foreign judgment.

The same decision must, however, be given in the converse case in which the judgment was pronounced in the State which is acquiring the province, and is to be executed within that province. It will be so, even although the province is placed under the jurisdiction of the supreme court of the State which acquires it, and the judgment to be executed was a judgment pronounced or approved by that very supreme court. The supreme court may have given a special deliverance, upholding the jurisdiction of the court that pronounced judgment, but it did so on the authority and under the guidance of the laws which prevailed in its old territory, and without regard to the principles of international law. As a matter of fact, it may be perfectly true that objections to the execution of judgments pronounced by the State which is acquiring the province will have less prospect of success than in the converse case. But, for all that, it is necessary to apply for a declaration of *exequatur*.⁸⁹

On the other hand, if the judgment was pronounced in the province which has now been acquired, and if it is desired to put it into execution there, there is no need of any *exequatur*.⁹⁰ The enquiry into the three points stated above has already by implication taken place; the claim in the action could not have been affirmed on any other footing. A new declarator would be meaningless. It might be that the judgment was in conflict with some statute of absolutely imperative force, published in the meantime by the annexing State. But this is a possibility which exists in every case, quite apart from any changes of territory. Thus it is not so much a question of private international law, with which we have to deal, as a general question of the extent to which valid judgments may be

⁸⁹ De Rossi (p. 172) and Moreau (p. 65) in substance agree with me as regards both cases. Despagne, § 259, holds that the *exequatur* is not necessary in the second case: "*parce qu'il serait irrationnel de demander l'exequatur à des juges établis par le souverain même du pays où l'exécution doit avoir lieu.*" Fiore (J. v. p. 235, and *Eff.* § 154), Norsa (Rev. vi. p. 253), and the Italian judgments reported by him, take a different view. The Italian courts have, however, differed much upon the subject (J. v. *ut cit.*). I cannot think that the arguments adduced upon either side are conclusive. Moreau argues that in those cases the party acquires a *jus quaesitum* by the judgment. That is a mere *petitio principii*; the question is whether the *jus quaesitum* must not give way to higher considerations, as frequently happens. Rossi takes sounder ground in pointing out that the courts in question, at the time judgment was given, were subject to a different *jus publicum*. This argument, however, does not exhaust the question, for we can conceive a territory being annexed in which precisely the same private law and procedure law prevailed as in the annexing country. We find the opposite view supported by the observation that "there is no longer any duality of sovereignty:" but this is a mere phrase. The adoption of the view that no *exequatur* is required may, it is quite plain, seriously damage the private rights of the defender, e.g. if judgment has been given against him as *in contumacem* by a court that had no jurisdiction. Let us put the case of a judgment depending upon an assertion of jurisdiction like that of the much criticised § 14 of the Code Civil.

⁹⁰ To the same effect Moreau, p. 65; Ct. of Paris, 9th June 1874 (J. ii. p. 188).

affected by subsequent legislation within the same State. The external form of execution will require to be altered. It will run in the name of the new sovereign, in place of that of the old.

Again, a judgment pronounced before the separation of the territories, by a court of the province which is now cut off, falls to be treated as a native judgment in the State from which it is cut off. At that time it had *ipso jure* validity and operation in all the other provinces of that State; no change has been made in its terms since that date, and an enquiry even into the jurisdiction of the court would be altogether unprofitable.

The same thing must be said, for the same reason, of a judgment which, before the surrender of the province, was pronounced in some other province of the State which is surrendering it, in a question as to the execution of the judgment within the surrendered province.⁹¹

But the point of time at which the judgment of first instance was pronounced will not always be decisive. If an appeal depended between the parties, and the court of appeal decides the matter at issue,⁹² then, in a legal point of view, the decision of the court of second instance is the only real decision in the case, although it may be disguised in the shape of an affirmation of the court of first instance or of a rejection of the appeal; the decision of the court of first instance is thereby reduced to the level of a mere opinion. But it is otherwise if no appeal was taken, and the judgment became capable of being put into execution, by reason of the parties allowing the period for taking such an appeal to elapse. In this case the date at which the judgment of the court of first instance was pronounced, and not the date at which the time for appeal elapsed, will regulate the matter. The fact that the judgment might have been assailed is not on the same footing as an actual affirmance, or reversal, or modification of it. The judgment existed before the days for appeal ran out. It was not the lapse of these days that brought it into existence.

But if we take the case of an appeal, in which the sentence of the court below is either cassed, or the appeal refused, in the former case the judgment of cassation, if pronounced after the surrender of the province, is a foreign judgment, which has no operation without an *exequatur*.⁹³ If appeal is refused, the parties have no further opportunity of challenging the judgment of the court of first instance. On this ground, it must be regarded as a final and conclusive judgment pronounced in that province.⁹⁴

⁹¹ Fiore, *Eff.* § 162, agrees as regards both of these last cases. Moreau, pp. 69, 70.

⁹² The authority of the Supreme Court resting, as it does, on the sovereign power of the State, ceases as regards the surrendered province and the courts that exist within it.

⁹³ Moreau (§ 59, p. 67) proposes to examine abstractly the character of the appeal. But this would involve us in difficult enquiries, and it may happen that an appeal takes the one character or the other according to the discretion of the superior court. (Cf. *e.g.* § 501 of the German *Civilprozessordnung*, dealing with appeals, and also § 528.) In principle, however, it is not the abstract law that will decide the point, but its concrete embodiment in the decision of the court.

⁹⁴ See Moreau, *ut cit.* He puts the result, however, in part at least, upon the theory of *droit acquis*.

When a part of a country is occupied by an enemy, there is no change in the sovereign right over it until peace is concluded: and the power which is in occupation cannot alter the municipal law. We cannot therefore admit that the occupation will have any effect upon the execution of civil judgments. Judgments pronounced by the courts of the country whose troops are in occupation are foreign judgments for the territory so occupied; and the converse also holds. Judgments, on the other hand, which are pronounced in the province so occupied are native and not foreign judgments as regards the State to which the occupied territory still *de jure* belongs. The converse here, again, is also true.⁹⁵

The question will wear a more difficult aspect, if the power, whose troops are in occupation, forces the courts of the province to give their judgments in name of this power so in occupation. This would no doubt be a transgression of the strict limits of public law. If, however, it were done, still, so long as the usurpation confines itself to that matter of form, we should give the same answers as we have already given.⁹⁶ It would put another face on things, if the power so in occupation should introduce new judges, or interfere with legislation.

IF THE COURT WHICH GAVE JUDGMENT IS SITUATED IN ANOTHER PART
OF A COMPOSITE STATE.

§ 454. No general answer can be given to the question whether a judgment, pronounced in another province of the State, is to be regarded as a native or a foreign judgment. We must consider the actual facts and circumstances of the particular country. But at all events it would be quite unsound to say that, because two territories had the same person as sovereign, one of them could not refuse to give execution to the judgments of the other. In the times of the old French monarchy, judgments pronounced within the territory of one French Parliament did not receive execution *de plano* within that of another: no doubt, at a later date, judgments specially authenticated by the Royal seal were declared to be entitled to execution without a "*pareatis*" being required. Scottish and Irish judgments, and judgments pronounced in English colonies, stand by no means on the same footing in England as English judgments: Sweden and Norway, too, although governed by the same Royal House, look each upon the other as

⁹⁵ See Moreau, § 66; Despagnet, § 258; Daguin, p. 371.

⁹⁶ In general this corresponds with French doctrine, and is recommended by considerations of convenience. Moreau, § 67, thinks it is too lax, and requires a process of *exequatur*. At the same time, he holds that the conduct of the German Allied Governments, in the campaign of 1870-1871, was not just. But a special difficulty arose in that case from the collapse of the Government of the Emperor during the war, and it could not be required of the Germans that they should at once recognise in all respects the Republican Government, thus newly established. But there was certainly no good reason for requiring all judgments to be pronounced in the name of the German Governments. See Edg. Löning, *Die Verwaltung des General-Gouvernements im Elsass*. Strassburg 1874, p. 121.

a foreign country in questions as to the execution of their judgments.⁹⁷ On the other hand, judgments pronounced in any of the Swiss cantons will receive effect all over Switzerland,⁹⁸ always, however, provided that the limits of jurisdiction prescribed in the federal constitution are not overstepped.

Judgments of the French colonies are treated in France as French judgments;⁹⁹ it is otherwise with England and her colonies. Within the German Empire all enquiry into the jurisdiction of the court that pronounced judgment is excluded. It is supposed that the theoretical ascertainment of the jurisdiction by the rules of the *Civilprozessordnung*, which are common to the whole Empire, is sufficient. But they can never, of course, exclude the possibility of there being an excess of jurisdiction in consequence either of an error in law or of an error in fact.

But, since by far the most important factor in the matter of execution is a close and complete scrutiny of the jurisdiction of the court which pronounced judgment, in logic the important point must be whether the courts of the different parts of a State or of a federation of States are subordinated to one and the same Supreme Court, which has power to enquire into their jurisdiction in all cases. If this is the case, then the party, by taking an appeal against the judgment of the court of first instance, can raise the question of jurisdiction before the very court before which it would be raised if the plea of "no jurisdiction" were taken in answer to a demand for *exequatur*. This purely logical treatment of the matter is generally modified by usage and by positive law,¹⁰⁰ and the question is not one of such vital importance, if, as is the case in England and in the United States, the execution of foreign judgments is in other respects made independent of arbitrary conditions.

THE CONDITION OF RECIPROCITY: COMMENTARY.

§ 455. One such special condition for the execution of foreign judgments is that there shall be reciprocity. Thus in particular § 661 (5) of the German *Civilprozessordnung* refuses execution "unless reciprocity is guaranteed."¹⁰¹ In fact, great weight is generally laid in international matters on the rule of reciprocity, which seems simply to be an equitable rule. We must not, however, stretch it too far, especially since the interests of private persons will be directly affected by the attitude of the

⁹⁷ See Olivecrona. J. vii. p. 83.

⁹⁸ By § 61 of the Swiss Federal Constitution. See Roguin, J. x. p. 113; Muheim, p. 304.

⁹⁹ Moreau, § 54.

¹⁰⁰ E.g. Austrian judgments, as already noticed, are executed in Hungary, and *vice versa*, over property lying in the State where execution is to be done, without any conditions at all.

¹⁰¹ Both in Austria and Hungary great weight is laid on this point. V. Püttlingen, p. 473.

State, and as it may well be that our State will severely damage itself and its subjects if it refuses to apply a principle which is sound in itself, because another State does not recognise that principle in its dealings with our citizens.

If we cannot confide in the administration of justice in other States, then, as Asser has noticed (Rev. i. p. 95), the system of reciprocity in the execution of judgments gives us no better guarantee on the matter. The unjust or erroneous judgments of the foreign State will not be made one whit more just or less mischievous to our citizens, because that State puts our far superior judgments into execution.¹⁰² It is much more logical, if we are to impose restrictions upon execution, and if we cherish distrust of the judicial arrangements of foreign States, to require, as Moreau does (§ 236), a treaty with the foreign State. The Government, or, if the case allows it, the representatives of the people, can then examine the guarantees for the administration of justice which exist in the other State. On the other hand, there is no logic in saying, "We distrust the foreign judgment, and accordingly we shall refuse to give it an *exequatur*, but, at the same time, we will trust any one who will trust our judicial system." Besides, there may be much dispute as to the application of this condition of reciprocity.¹⁰³ It is enough that the foreign State will execute some judgments of our courts? Or is it necessary that it should execute them in all cases in which our courts would execute judgments pronounced in that other State? Or, lastly, is it enough that, in the same circumstances as exist in the particular case, the foreign State would give execution? If we assume the first of these suggestions, we should very soon find that our State had to a certain extent debased itself, if the foreign State as a matter of fact should give execution to foreign decrees in a very few cases only, and if, for instance, it should give its own courts a very wide international jurisdiction, while it only recognises the jurisdiction of foreign courts within a very limited area. As regards the second suggested system, it will lead to a denial of execution in the vast majority of cases, particularly if codes and statutes continue to mix up, as they are so apt to do, questions of international with questions of intra-territorial jurisdiction. This would be the result, because execution would have to be refused wherever the regulations as to jurisdiction in the two systems of law concerned did not accurately correspond. The third suggested system is, comparatively speaking, the most correct. It labours, however, under the great evil, that in each particular case uncertainty may easily arise,

¹⁰² Still, this is the system of the German *Civilprozessordnung*. Where reciprocity is ensured it does not allow execution to be refused, even when there is a palpable and gross violation of general principles of law, e.g. it will force the German judge to execute a judgment against a German subject, if the case be so, although that judgment was obtained by bribery, or although to some extent it wilfully put the German subject at a disadvantage. The German subject will have no remedy save recourse to the foreign courts or to diplomatic representations.

¹⁰³ We cannot, of course, require the foreign State to have a process of execution which coincides with ours. For that end we should require to have an identity of procedure, and perhaps also of judicial system. Wach, i. p. 235.

especially if, as necessarily must happen, we have to enquire into the actual way in which cases are treated in practice in the foreign country, as well as into their enactments on the subject. One who is about to sue in the courts of the one country will, as a rule, not know whether he can obtain any substantial success, after he has obtained judgment, within the territory of the other State.¹⁰⁴

But, in view of the variety in rules of procedure and in the theories on the subject, it is often a question of the greatest doubt whether in the particular case a foreign judgment would be recognised as such by the foreign country. Suppose, for instance, that in one State, say England, there is not so much reverence for the formal validity of foreign judgments as to exclude all recourse against judgments that have been fraudulently obtained—although that recourse is only employed in the most extreme cases—and take it that, as in Germany, the other country allows no discussion of any such point in its courts, then in strictness we have a want of reciprocity on the side of England, and consequently must refuse execution.

We may see, from an interesting judgment of the German Imperial Court (iii.) of 19th May 1882, which is stated with the greatest elaboration, in what enquiries this question of reciprocity may land us,¹⁰⁵ and at the

¹⁰⁴ The controversies and doubts which exist as to the provision of the German *Civilprozessordn.* confirm what is stated in the text. It is said, for instance, by Struckmann and Koch on § 661, No. 10: "The idea of reciprocity involves that the conditions under which the foreign court will execute German judgments must be the same as the German conditions, or at least not more strict. For instance, the fact that a foreign State generally executes German judgments, will not avail to obtain the execution of a foreign judgment where the jurisdiction of the court was put upon the *forum contractus*, if the foreign State does not execute German decrees based on this *forum*. In every case, we must enquire whether a foreign State will execute a German judgment pronounced under the like conditions." Wach, i. pp. 235, 236, thinks that there is no want of reciprocity, unless the foreign State recognises the jurisdiction in question for itself, but will not allow it to our courts or to those of any other country.

¹⁰⁵ Dec. vii. No. 124, p. 406. In the judgment, at its close, it is urged against the execution of English decrees in the German Empire, that in England decisions of foreign—and therefore German—courts on points of prescription are not recognised, because, according to English theories of law, prescription is purely a matter of procedure.

The court below, that of Oldenburg, proceeded on the view that the only question was (the question of jurisdiction being disposed of by the voluntary submission of the defender to the English court) whether the defender would in England, in the execution of a foreign judgment, have been allowed to state objections of the same character as he now urged before the German court. The Imperial court reversed this determination, and affirmed that no execution could be allowed to any country in which the legality of a German decision could in any other case be called in question, because in § 661 (i.) of the German *Civilprozessordn.* it is expressly said, "the judgment of *exequatur* must be pronounced without examination into the legality of the original judgment."

Piggott, in his 2nd edition (pp. 429, 430), gives a commentary on this important decision, which he translates in full (p. 470). He says that he cannot concur in the decision of the court of Oldenburg, because it made the law of Germany altogether dependent on the law of the foreign State, and if the foreign State required reciprocity in the same sense, then, in future, there could be no execution in either; "a deadlock would be the result." He thinks the judgment of the Imperial Court was sounder, but its results as mischievous. Assume that German law allows objections A and B to be taken in defence, while the law of the other State allows A, B, and

same time, how uncertain these questions are, if, for instance, the two systems in comparison are such systems as the German and the English systems. The only satisfactory way of answering the question whether there is sufficient reciprocity is to be found, as in so many other questions, in a sort of unfettered discretion, apart from ordinary legal argumentations, a discretion which may be exercised by Government or by a department charged with the administration of justice, but cannot be exercised by courts of law.

But, as has already been noticed, we are by no means likely to advance in international law by insisting on this demand for reciprocity; as a rule it will impede our advance. Every State which takes its stand on "reciprocity," asks its neighbour to take precedence with some liberal regulation that shall facilitate commerce, and thus they both remain where they were. Even if, as a matter of fact, reciprocity actually were in use, errors of individual judges might suddenly disturb the whole course of practice. In State A, execution is refused on some special ground; in State B, they reply to this by refusing execution on some broader ground, and soon there is a general refusal to give execution in both States.

§ 456. Accordingly, many authors, among them Asser, and, after the experience derived from the German *Civilprozessordnung*,¹⁰⁶ Beschorener also (J. xi. p. 43), have declared against any such condition:¹⁰⁷ as a matter of fact, too, in England, the United States, and Italy (Code of Procedure, §

C, or A and C, then in either case the reciprocity desiderated by the Imperial Court would be wanting. But since, unfortunately, the rules of procedure in two different States can never absolutely correspond in these matters, this theory will lead to a denial of all execution. I find in a decision of the Old German Imp. Ct. of Comm. on 3rd June 1876 (Dec. xxi. No. 5, p. 14) a better conception of what is implied in the defence of "fraud" recognised in England and the United States, than is contained in this judgment of the Imperial Court.

¹⁰⁶ Wach's survey (i. p. 239) shows that upon the whole the provision of the *Civilprozessordnung* has had this effect, that it is only the judgments of a very few States, and those for the most part States which on their side do not require reciprocity, that will be executed. Austrian judgments will no doubt be executed, although Austria does require reciprocity (Imp. Ct. (i.) 22nd Sept. 1883; Seuffert, xxxix. No. 171). But this reciprocity may be very easily disturbed. Again, the party who asks for execution within the German Empire has so much trouble in showing that reciprocity does exist, and the different courts to which application is made contradict each other in the particular case so completely, that it would be more convenient for the party to pass altogether from the question of execution in the German Empire, and simply to take up the matter *de novo*. But as there may be thought to be some doubt whether the party is entitled to throw up the results of the *res judicata*, and instead of it to advance his original claims anew, he is often driven into a costly and troublesome series of attempts to make good his foreign *res judicata*. Thus a party who has been successful in an action abroad is often in a worse position in the German Empire, than if the French system, by which there is no execution of foreign judgments, were the rule.

¹⁰⁷ The condition of reciprocity was not in the original draft of the *Civilprozessordnung*. It rests upon an amendment proposed by Struckmann. The representative of the Federal Government was right in asserting that it behoved the German Empire to take the lead in setting up great international principles (in this case he should have said to follow Italy in doing so). Marquardsen, Gneist, and Becker voted against the amendment, and its want of distinctness was pointed out by Heuser. See Hahn, *Materialien zur Deutschen Civilprozessordnung*, i. p. 77, ii. p. 887.

944), foreign judgments are executed without regard to reciprocity. No one can say that the national dignity is in any way thereby impaired. States should do justice to individuals—and that is the first matter at stake here—without caring whether other States do so also or not. As the bold conduct of France in the recognition of literary property has shown, such liberal treatment of questions of private international law has often more effect than an anxious adherence to the principle of reciprocity.

But lastly, it is very difficult to establish the fact of reciprocity, and very easy to dispute it. It is possible to define it precisely in a treaty, but, in the case of a treaty, it is superfluous to appeal to the principle of reciprocity as such, since treaties generally rest on the principle that the stipulated prestations on either side are to be held to be satisfactory to the parties. The point will be seen to be more doubtful where there are mutual declarations or proclamations by two States, for there the reservation is always either made expressly or may be implied without difficulty, that the one party need only follow out its own declaration so long as the other party adheres to its declaration. Further, a law may be administered in such a way that the reciprocity which ostensibly exists should in fact be reduced to a minimum. Indeed, the reciprocity which is hung out as a sort of signboard may be, by other enactments, *e.g.* as to jurisdictions, the competency of objections, etc., made almost illusory. Finally, a course of practice may very easily be upset by isolated judgments, or, if the fact be not really so, yet the other State may be misled into thinking so. The German *Civilprozessordnung* requires reciprocity to be guaranteed (*verbürgt*).¹⁰⁸ But there is much dispute both among theorists and practitioners wherein this guarantee shall consist. Many desiderate a legal rule laid down by the foreign State, specially sanctioning reciprocity (see *e.g.* Francke, p. 70, Imp. Ct. (iii.) 19th May 1882; Dec. vii. p. 406): others are contented if legal usage be that reciprocity is given (Struckmann and Koch, note 9 on § 661). But, in any case, all are agreed that the party who asks for execution must prove the existence of reciprocity.¹⁰⁹ In many cases the proof of such a practice, almost amounting to a customary law, will be more difficult than the proof of the claim itself. But proof of the claim is in the meantime excluded. (See *infra*, § 462.)

Much sounder than any system of reciprocity is, as we have already remarked, the principle of retaliation. Accordingly, in drafting the German *Civilprozessordnung*, it was originally intended to use that weapon in the extreme cases. It is actually reserved by § 4 of the Bankruptcy Statute for use against foreign creditors, who claim in a German sequestra-

¹⁰⁸ See Struckmann and Koch on § 661, note 12, as to the States in which it is held that there is sufficient reciprocity shown to the German Empire. Seuffert also, on § 661, note 7.

¹⁰⁹ Imp. Ct. (iii.) 7th March 1882 (Dec. vi. No. 114); Francke, p. 79; Wach, p. 238; in many countries the matter is doubtful, and divergent decisions have been pronounced about them.

tion. In making a reservation of that kind, we work upon a sound principle; we do not wait for others to begin, and it is only in extreme cases that we make our neighbours feel the disadvantages of the unsound principle. In the execution of judgments, that may be a very practical matter. If, for instance, our State executes the judgments of State A, while State A will not execute ours, the result may be that parties will prefer to have recourse to the courts of State A, since their judgments will be certain to obtain execution in our country, whereas a judgment of our courts, although they are better administered, will practically have no effect in A. If we have sound rules for the regulation of jurisdiction, the dangers of such an abuse are not very great: if they are felt, however, we should be able, by means of retaliation, to find a remedy for them, and in this way, perhaps, viz. that we should refuse execution, if that will prejudice the citizen of the foreign country who has been successful, but allow it if the judgment is against him.¹¹⁰ If we really act on large liberal principles, we are entitled to use sharper remedies against non-progressive prejudice and national ignorance, and to act in a way that at every turn will wound the State which disregards the community of nations. If we wait in anxiety till some one else takes the first step, we deprive ourselves of this more effectual remedy. It matters not that retaliation cannot be administered by the courts. The courts as such, in deciding particular cases, are not in a position adequately to estimate the general operation of international relations. Of course, retaliation of this kind in civil actions should not be employed as an engine in large questions of international policy. The possibility of so employing it was recognised, no doubt, in the German Imperial Judicial Commission as a reason for requiring that there should be a general reciprocity required by statute. It will be possible, however, to prevent its being used for any such ends, if the Government is only authorised to employ retaliation when they can obtain an opinion from the Supreme Court or a committee of their number, that it ought to be employed.^{111 112}

¹¹⁰ Earlier French law took the distinction that foreign judgments should not be executed against French subjects: that was, however, from selfish motives. Cf. Moreau, § 19, on the ordinance of 1629. The German *Civilprozessordnung* uses the principle, although not in a very correct way, in the case of foreign judgments *in contumaces*; see *supra*, § 441. The nationality of the party at the time the action is instituted must decide; for that is the point of time that rules other things in connection with the action: and while the successful party in the process must not suffer by its being protracted, on the other hand, if a later point of time were decisive, the law might be evaded by assignments, which might be collusive.

¹¹¹ Asser (Rev. i. p. 411) no doubt has retaliation of this kind in view, when he says that we must not throw away the demand for reciprocity, as a means of obtaining concessions from other States in diplomatic negotiations.

¹¹² It is, however, of course obvious that if there be a question of the *onus* of proof, e.g. if the law allows its courts to employ retaliation on certain conditions, that cannot affect the party who asks for execution: the reasonable course is that his opponent should be put to proof that the judgments of the State which is now asked to give execution do not receive it in the other country.

VALUE OF TREATIES DEALING WITH THE EXECUTION OF JUDGMENTS.

§ 457. In close connection with the question of reciprocity stands the question whether the best way of ensuring recognition and execution of foreign judgments is by entering into treaties.¹¹³ Probably most people think it is.¹¹⁴ I cannot, however, bring myself to take this view. The safer way seems to me to be through the legislation of the different States, although at the same time no opportunity should be lost, while we are making liberal progress in our legislation, of working on the legislation of other States by diplomatic measures, taking up, if need be, the weapon of retaliation. Although it is no easy matter to formulate in legislation the conditions under which the execution of foreign judgments is to be allowed, it is still more difficult to do so in a treaty in which we have to do justice to two divergent systems of law, two philosophies of law which may be far asunder, and two different terminologies. Experience confirms these views. The relations of France and Switzerland, for instance, are close and of long standing. There are agreements between the two countries as to execution of judgments and their respective jurisdictions going back to the beginning of the eighteenth century. French law, too, does not differ very markedly from that of Switzerland, and indeed in a considerable part of Switzerland it is substantially the law of France which rules, so that it might be thought to be particularly easy to come to an understanding. But yet the most recent treaty—in 1869—has not put things on a satisfactory footing. Again, nothing has come of the diplomatic procedure by which the foreign minister of the Netherlands, Gericke v. Hercoynen in 1874¹¹⁵ undertook to promote a more general international agreement as to the execution of foreign judgments, upon a basis which in substance was satisfactory: nor has the more ambitious action set on foot by Mancini in 1881, when he was Italian minister of foreign affairs,¹¹⁶ borne any fruit as yet. Then, again, no treaty has ever yet been concluded between the German Empire and Austria, although the same philosophy of law prevails in these two countries. The observation at once occurs that it is not so easy to correct any errors that may slip into such a treaty as it is to correct them in a statute, and the law will gradually work out its own development on a sound basis, unless there is a positive statute, as most lawyers think that there

¹¹³ Lammasch (p. 351) gives a review of the more important treaties.

¹¹⁴ See the resolutions of the Institute of International Law on 5th Sept. 1878 (Ann. 3 and 4, i. p. 96). "*Une réforme complète à l'égard de l'exécution des jugements étrangers ne saurait être réalisée par le seul moyen de lois générales, uniformément applicables à tous les jugements étrangers. Il faut en attendre le complément d'un système de conventions diplomatiques à conclure avec les Etats dont les tribunaux et l'organisation judiciaire paraîtront présenter des garanties suffisantes.*" Lammasch, p. 351, declares against any system of legislation, and exclusively in favour of a system of treaties.

¹¹⁵ See J. i. p. 159.

¹¹⁶ The substance of it is given in J. xiii. p. 35. See Lammasch, p. 354, note 101.

is in France, forbidding the execution of foreign judgments without special directions in a treaty to do so. Such countries as England and the United States, which do not make a fetish of statute law, and in which law has better conserved its natural capacity of developing its rules according to the nature of the subject, are in a still better position. The exposition given by Piggott, in his second edition, of the most recent English law on the subject of recognition of foreign judgments, shows that sound principles are more and more pervading the law, and are being crystallised in pithy maxims. On the other hand, a series of profound errors is attaching itself to the German *Civilprozessordnung*, which are fettering German law, as we have noticed more than once. Lammasch, who can certainly not be counted among the adherents of the theory, which, with Laurent's, looks for the golden age of international law to be brought about by the operation of treaties, takes a different view of the matter from us (p. 351), and that although he himself points out (p. 357) many of the tombstones which cover the drafts of treaties on the subject between the leading States. He thinks that to do what can be done by treaties has this advantage, that concession will be balanced by concession, and that the points of agreement will fit exactly into the circumstances of both States.¹¹⁷ For that reason he thinks that it would be possible to go into exact details, and to draw up such precise rules for the different heads of the subject, that no room would be left for the play of judicial discretion at all. But we cannot promise to ourselves that any special advantage would flow from so careful a balancing of concessions, or rather from transactions by way of concession in matters in which the question at issue is as to justice. On the contrary, diplomatists are very apt to go wrong in such matters, and subsequent practice shows what was expected to be advantageous in a totally new light. Practice, too, if it is left unfettered in the application of principles, can fit itself much better and with much more elasticity into the judicial arrangements of the States concerned, than a treaty can do. In negotiating a treaty, every attempt to alter the domestic legislation of either country lets loose a flood of doubts and debates, and gives rise to diplomatic difficulties, or even perhaps to reprisals. To go very carefully into details in making treaties is, just as it is in making laws, to breed more controversy. Of course, in all this we assume that the practice of which we have spoken is a practice that has not entirely forgotten how to develop for itself the logical results of comprehensive principles.

RESTRICTION OF EXECUTION TO JUDGMENTS OF CERTAIN SPECIFIED STATES.

§ 458. A critic may start this further question, viz.: Given the general conditions for execution, should we execute the judgments of all States,

¹¹⁷ Feuerbach, *Themis*, p. 309, is somewhat in the same vein.

even although, as far as we can see, the judicial administration of this or that State is not one that inspires confidence? The question seems a serious one, but in truth it is not, as we see from the case of England, whose subjects live in great numbers in foreign countries, and whose commerce is the most extensive in the world. If the international jurisdiction of the courts is defined on sound principles, there is a good deal less danger, whereas it must be said that a reciprocal international application of the principles of jurisdiction, laid down by the German *Civilprozessordnung*, would make the execution of the judgments of foreign countries generally a very serious matter. We must, however, add that, as we have already explained, the pleas of gross and palpable injustice, and of improper influence having been exercised on the court by fraud or crime, must be available, as they are in England and in the United States. Lastly, we cannot well put into execution the judgments of a State within which the citizens of our State enjoy the privilege of extra-territoriality, or should claim it in the view of our own Government. Such an exceptional situation is a proof that the civilisation of the country concerned still differs in too serious particulars from the civilisation of which Europe is the centre, while, of course, we cannot for a moment entertain the idea of executing the judgments of any country with which we have not some community of legal ideas. The judgments of such States are not to be executed even against their own subjects; they could not be brought up as against subjects of our State, because the court that pronounced them would not have any jurisdiction. In doubtful cases the law might empower the executive government, acting on an opinion to be obtained from the Supreme Court or a committee of its judges, to declare that the judgments of the courts of this or that particular State could not receive execution from our courts. It does not seem equally desirable to select, in the Code of Procedure or in some auxiliary ordinance, the particular States, whose judgments are to receive execution.¹¹⁸ In the first place, it might in certain circumstances be thought that such a course involved an offensive expression of distrust of the courts that were not mentioned; it would also seem to imply something like a blind confidence in the courts of the States which were mentioned. Further, the adoption of the measures which we have suggested need not make us apprehensive of any unwarrantable interposition by the Government, since it could only proceed after obtaining an opinion from independent legal officials. This opinion will protect the Government in its relations with the foreign Government, and it will not refuse to give effect to the judgments of civilised States, unless it shall be proved or made highly probable that its courts habitually sanction wilful breaches of justice, or that bribery or other influences of that kind are in full swing there.

But it is just as hopeless to look for a world-wide treaty for the

¹¹⁸ So § 436 of the draft of a Danish Code of Procedure. See, on the other hand, Fusinato, p. 64.

execution of civil judgments as for criminal sentences.¹¹⁹ The minimum of guarantees, which may be quite sufficient for a postal or for a telegraphic union, would not be enough to ensure the observance of the provisions of such a treaty. Nor can we draw any analogy from the conventions for the protection of so-called literary property. In these conventions we are not dealing with any question of the confidence to be given to foreign courts, but merely with a part of the attitude which the legislation of each country should hold to foreigners, an attitude which is at once deducible from the conception of the right that is to be protected. It would, too, be quite a mistake to introduce the most favoured nation clause in any such treaty. But it is quite feasible for one State, in its intercourse with its immediate neighbours, to refrain from insisting on the observance of certain formalities, *e.g.* those which go to prove the authenticity of the judgment, although they may be quite indispensable in intercourse with more distant States.¹²⁰ International treaties are, however, of more service where mere formalities are concerned than where principles have to be dealt with.¹²¹ But if there must be treaties to settle principles, let them be concluded for a specified time, and with a clause providing for withdrawal,¹²² so that our own legislation may not be tied up too tightly, and some room be left for experience. But yet it is more difficult and more dangerous to withdraw from such treaties than might on a cursory consideration be thought to be the case.

OPERATION OF TREATIES. RETROSPECTIVE EFFECT.

§ 459. Treaties of this kind, however, unless there be any express provision to the contrary, are not confined to the subjects of the States who make the treaties, *i.e.* it is not these subjects alone who are entitled to plead them. They apply generally to the judgments of the courts of the States concerned, irrespective of who it is that pleads them.¹²³ In logic, too, these treaties do not fall aside in the case of war between the contracting States.¹²⁴ It is not to be supposed that in civil matters the courts of a civilised State would take sides against the subjects of the hostile State. We cannot, however, in this place exhaust the question as to how far, in the case of war, international treaties should remain intact.

A treaty, which enacts for the first time that the judgments of another State are to be executed, has a retrospective effect. No one has a *jus quasitum* that a judgment given against him should not be executed in

¹¹⁹ See Bar in the *Gerichtssaal*, 1882, p. 490, against a resolution of the German *Juristentag* of this character, dealing with the subject of extradition. Lammasch, too (p. 353), declares decidedly against such an idea.

¹²⁰ See Lammasch *ut cit.*

¹²¹ See Moreau, § 263.

¹²² See in this sense Fiore, §§ 244-248. He justly says that too much weight is often given to treaties in connection with such matters.

¹²³ Moreau, § 150.

¹²⁴ Moreau again, § 151.

another State. That they have not, up to this time, been executed, is merely a natural consequence of the circumstance that the power of the State from whose courts the judgment proceeded was restricted to its own territory, except in so far as another State should give it aid. It may, however, be presumed, if any aid is to be given for executing foreign judgments, that the party who has been condemned by the competent court of a foreign State is wrong; no other consideration would justify execution, and a State treaty making provision for execution. We cannot suppose that any party so condemned is less wrong, because judgment was given a few days or months before the treaty came into operation. Francke (p. 89), with whom Lammasch concurs (p. 362, note), draws this very sound inference from this retrospective effect of such treaties,¹²⁵ that even although an application for execution has been refused, that refusal taking the shape of a judgment, there is nothing to prevent the application being repeated, if it was only refused because of the want of any means of giving execution, and in the meantime a treaty, which sanctions such execution, has come into force.

JUDGMENT AWARDING *exequatur*. REQUISITIONS BY THE OTHER COURT.
ACTIONS FOR OBTAINING *exequatur*.

§ 460. The law of the place of execution must, of course, determine the shape in which the foreign judgment is to be presented for execution. In old days the ordinary method in use upon the continent of Europe was a requisition addressed by the court which had pronounced judgment to the court which was to give execution,¹²⁶ and sometimes the person against whom execution was asked was only allowed a hearing upon any representation or complaint he might have to make against an order by the court of execution granting the requisition of the foreign court. Nowadays more modern legislation in the more important States has converted the application into a contentious proceeding from the very beginning, in the shape of an ordinary action,¹²⁷ or at least requires a formal judgment on the application; and even in England the foreign judgment serves merely as a foundation for an independent suit.¹²⁸ Unless, however, the advan-

¹²⁵ Kohler in Grünhut's *Zeitschr. für das Privat und öffentliche Recht der Gegenwart*, xiv. (1887), p. 27.

¹²⁶ See Wetzell, *Civilproc.* § 31, note 25, § 47, note 117. The application of the *actio judicati* in Germany has not been undisputed. See Ct. of App. Jena, 16th July 1844 (Seuffert, xvi. No. 268); Sup. Ct. of App. Cassel, 21st February 1854 (Seuffert, xi. No. 104). The latter judgment lays weight on the consideration that if there are in existence special rules as to the conditions and the form of execution, these should not be evaded by means of the *actio judicati*. See Moreau, § 155, as to the requisitions required by the Franco-Sardinian, now the Franco-Italian treaty. In Austria the procedure is still by requisition, but it is also competent for the parties themselves to move for execution. See Vesque v. Püttlingen, § 127.

¹²⁷ So in the German *Civilprozessordnung*, § 661 (2); for French law see Moreau, § 136, Daguin, p. 108. The Italian Code of Procedure speaks of a "*Giudizio di deliberazione*."

¹²⁸ See Piggott's exposition (J. x. p. 34). It is now recognised that the original ground of action cannot be pleaded anew.

tages of the execution of foreign judgments are to become in great part illusory, we must not allow this action for execution quite the same position as the Roman *actio iudicati*, which may be fought on special independent grounds, while the party has also the privilege of availing himself of a simple application for execution, or at least might have availed himself of that, before the expiration of a certain period. On the contrary, unless there be some express enactment to the contrary, the action for execution, raised upon the basis of some foreign judgment, can only be met by such objections, arising after that judgment has been given, as could in similar circumstances be pleaded in arrest of the execution of a judgment pronounced in this country. Thus, if a judgment pronounced in this country can only be met by certain specified kind of evidence, *e.g.* documents, which have become available since its date,¹²⁹ the same limitation must apply to objections against a foreign judgment which has not yet obtained an *exequatur*. If it is not to apply, the person against whom execution is asked must show that the law of the court in which the judgment was pronounced recognises a wider range of objections. For the procedure that goes before the decree of *exequatur* has no other object than to test the considerations which tend to prevent foreign judgments being placed on the same footing as judgments of this country; if there are no such considerations, then an *exequatur* should at once be pronounced. But we shall make it impossible to take this latter course, if we allow objections, even if they be of subsequent origin, to be pleaded in the action for execution, unless they are capable of being instantly verified by proof (in particular by official documents) such as we require in all cases where judgments of our own country are to be put in force. Any unprincipled debtor would otherwise have it in his power, by putting forward objections, which it might take months, or even years to verify, to force his creditor into a new process in spite of his having obtained a judgment in a foreign court; that process might again be carried from court to court, and might cause the creditor in the end as much delay as an entirely new action. If this restriction is not observed, the execution of foreign judgments may turn out to be a snare.¹³⁰ If, then, the defender in the action of execution raises

¹²⁹ According to the older common law of Rome, as it prevailed in Germany, none but liquid objections could be raised; nor could they, unless they were subsequent to the judgment. See Wetzell, § 47, note 124. The German *Civilprozessordnung* (§ 691) retains for German judgments that require execution the condition that objections to the execution shall be capable of instant verification.

¹³⁰ This specially important point has not been noticed with sufficient distinctness in the literature that deals with the relative provisions of the German *Civilprozessordnung*. This is just what might have been expected from its formal treatment of the procedure connected with private international law, and from the way in which it adheres to the literal words of the statute. I should like to notice that Wach (§ 19, note 18 *ad fin.*) insists on the character of the procedure which has for its object a decree of *exequatur* as an *ordinarium*, "the objective limits of which are not more narrowly drawn by the statute;" he declares himself in favour of allowing illiquid objections. The formalistic point of view, which leaves the true object of the procedure altogether on one side, comes prominently into view in Planck's *Lehrb. d. Deutschen Civilpr.* § 27, note 51. "In consequence the party does not submit the

objections that are illiquid, he must be referred to the court which pronounced judgment,¹³¹ or he must raise an action of repetition (*condictio*) in the court that has jurisdiction. Until a valid judgment is pronounced in such an action, it can exercise no influence on the procedure for execution.

But should the court that pronounced the original judgment, or some court of the same foreign State, which can control that court, or some objection raised by the person against whom execution is to be done, withdraw the right to execute the judgment, or withdraw it for a time, absolute respect must be paid to this decision in the process of *exequatur*. The decision, which, as Piggot (p. 100) expresses it, has to be clothed in our courts with a kind of auxiliary decree, to give it the accessory force that is necessary to ensure its operation there, still remains a foreign decree, and draws all its substantial virtue from the judicial order of a foreign State. It loses, then, all its virtue in this country the moment the foreign judicial authority recalls it. The matter is quite in a different position, if the right of the original judgment to obtain execution has been already formally established:¹³² if, *e.g.* the judgment of *exequatur* required by the German *Civilprozessordnung* has been pronounced, or if, at least, the process of *exequatur* has already reached the stage at which objections can no longer be received. In such a case the second judgment of the foreign court, in order to be admitted to the effect of sisting the exercise of its *imperium* by this country, must in its turn receive an *exequatur*. No officer in this country who has a judgment by one of his own courts, requiring immediate execution, put into his hand with the right and the duty of so executing it, can well enquire whether some foreign judgment must be taken by him as an authority for deferring execution.

NO COUNTER ACTION ADMISSIBLE IN THE PROCESS WHICH IS INSTITUTED TO OBTAIN EXECUTION.

§ 461. It is, however, completely inconsistent with the idea of an auxiliary process to admit a counter action against the claim for execution. An illiquid process of this kind is still more likely than an illiquid objec-

request of a foreign court for assistance; he raises a claim, for which provision is made by the *Civilprozessordnung*, to be allowed means of execution." The view which holds that objections which have arisen subsequently, are not admissible before the court of execution, even though they be liquid, is in any case wrong. See *supra*, § 450.

¹³¹ To a different effect judgment of the Imp. Ct. (iv.), 5th Feb. 1885, Dec. xiii. No. 88, p. 349, which lays down that objections that have arisen subsequently cannot be remitted to the foreign court.

¹³² Francke (pp. 12 and 85) overlooks this distinction. He always harps on this, that no foreign court can interfere with execution in Germany. But, in the first case put, it is not proposed that it should. But see Gianzana, iii. § 96, and the judgment of the Ct. of Paris of 3rd June 1881 there cited. An action for repetition of something paid under a foreign decree can only be raised in the courts of the country that gave the original judgment. See Esperson, (J. xi. p. 270), who founds upon a decision of the Appeal Court of Florence of 5th April 1869.

tion, to turn the whole advantage which the victor has taken from the foreign process into a mockery. Even Moreau, § 125 (4), who, in other respects, is cautious enough with regard to any concession that it is proposed to make to the foreign court, regards a counter action as irreconcilable with the "*demande en exequatur*." The whole foundation for jurisdiction in counter actions lies in considerations of equity, which are unpractical and out of place, as I have shown, in all questions of international jurisdiction, but, in connection with the matters which we have now in hand, result in absolute injustice. If a pursuer proposes to deal exhaustively with some claim in this or that court, it may be thought fair, and in the interests of simplicity of procedure, that his opponent should be able, while he is so engaged, to deal with his claims on the other side in the same court. But, in the case of a process of *exequatur*, a complete and exhaustive treatment of the subject is impossible; all that is now competent is a secondary enquiry of a formal kind. Would it then be fair, that the one party should be able to draw in his successful opponent, who, as it is, is already in many cases suffering severely from the territorial limits to the operation of the judgment he has obtained, to discuss with him exhaustively some other matter altogether? But eminent German jurists lay down,¹³³ that by the German *Civilprozessordnung*, which treats a claim for execution in form as an ordinary action, a counter action is allowable. This shows us that such new formalities as are introduced by this German Code, in what we must call an obscure way, not unfrequently indicate a sad retrogression, in spite of all their apparent plausibility. Then, too, as a matter of legal reasoning, the case is made even worse by the limitation imposed by § 33 of the German Code on the competency of counter actions, viz. that the claim which is advanced in the counter action must be connected with the claim advanced in the original action, or with the defences stated in that action against it.¹³⁴ The question whether such a connection does or does not exist, leads directly to a discussion of that claim, which should in the light of the foreign judgment be recognised as *res judicata*.¹³⁵

ORIGINAL CLAIM EXCLUDED. POSSIBILITY OF ADVANCING IT IN THE END.

§ 462. But, while the foreign *res judicata* may as such be advanced in support of an *exequatur*—either by way of action or by way of requisition—

¹³³ Francke, p. 99; Wach, *Civilproc.* § 40, note 37, p. 485.

¹³⁴ One of the examples adduced by Wach and by Francke on this matter is instructive. The defender alleges that after the foreign judgment has been pronounced he has extinguished the claim for which decree was given by a certain payment or prestation, and, as what he gave was in excess of what was due by him, he has now a claim against the original pursuer. Francke does not state this illustration quite correctly, but Wach corrects it.

¹³⁵ What is to be the result, if the plea in defence, with which the counter action is said to be connected, was brought before the foreign court, but repelled as formally incompetent, or if the judge of this country takes a different view of the plea from that taken by the foreign judge?

it must also be so advanced.¹³⁶ The party is no longer at liberty to choose whether he shall advance his original claim or plead the *res judicata* of the foreign judgment.¹³⁷

On the other hand, applying again general principles, there is nothing to prevent a party, who could raise an *actio judicati* to carry out a judgment of a court of this country, from doing the like to carry out a foreign judgment,¹³⁸ instead of availing himself of the method of requisition or of an action of *exequatur*. These latter methods ensure him certain advantages, e.g. that even objections which have subsequently arisen are only to be looked at if they are liquid: it is competent on general principles for the party to decline to avail himself of such advantages.

Of course, the limitations which are in other cases set upon the execution of foreign judgments cannot be disregarded by adopting this means of execution, viz. the *actio judicati*. All the limitations which are set upon the ordinary process of execution in this respect are applicable also to the *actio judicati*. Some positive enactment may exclude the *actio judicati*; thus, for instance, it may be excluded by implication, if all attempts to put foreign judgments in force must be brought before a superior court in view of the public interest, while the *actio judicati* is competent only before the ordinary courts of first instance. [An *actio judicati* will therefore be competent only upon native judgments.]¹³⁹

But, even assuming that the *actio judicati* is admissible according to the law of the State of execution—and still more naturally, if that law gives no such choice—it is of the very highest interest for the party, who has been successful in obtaining judgment in a foreign country, to know in good time, whether the foreign judgment as such will be recognised as *res judicata*, so as to aid him in obtaining execution. Any uncertainty on that point may give rise to a costly, wearisome, and entirely unprofitable action. Then, again, if the party has the power, as he certainly has in

¹³⁶ The *exceptio rei judicatee* prevents an action being raised on the original *media*. See Ger. Imp. Ct. (i.) 30th June 1886 (Dec. xvi. p. 435).

¹³⁷ The novation which is effected by the foreign judgment excludes the original claim, and, at the same time, such a privilege of selection would be startlingly unfair to the other party.

¹³⁸ He may have good ground for it: he may, for instance, see that the person against whom execution is to be done would raise a counter action, founding on facts alleged to be of subsequent date, but incapable of instant proof: the party, however, desires to dispose of the whole matter at once from the bottom.

¹³⁹ The First Division of the German Imp. Ct. at one time (29th Jan. and 7th April 1883, Dec. viii. p. 387, and Dec. ix. p. 374) laid down that an *actio judicati* upon a foreign decree was competent; that same Division has now, agreeing with the Fourth Division, affirmed that it is incompetent (see Dec. 30th June 1886, Dec. xvi. No. 106, p. 427. Seuffert, xlii. No. 268). Seuffert, note on § 660, and Struckmann and Koch, note 2, approve of this latter decision. The former decision seemed to have taken it for granted that the *actio judicati* would continue to subsist with its ordinary effects at common law. The judgment subsequently pronounced by the First Division substantially rests on the ground that the provisions of the *Civilprozessordnung* are intended to deal exhaustively with the whole matter, and therefore leave no room for the *actio judicati*. This technical reasoning, blind to all the real requirements of the case, corresponds entirely with the theory which holds that the *exceptio rei judicatee* is completely ruled by the provisions of the *Civilprozessordnung*.

virtue of the German *Civilprozessordnung*, to combine with his action for execution an action founded on the original legal relation, this combination, thus competent *in abstracto*, but in truth generally impracticable, will be the source of the greatest delays, at considerable expense, and with no result in the end. Thus the pursuer will, as the whole matter will eventually be taken up *de novo*, lose a good part of the profit to which he is entitled in respect of his *res judicata*.

Special prejudice may be suffered, and has already been felt by the necessity, within the German Empire, of showing that the foreign country will give reciprocity, and if we put all considerations together, we shall in the end be still more inclined to say,¹⁴⁰ that, rather than adopt the rules laid down in the German *Civilprozessordnung*, we should have recourse to the simple position which now prevails in France, where, apart from the provisions of treaties—and the German Empire has not as yet concluded any, although for some of the German States they do exist—foreign judgments are not admitted at all to execution. The parties then know at least where they are, and do not require to learn, as in many, perhaps in most cases they will learn, after marching through several courts, that there is no such thing as an auxiliary judgment for them. In the German system, the decisions of the higher courts are not absolute guides for the future: and, apart from the very various conceptions that lawyers may form of what “reciprocity” is, the actual circumstances of the other State may very possibly alter. A single judgment, refusing to give effect to the judgment of a German court on any ground whatever, may be sufficient to destroy the doctrine, hitherto held, that there is in that country a guarantee of reciprocity.

CONSIDERATION OF POSSIBLE LEGISLATION ON THE PROCESS OF *exequatur*. TERRITORIAL SCOPE OF THE *exequatur*.

§ 463. The old forms of the requisition had, as we remarked, many advantages over the form by which the party raises an action for himself, which has been more and more adopted, and has been to a greater and greater extent naturalised by practice. This latter process, however, seems to be better suited to the forms of modern procedure. Our object, therefore, should be to put it in the shape in which the creditor shall be able to get his rights as quickly and as cheaply as possible.¹⁴¹

If then, as seems to follow from the principles we have laid down, all that the party asking for execution is required to do is, in substance, to prove the jurisdiction of the court (in cases of decrees in absence, to show that there has been adequate, and real, not fictitious citation),¹⁴² and to

¹⁴⁰ See *supra*, p. 977, note 106.

¹⁴¹ See Lammasch, p. 433.

¹⁴² That proof will be furnished by official documents, and accordingly is very simple.

produce the judgment which is to be executed in authentic form, verified, if need be, by a certificate from the foreign ambassador, it seems unnecessary¹⁴³ to allow an appeal from one court to another on the facts, upon which the jurisdiction of the foreign court is rested,¹⁴⁴ so simple are they in most cases. But, on the other hand, the question of the execution of foreign judgments is a question of great and of general importance for the security of international intercourse, and raises sometimes so profound and so difficult considerations of legal doctrine, *e.g.* when there is a question as to the admissibility of certain objections or as to the value to be set upon prohibitive or coercitive rules of law, that it does not seem proper to shut out review by the higher, or even by the Supreme Courts, or to circumscribe their powers of review more than is imperatively necessary. We must remember, too, that the establishment of uniform general principles, a thing which is in the highest degree desirable in the sphere of the execution of foreign judgments, can only be effected by the interposition of the Supreme Court.¹⁴⁵ Accordingly, the enquiry should in the first instance be conducted by one of the higher courts (in Germany the *Oberlandesgericht*), a course which is adopted in Italy.¹⁴⁶ The Supreme Court would then have simply to examine the rules of law laid down by this court, in its character as a court of cassation or of review.¹⁴⁷ Any danger of overloading the Supreme Court by cases of the kind might be avoided by requiring the amount involved in the suit to be so and so to warrant an appeal, or by imposing a fine in the event of the failure of the appeal, as is done in the French Court of Cassation.

Of course, a simple system of that kind will be unsuitable if the objections to the process of execution are allowed to be unduly extended, or if counter actions are permitted, as they are by the German *Civil-*

¹⁴³ Of course, the question of transmission of the party's rights, as well as the question whether the debt has or has not been discharged, may in certain circumstances raise special difficulties. In these cases parties might be referred to the court of first instance, if the pursuer should not at once have had recourse to it.

¹⁴⁴ The enquiry into the facts which regulate the question of international jurisdiction will present no difficulties, unless there is some impossibility of separating them from the *materialia causæ*. But in these cases the parties are completely instructed on the subject by the antecedent procedure in the court which gave the original judgment. One cannot, therefore, use in this case the argument which is generally cited in support of the maintenance of a complete course of appeal, viz. that it is only in the court below that the parties first become thoroughly acquainted with the facts on which the case depends. Again, in other cases, in which the proof is from some special reason more complicated, it is at all events well known what the point of the enquiry will be, since the object is simply to settle the question of jurisdiction.

¹⁴⁵ In Spain, where foreign judgments are executed on the condition of reciprocity, even although there is no treaty, the Supreme Court at Madrid in very simple procedure determines the question of *exequatur* directly.

¹⁴⁶ See Esperson (J. xi. p. 262) on the reasons which have induced Italy to take this course.

¹⁴⁷ I cannot assent to the view, that, if the judgment has been pronounced by a higher court, then a correspondingly high court shall deal with the *exequatur*. See Moreau, § 133. Weiss, pp. 869, 870.

processordn., or if the pursuer has the burden thrown upon him of showing that there is reciprocity practised or guaranteed by the other country concerned. If it is desired to have any such troublesome extensions of the enquiry, which are quite inadequate, because they are irrelevant, then, keeping in view the rules of procedure which must necessarily be adopted, it will be necessary to double the courts of review.¹⁴⁸

But, since the pursuer, if he fails to get a judgment of *exequatur*, will only be able to sue on his original grounds of action in a court of first instance, it will be desirable, in the prospect of such a contingency arising, to give the party who asks for an *exequatur* his choice between the court of first instance and the court of second instance. In cases where there can be no doubt suggested, he would at once apply to the superior court; if there was doubt, he would have recourse in the first place to the inferior court, and would eventually, if need be, combine with that application his action upon his original claim.

On the other hand, it is desirable that, when the application for an *exequatur* has once been granted, the decree should be one that can be executed all over the territory of the State.^{149 150}

If we look upon the motion for execution as an *actio judicati*, then this extension of the force of the *exequatur* is justified by the consideration that the judgment in the *actio judicati* is a judgment by the courts of this country, and as such must receive effect all over the territory belonging to this country. But we reach precisely the same result, if we hold the theory, which is less restricted, and in my opinion is more correct, according to which the procedure is simply intended to be the means of obtaining a decision of the point, whether, in the view which the State where execution is asked holds of international law, it should and will allow the foreign judgment to enjoy the compulsitors of law within its territory. Any other theory is a remnant of the old procedure, according to which the court, to which the requisition in the particular case was presented, had in each case to consider whether it should grant the prayer of the requisition. The court in which the action originally depended issued as many requisitions as there were jurisdictions within

¹⁴⁸ The German *Civilprocessordn.* § 660 (2), allows the ordinary principles of German law to determine the jurisdiction of the courts in so far as the subject matter or the value of the subject of the action is concerned. Accordingly, as a rule, the action will, in the case where the value is small, be raised before a single judge (*Amtsgericht*); where the value is large, or where it cannot be estimated in money, in the courts of first instance, where several judges sit together. The judgment that is to be executed, and not the original conclusions of the action, will determine what is the value of the cause. See Struckmann and Koch on § 660, note 4.

¹⁴⁹ It is so in England, in the United States, in France, and in the German Empire (*Gerichtsverfassungsgesetz*, § 161). See Francke, p. 15. Also Lammasch, p. 433.

¹⁵⁰ In the Italian Code, § 941, execution can only be done within the limits of the jurisdiction of the court giving the *exequatur*. A judgment of the court at Milan, of 29th Oct. 1877 (J. vi. p. 214), lays down that, if the person cannot at once point to assets in any particular jurisdiction, he may take decree *in foro domicilii*. That is so in Hungary (see Lammasch, p. 439). It seems to be so in Austria also. See v. Püttlingen, p. 475.

which measures for execution had to be taken. In addition to this, it was the case that, even in the case of requisitions by courts within the same territory, an investigation into the competency of the judge from whom they proceeded used to take place, and no such marked distinction was drawn between the judgments of the courts of this country and those of another, as in our times is seen to be obvious and necessary.

If, then, the decree of *exequatur* is to be operative all over the territory, it is desirable that the court of the domicile of the person against whom execution is to be done should be selected as the proper court in which to make the application, and that the court, within whose jurisdiction property available for execution exists, should not be competent, unless the defender has no domicile in the country. That is the effect of the German *Civilprozessordn.* § 666 (2). Moreau, too, thinks that the same rule should hold in France, and, as we know, in England and Scotland personal actions belong primarily to the jurisdiction of the court where the defender has his domicile, or at least some residence that is not a merely temporary residence. Further, in so far as the *res judicata* of a foreign country is to be respected as such, and all further enquiry in the matter is excluded, the *exequatur* is a matter for the consideration of the courts that have a general jurisdiction,¹⁵¹ and not for any of those courts that have a limited and special jurisdiction, *e.g.* courts of commerce or Admiralty courts. But even if some review on the merits is competent, it is desirable to refer the procedure to the courts of ordinary jurisdiction,¹⁵² for this reason, that these doubts and disputes as to jurisdiction, which will necessarily arise, if the particular kind of court, which is now invoked, does not exist in the foreign country, will be avoided. Logic hardly requires any other course, unless the case is to be treated anew from the beginning. But one would be much inclined even in that case to break through the strict rules of logic, and to hold that the ordinary courts have jurisdiction, in order that it may thus be possible, if the occasion should arise, to dispose of the application for an *exequatur* and of the merits of the original claim together, if the matter of the *exequatur* be one that is not referred to the Appeal Courts.

INCORRECT CONCEPTIONS. EXPENSES OF THE PROCESS.

§ 464. The theory, which in our opinion is the sound one, does not acknowledge that there is any separate and independent claim for the execution of the foreign judgment. The truth rather is that we find, in the judgment of *exequatur*, a declaration that the consequences of the

¹⁵¹ See Weiss, p. 969, to this effect; Daguin, p. 189. In the sound view of the German *Civilprozessordn.*, motions for *exequatur* can never come before the commercial courts. See Francke, p. 94; Struckmann and Koch, § 660, note 4.

¹⁵² Weiss (*ut cit.*) and Moreau (§ 132) hold that in this case commercial courts have jurisdiction in commercial questions. This is the logical view, but on considerations of expediency see Lammasch, p. 434.

judgment may be enforced by legal compulsitors within the territory. This view of the matter enables us to avoid an illogical conception of the effects of the judgment, which will result from the opposite view adopted in the German *Civilprozessordnung*. The conception entertained in that code is that it is merely the judgment of *exequatur*, following upon the judgment of the foreign court, that is admitted to execution, and that that foreign judgment is not itself allowed execution at all. Accurately considered, that involves a right to demand execution in the second degree, and is a logical contradiction, for the judgment of *exequatur* does not itself contain anything that can be enforced by compulsitor. It is quite true that the decree of *exequatur* must contain the clause of execution which is required in ordinary circumstances by the German *Civilprozessordnung*. That is so, because the process of diligence is worked out by officers who act upon their own responsibility, and must have some evidence that is at once available in their hands, which will show on simple inspection that there is no reason for delay in executing the judgment that has been pronounced, and that that judgment is not liable to be suspended by any form of legal process still available. But any such clause as that must in logic be referred to the foreign judgment, and not to the judgment pronounced in the country of execution, although it may no doubt be controlled by any limitations or modifications attached to the former by the latter.¹⁵³ And thus even a provisional sentence of execution, which may be awarded on account of some circumstances that have chanced to emerge before the court dealing with the *exequatur*,¹⁵⁴ must, accurately speaking, proceed upon the original foreign judgment.

Primarily, of course, what we have said is concerned simply with matter of form; but many mistaken conclusions are drawn from incorrect ideas on matters of form. Thus, for instance, some French decisions have proposed to throw upon the person who applies for the *exequatur* the whole expense of the procedure even although it is entirely successful, because the applicant desires to have a document, the foreign judgment, declared to be capable of execution. If we hold fast to the true theory, by which the process of *exequatur* is merely a continuation of the leading process, we are secured against any such fallacious conclusions. The ordinary rule must, of course, prevail, and one who sets himself to carry out this further procedure in a wrong way, or without good cause resists that procedure, must bear the expense. It would be wrong to relieve any one of expenses who has nothing to say against the *exequatur*, but, as a matter of fact, by

¹⁵³ *E.g.* if in the view of the court of the country of execution the court which gave judgment invaded by its judgment the territory in which execution was to be done, and decreed something that was unwarrantable.

¹⁵⁴ §§ 653, 654, of the German *Civilprozessordnung* no doubt require that, if execution is to take place, the decree in virtue of which it is to take place must be a final decree. The device adopted, to evade the difficulty, is that the decree of *exequatur*, and so indirectly the judgment on the merits, are declared to be provisionally capable of execution. But the German *Civilprozessordnung* would prevent even judgments that had been declared by a foreign court to be provisionally capable of execution, from being executed. See *supra*, p. 947.

his failure to pay compels his adversary to apply for an *exequatur* in another country. Our theory, too, unlike the theory which holds the foreign judgment to give in some vague way a foundation for an independent claim or action for execution, results in this, viz. that, when an *exequatur* is granted, the decree granting it has necessarily a retrospective effect in the State which grants it, and that the right thus clothed with an *exequatur* dates from the point of time at which the decree, or the law of the court that pronounced the decree, puts its origin.¹⁵⁵ No additions to the subject matter of the action, or modifications of it, are competent in the course of the process of *exequatur*.¹⁵⁶ If the claim in which the pursuer has succeeded is transformed into some new claim, from the fact that the object to recover which it was directed has passed into our territory, then a new action, to give effect to this new claim, must be raised in our country: the foreign decision may afford a prejudicial or an incidental point to the parties in this second action.

JURISDICTION OF THE STATE TO WHICH APPLICATION IS MADE FOR *exequatur*
TO ENTERTAIN SUCH AN APPLICATION EVEN WHERE FOREIGNERS ARE
CONCERNED. AUXILIARY JURISDICTION TO AFFIRM THE ORIGINAL
GROUND OF ACTION.

§ 465. The courts of the State in which an *exequatur* is desired, derive, however, under all circumstances their jurisdiction to entertain that application from the fact that what is desired is an order upon the officials of that country (see *supra*, § 436), and that irrespective of whether all the parties are foreigners or not. If the State refuses on some other ground to give its *exequatur* to a judgment which has been pronounced by a competent court, it must at least allow the original claim to be founded on in a new action, if the defender has assets within the territory on which diligence can be done.¹⁵⁷ The nature of the case justifies this peculiar jurisdiction: but for some such jurisdiction a refusal to give an auxiliary decree would involve an absolute denial of justice. Any State, which, in place of recognising the *res judicata*, would not even allow the original claim to be sued on with the object of attaching any assets situated within its own

¹⁵⁵ To the same effect Moreau, p. 133.

¹⁵⁶ See Moreau, *ut cit.* Thus, for instance, it is incompetent to give decree for expenses in the original process or for interest on those expenses.

¹⁵⁷ A judgment of the Ct. of Paris of 15th June 1861, to an opposite effect, has been subjected to the sharpest possible criticism in France. See Daguin, p. 96. Art. 9 of the Brazilian statute of 27th July 1878 (translated by Constant, p. 23) very properly provides: "*Lorsque le jugement aura été déclaré non exécutoire les pièces, documents et autres preuves qui lui auraient servi de base, pourraient être exhibés dans les actions qui seraient intentées dans l'empire pour le même objet et seraient reçues selon leur valeur d'après le droit.*"

In the German Empire the jurisdiction created by § 24 of the *Civilprozessordnung* applies, and in this case properly applies. It is: "In actions of a patrimonial nature against a person, who has no domicile in the empire, the court within whose territory property, or the article claimed in the action, is found to exist, has jurisdiction."

territory, would convert itself, to its own loss, into an asylum for the unprincipled debtors of all countries. To this extent at least a judgment pronounced by a court which, on the principles of international law, had jurisdiction, must give a title to sue all over the civilised globe.

FORM OF ENQUIRY IN APPLICATIONS FOR *exequatur*. (AVERMENTS OF THE
PURSUER AND DEFENCES FOR THE DEFENDER. OBJECTIONS.)
ENQUIRY *ex parte judicis*.

§ 466. By English law the foreign judgment is treated as *prima facie* valid and operative, and it falls upon the person, against whom execution is asked, to show the English court as a defence that the judgment is invalid or should not be respected. On the other hand, in a German court, the applicant is required to show that there is reciprocity, and logically therefore will be required to show that all the other conditions, necessary for an *exequatur*, are present. An intermediate course seems to be the sound one. Jurisdiction and, in the case of decrees in absence, citation, are substantially conditions indispensable to every *exequatur*. Accordingly, these the applicant must prove. The other points, however, to which attention may require to be given, constitute exceptions, and, according to ordinary legal rules, the burden of pleading and of proving them must lie on the party who appeals to them; that, for instance, would be the case with the objection that the judgment was based on gross injustice, in particular on fraud. There is no danger involved in this division of the burden of proof, provided that the court is free to weigh the evidence that is laid before it. If an application is made for execution of a judgment pronounced in some country in which there is good ground for saying that gross irregularities of procedure exist, it may perhaps with some probability be inferred that in the particular case in hand something of the kind has taken place, and some corroborative circumstances, combined with the general impression of the whole case, or even the terms of the judgment itself, may be sufficient to warrant us in pronouncing that this objection is well founded. We see, then, that if sufficient liberty of discretion is left to the court, there is no such danger as some people think, in recognising that execution may be allowed without any special treaty to that end, even as regards distant countries. On the other hand, a State treaty in which, from considerations of international courtesy, there is no mention made of the plea of gross injustice or of fraud, and where therefore these pleas are incompetent, is a much more dangerous matter. To refuse execution in that case is at the least an offence against the letter of the treaty, and will readily give rise to diplomatic questions. If the Government should venture to depart even slightly from the treaty, that may be regarded as a slight upon the other State. Accordingly, there is much to induce the Government to refrain from doing so on grounds which cannot be reconciled with the claims of justice. On the other hand,

the somewhat cheaply earned laurels of concluding a treaty for auxiliary executions of judgments, according to a fixed plan, may have a charm for the diplomatist. It is very likely that, in concluding the treaty, the judicial arrangements of the other State may be found to be all that can be desired. It is only after it has been concluded that it is discovered how much danger is involved in it.

The result of what has been said is that—at least where the court is unfettered in its discretion—there is not the least necessity for introducing any special rules of procedure to regulate the process of *exequatur*. It is not, *e.g.* necessary to impose any duty upon the judge or any one else of making an official enquiry to determine the presence of the necessary conditions for *exequatur*, or to exclude on principle the admissions of the parties with reference to these conditions. The question of the effect to be given to any concessions of the parties as to the jurisdiction of the court, must depend upon the extent to which the parties are free otherwise to deal as they please with the subject of the action. On the other hand, as regards the question whether a particular act may be enforced within the territory of the State in which execution is demanded, no declaration by the parties can avail, since the matter to be determined is a pure matter of law, and belongs to *jus publicum*. Even Moreau¹⁵⁸ (§§ 128, 129), although, as we have noticed, he is by no means inclined to concede much to foreign jurisdiction, distinctly declares in favour of giving the largest possible effect to an admission or a voluntary submission by the parties, and that even from the point of view of the French law, which requires, if there be no treaty in existence, a revision of the judgment on its merits by the French court. He very properly describes as erroneous the opinion that the rights of the sovereign power of France exclude parties from making any such arrangement. If that were so, we should require to hold that a payment could not validly be made on the strength of a foreign judgment, and that it would in all such cases be competent to reclaim the money.

It is remarkable that the commentators on the German *Civilprozessordnung*, holding fast to the letter of the statute, have come to the conclusion that, as regards all the conditions (1-5), expressed in § 661, there is a special duty upon the judge to take up the enquiry,¹⁵⁹ but what the special character of that enquiry is to be they do not make very clear. There are no real grounds for this interpretation springing from the necessity for protecting legal intercourse between different States; while I have not been able to discover that any such interpretation is obvious upon the words of the statute.¹⁶⁰

¹⁵⁸ He does not specially mention admissions made in the course of the process of execution: but they are *à fortiori* included.

¹⁵⁹ See a judgment of the Ct. of Turin, of 6th October 1870 (Rev. ix. p. 262), for the erroneous view, which holds that it is *pars judicis* to hold enquiry into the jurisdiction of the foreign court, because the question is one of public order. See, on the other hand, Gianzana, iii. § 113, "The plea of no jurisdiction is lost, if the defender appears and does not take it."

¹⁶⁰ It seems from Francke, p. 77; Struckmann and Koch, note 3 on § 661; Seuffert, note 2; v. Wilowski-Levy on § 661, that the inference is rested on the expression, that a judg-

ANY ENQUIRY INTO THE MERITS IRRECONCILABLE WITH THE RECOGNITION
AND EXECUTION OF THE JUDGMENT. SYSTEM OF REVISION ON THE
MERITS.

§ 467. We must regard it as incompatible with the recognition of *res judicata*, and with the execution of foreign judgments, that there should be any enquiry into what has already been decided in the judgment of the court in which the suit originally depended, whether it was so expressly decided, or merely by implication, some part of the pursuer's demand being refused by ignoring a point which must necessarily have been presented for consideration. A judge, who revises a judgment and adopts modifications of it according to circumstances, or who finds that on the merits it is ill founded, in reality is pronouncing a new judgment. The practical effect of such a revision on the merits will be that the judgment of the foreign court will be more often recognised than it will be under the principle, by which the parties have to discuss the whole matter anew. There is, too, this further difference between a revision and a completely new discussion of the subject, that, in the former case, as Moreau (§ 110) points out, the parties must confine their application to the limits of the conclusion of their original action,¹⁶¹ although it is within the power of the court to arrive at a different result in disposing of these conclusions. It must always, too, be the case, if the system of merely revising and then executing a foreign judgment is to be brought into play, that the court from which the judgment proceeded should be recognised as having jurisdiction according to international law. A judgment pronounced by a court having no jurisdiction would simply leave it open to follow out entirely anew the original claim: that does not necessarily imply that the new process should be before the courts of the country in which there happen to be assets open to diligence.

The system of revision, which may be described as that most commonly in use, is liable, besides, to be to some extent indefinite. At times parties may find it more for their interest to begin proceedings *de novo* rather than to proceed under these indefinite restrictions.

But, even although the foreign judgment may not be recognised as the basis for actual execution in another State, it may be regarded as *prima*

ment of *exequatur* is not to be pronounced, if, etc., etc. If, however, a statute were to say that a defender is not to have decree given against him, unless the pursuer proves his grounds of action, could it be inferred that this proof was not intended to fall under the ordinary rules of proof and of admissions in civil actions? The explanation of the whole of the somewhat absurd idea is that the legislator first proclaims the principle of the recognition of foreign judgments without examination as a great achievement, and then, with much anxiety, takes back part of his concession. There is no want of such instances in German law, especially where, as is often the case, you have some compromise between the factors on either side, some transaction of their differences. See e.g. the ideas expressed in § 11 of the preliminary part of the *Gerichtsverfassungsgesetz*, where the beginning of (2) is directly contradictory of (1).

¹⁶¹ This application of the principle of concession or admission is, however, sound.

facie proof of a legal fact,¹⁶² under this limitation, as I think, that the court in which it was pronounced had jurisdiction, or at least may *prima facie* be assumed to have had it. Thus, for instance, an arrestment in security may proceed on a foreign judgment, and a security may be allowed to be provisionally recorded, although it has been constituted by such a foreign decree. That is held to be the law in France, in spite of the incompetency of putting foreign judgments into execution there. Of course, a foreign judgment, which might be put into force under the law of the court which pronounced it, must be in that position, *i.e.* must be capable of execution, before an *exequatur* can be given.¹⁶³

AWARDS BY ARBITERS IN A FOREIGN COUNTRY.

§ 468. Awards by arbiters pronounced upon contracts of submission under the Roman law are simply contracts.¹⁶⁴ Parties who agree to such an arbitration, make a bargain that they will recognise the sentence of the appointed arbiter or arbiters. There is this further condition in the contract, that the award shall be pronounced by the individual named, or by the majority of the individuals named. We have nothing to do in this contract with direct execution: that is a matter for which application must be made to the competent court, while, on the other hand, the deliverance of the arbiters will always afford an *exceptio pacti*. But, supposing that some code of procedure gives direct execution to such a sentence under certain conditions, *e.g.* if all the necessary proof is furnished by documents publicly attested, we should still have to consider the question, whether a decree for execution could be pronounced upon a contract embodied in documents attested by the public authorities of some foreign country.

It would be altogether unscientific to put deliverances of this kind, which are based simply and solely on a contract between two parties on a level as regards international relations, with judgments by a judge.

We need not, therefore, discuss whether we should give or refuse recognition and execution to such deliverances under the conditions under which we should do the one or the other to judicial sentences.¹⁶⁵ It is, too, immaterial whether the deliverance has or has not obtained an executorial power in the foreign country: that will not make it a judicial decree, and the declarator in the foreign country that it may be put in force has no meaning within our territory.¹⁶⁶ But, if the law which is applicable to the

¹⁶² See Fiore (J. v. p. 241); Ct. of Turin, 20th March 1876 (J. vi. p. 86); Moreau, § 119; Clunet (J. ii. p. 305, and vi. p. 86). There seems to be some dispute in France as to the registration of securities. See Moreau, § 120.

¹⁶³ Dubois, Rev. viii. p. 494; Trib. Civ. Antwerp, 31st Oct. 1873; Trib. Civ. Lille, 4th June 1885 (J. xii. p. 560), and the French judgment reported there. Gerbaut, § 36.

¹⁶⁴ See Fœlix, ii. § 424.

¹⁶⁵ German Imp. Ct. (i.), 5th Nov. 1881; Dec. v. No. 114; Struckmann and Koch on § 868, note 1.

¹⁶⁶ So the decision cited in the immediately preceding note.

deliverance pronounces that it cannot itself be put into execution, but must be followed out by an action at law, as was the case in Roman law, then all that can be done with the award in another State is to sue upon it: execution cannot follow on it directly. The opposite view would give the award a meaning which it does not possess according to the law which governs it.¹⁶⁷ Accordingly, it is not quite accurate to say, as Francke says in general terms (p. 29), that foreign awards may be set on the same footing as awards in our own country.

But it is a different thing if the court in which an action is pending leaves certain questions, emerging in the course of the process, to be determined by arbiters,¹⁶⁸ or even perhaps refers the final decision to arbiters to whose award the parties must submit.¹⁶⁹ In such cases, the deliverance must rank in international matters as a judicial deliverance: for in international matters the only possible question is whether the authority of the deliverance rests upon the compulsitor of the State or on the free will of the parties. It is just as much a matter of indifference to foreign States as any other point in the internal constitution of the State can be, whether the State appoints permanent judges, or jurymen, or persons in the selection of whom the parties may have a voice, to pronounce decisions that are to be invested with its sovereign authority.

§ 469. Special difficulties may be raised by mongrel varieties of arbitration,¹⁷⁰ such as are created by the provisions of the German *Civilprozessordnung* (§§ 851-872). According to these enactments, on the one hand, judicial authority may step in to supplement the arbiter's powers, and, on the other hand, the arbiter is bound to observe certain rules of procedure, and if he shall transgress these rules, a special form of action is laid down for setting aside the decree-arbitral. In such cases, the circumstance that must decide is, whether as a matter of fact¹⁷¹ the foreign

¹⁶⁷ To this extent we agree with Wach, pp. 248, 249. There is no object in associating with the foreign *laudem* effects that are strange to it under the law in accordance with which it was pronounced. The nationality of the parties and of the umpire will, as a rule, be of no consequence: the parties will, as a rule, be desirous of submitting themselves to the law of the place in which the court of arbitration has its seat. But it may be otherwise, if, e.g. all the parties are of the same nationality. Wach speaks too generally on this point. [It is quite competent for a foreigner to act as an arbiter; he is truly a mandatary (*Albertoli v. Gonthier*, 15th March 1875; Ct. of Chambery, J. iii. p. 101).]

¹⁶⁸ This may happen in English actions of count and reckoning. See Schuster, p. 180.

¹⁶⁹ See §§ 51, 63, of the *Code de Commerce* on *arbitrage forcé* in disputes on trading company questions. These articles were, however, repealed by the French law of 17th July 1856.

¹⁷⁰ The important points of difference insisted on here are frequently overlooked. The German literature on this subject is permeated by this mistake. Even Francke (p. 28) and Wach (p. 248) forget that the arbitration procedure organised by the German *Civilprozessordnung* need not by any means be a private procedure. (See, too, the mistaken grounds of judgment assigned by the Sup. Ct. of Comm., 1st Sept. 1873 (Dec. x. p. 392), and a like error in a judgment of the Trib. Civ. Antwerp, 27th June 1873, reported by Dubois, Rev. viii. p. 490.)

¹⁷¹ The bare possibility of the interposition of the sovereign authority cannot be taken into account. Even in States where the common Roman law prevails, and where, therefore, the judicial authority has nothing to do with the nomination of the arbiters, and the arbiters are not tied down to any special rules of procedure, arbiters may of their own accord respect

judicial authority has been interposed: if it has, then all that has followed must be regarded as a consequence of that authoritative interposition of the sovereign authority.¹⁷² The decree-arbitral in such a case can no longer rank as a private contract, but must in reason be dealt with as if it were the sentence of a judge. Whether special provisions in a statute or in a treaty have the same effect on the decree is another question, to which no general answer can be given. As, however, it is not the *lex fori* that determines in a case of a private contract whether or not it can be challenged, but the law to which the contract is otherwise subject; so a decree-arbitral which has to be carried into a foreign country for execution must be subject, in all questions as to the possibility of challenging its validity, to the law of the country of the arbitration.¹⁷³ If by that law some particular formalities and methods are prescribed for setting it aside, *e.g.* if a particular court must be approached for that purpose, then these formalities and methods must be observed: they are part of the contract stipulations. Accordingly, so soon as the person against whom diligence is to be done pleads that the decree has no binding effect, the court to which application for execution has been made must await the decision of the court specially appointed to decide such questions, and must necessarily appoint a time within which the action of reduction must be raised, if, indeed, the court of arbitration has not appointed a time for itself. Again, as Lammasch (p. 441) points out, execution cannot be refused on the ground that the law of the place of execution would not permit the legal question in dispute to be referred to the determination of arbiters: it is not the law of the court of arbitration, but the law that regulates the substance of the legal question in dispute, that must determine that question.

such rules, and will often consider themselves bound in conscience to follow them. See Fiore *Eff.* § 214. He does not, indeed, formulate the principle with sufficient sharpness, but remarks that the decree-arbitral can no longer be treated as a private contract if one of the arbiters has been named by a public authority. See Fœlix, ii. § 425; Fusinato, p. 128.

¹⁷² If, however, the interposition of a foreign court is confined to a declaration that the decree is to be put into execution, the effect of that upon the treatment which is to be accorded to the decree-arbitral in another country is simply that that declaration will be taken as a satisfactory proof that execution can competently be asked on the strength of the decree-arbitral. Asser (p. 47) does not quite agree with us.

¹⁷³ Wach (p. 250) takes a different view, because a foreign decree-arbitral should have no greater force than a decree-arbitral of this country. There is a confusion of ideas here. The effect of the decree-arbitral is the execution that is done upon it, and that, of course, is subject exclusively to the law of the State where execution takes place. But when the decree is challenged, the question is as to the conditions on which the decree rests. If Wach were right, then the question, under what conditions a foreign judicial sentence may be challenged, would have to be determined by the law of this country. An example will show at once the error of Wach's theory. Under § 867 (4) and (5) of the German *Civilprozessordnung*, the decree-arbitral may be challenged if the party has not been heard as the law prescribes, or if the decree has no reasons appended to it. But an agreement of parties may bar these grounds of challenge. What is to be said, then, if the law of the foreign decree lays no such duties on the arbiter? Is the decree not to receive effect in this country?

Wach himself says (p. 249), "It is impossible to apply our law to the foreign *laudum*." And yet he proposes that § 867 shall apply.

In the same way as Wach, Ct. of Montpellier, 21st Sept. 1883 (J. xi. p. 70).

§ 470. If we adopt the principle that the execution of foreign judgments should not be made dependent on any capricious conditions, such as reciprocity, then it is obvious that all foreign decrees-arbitral must be put in force, to which the authority of the State has been interposed, in so far as the authority of the State was competently interposed, and the contract for arbitration was valid in itself.

If, on the other hand, the execution of foreign judgments is, as a matter of principle and in the absence of treaties, refused, then logic demands that we should also refuse to execute foreign decrees-arbitral. If we distrust foreign judicial authority generally, we cannot put any confidence in it when it mixes itself up with arbitration procedure. Execution can only be given if, as a matter of fact, the foreign decree has come into existence without any interference from public authorities.

If we have to adjust a treaty, then we may without any risk allow the decree pronounced within the State which takes part in that treaty to be executed. Voluntary submission by the parties must, in all matters which they are free to deal with as they please, give at least as good a guarantee as is to be found in a judicial sentence pronounced by a court in the proper exercise of its jurisdiction. As a rule, treaties make no mention of decrees-arbitral. They are, however, mentioned in the Austro-Servian treaty, as Lammasch (p. 440) points out, and with the good practical result of anticipating and disposing of some doubtful questions.

The question presents most difficulty when judicial sentences are only executed on condition of reciprocity: but, even in this case, we must allow decrees-arbitral to be put in force. The ground on which we support the extension of the treaty provisions to the case of decrees-arbitral is decisive in this case also.¹⁷⁴

EXECUTION OF JUDGMENTS PRONOUNCED IN MATTERS OF VOLUNTARY JURISDICTION.

§ 471. In any case, we shall be very safe in allowing execution to proceed upon foreign instruments connected with matters of voluntary jurisdiction. However little reliance we may place on the judgment of a foreign judge, we cannot assume that instruments issued in matters of voluntary jurisdiction by the courts of any civilised country are false or grossly misrepresent facts, especially as parties can generally seek out for themselves the tribunals most suitable for the case that has to be dealt

¹⁷⁴ Wach refuses to admit the analogy between judicial sentences and decrees-arbitral, because such sentences and decrees pronounced within this country are disposed of on different principles. I cannot accept this conclusion. Because two persons do not play the same part in a house, it does not by any means follow that they may not fairly claim equal treatment from persons outside.

On this subject, Wach reaches results very different from mine, because he does not advert to the distinction between the purely private arbitration and that on which the foreign judicial authority has operated.

with. Such false statements as that persons, who in truth did not appear at all, are represented as taking part in the transaction, are happily rare. Accordingly, all that we require is that the rules of the foreign law must allow immediate execution upon the instrument; while, on the other hand, the instrument must satisfy the conditions required by the law of the country in which execution is to be done. We need not insist on this latter point, if the procedure of the court ordains that there shall be a contentious procedure and a formal judgment, in order to make such instruments capable of being put into execution; in that case the foreign instrument is invested with all the force of an instrument belonging to this country.

Modern treaties concluded by the Kingdom of Italy have provided specially for the execution of notarial instruments or of the *atti autentici* of foreign States in general.¹⁷⁵ On the other hand, there is no mention of such instruments in the Franco-Swiss treaty (Curti, p. 154). Whether the omission to mention such instruments in a treaty which ensures the execution of foreign judgments implies that these instruments are not to receive execution, or, on the contrary, that they are to be regarded as not requiring separate mention in the treaty, cannot be absolutely decided. It will be necessary in each case to have regard to the previous practice of the States in question. In doubt, one would be inclined to adopt the latter and more reasonable alternative.

REVIEW OF THE PRINCIPLES ADOPTED IN A NUMBER OF LEADING STATES.

§ 472. Although the plan of this work does not as a rule admit of statistical comparisons of the systems of law prevailing in different countries, it will be useful, in view of the great diversity which we find in connection with the execution of foreign judgments, to give a sketch of the works from which one may gather what the attitude of different States and codes of law on this matter is.

(1.) Argentine Republic. See Daireaux (J. xiii. p. 417) and Palomeque (J. xiv. pp. 539-558). The principles of the statute of 1878 are: execution is given, with certain exceptions, which are perhaps not very clearly defined, *e.g.* decrees in absence, and in the case of obligations which are invalid by Argentine law.

(2.) Austria. Vesque v. Püttlingen, p. 473, Menger, i. p. 174. Execution on condition of reciprocity. Decree of the court, 18th May 1872 and 15th February 1805.

(3.) Belgium. Code of 25th March 1876. Humblet (J. iv. p. 339); also J. ix. p. 367, and Moreau, p. 195. Execution is only given where it is so provided by treaty; otherwise there is revision of the merits of the judgment.

(4.) Brazil. Code of Civil Procedure of 1878, art. 652, and statute of

¹⁷⁵ See Lammasch, pp. 441, 442.

27th July 1878. See Constant, p. 22; Moreau, p. 198. *Exequatur* is given on condition of reciprocity.

(5.) Bulgaria. *Exequatur* is given to a large extent, without enquiry into the merits of the judgment, in accordance with a resolution of the Supreme Court at Sofia. See article by the Bulgarian Minister of Justice (J. xiii. p. 570).

(6.) Denmark. See Goos (J. vii. p. 368). No special statutory regulation, but apparently recognition of foreign judgments, if the foreign court has jurisdiction.

(7.) Egypt. See Vidal Bey (J. xiv. p. 224). *Exequatur* on condition of reciprocity.

(8.) In France there is no execution without a review of the merits of the judgment, except where a treaty provides otherwise. The French treaties are printed by Durand, p. 462.

(9.) Germany. *Civilprocessordn.* *Exequatur* is given without review of the judgment on the merits, unless the courts of the foreign country in question do not show reciprocity. See Wach, i. pp. 239-246.

(10.) Great Britain. We have shown in detail in the course of the discussion what is required here. The result [so far as England and Ireland are concerned, and probably in Scotland also] is that execution is given without any enquiry into the merits (unless in exceptional cases a plea of fraud is urged against the judgment), and without reciprocity being required. This doctrine is established by decisions only, and accordingly is now and again made matter of dispute in some particulars. See Piggott, pp. 377-551, and *supra*, p. 902 note.

(11.) Greece. See Saripolos, J. vii. p. 173. The provisions of the Code of Procedure, unless it is otherwise provided by treaty, take a distinction between the case where one of the parties is a Greek, and where both are foreigners. In the former case, there is no execution without a review of the merits; in the latter case, execution is given without any such review, and without reciprocity being required.

(12.) Hungary. In accordance with the statute of 1881, execution is given on condition of reciprocity.

(13.) Italy. Execution according to art. 941 of the Code of Procedure, without reciprocity being required.

(14.) The Netherlands. No execution without enquiry into the merits of the judgment, except in question of salvage and average. Katz in *Rechtsgeleerd Mag.* i. p. 498; Hingst, Rev. xiv. p. 425; Constant, p. 28; Asser-Rivier, § 89, note 3; Code of Procedure of 1838, ii. 1, art. 431.

(15.) Peru. See Pradier-Fodéré, J. vi. p. 266; Constant, p. 30. No *exequatur*: foreign judgment is treated as evidence.

(16.) Portugal. Moreau, p. 218; Piggott, p. 489; Daguin, p. 337. The Code of Procedure of 1876 only requires review of the merits, if the judgment has gone against a Portuguese subject, and with reference to the question whether the rules of Portuguese law, in accordance with which the matter should have been decided, have been transgressed.

(17.) Roumania. Piggott, p. 495; Daguin, p. 323. *Exequatur* on condition of reciprocity.

(18.) Russia :—

(a.) Baltic Provinces. *Exequatur* on the principles of the German *Civil-processordn.* The question is not, however, altogether beyond doubt. See Engelmann, *Die Zwangsvollstreckung auswärtiger richterliches Urtheile in Russland*, Dorpat 1884, p. 47 (translated in J. xi. p. 113), and further sketches in Wach, i. p. 245, especially a deliverance of the Prussian Ministry of Justice in the *Justizministerialblatt* of 1883, p. 192, which differs from Engelmann's view.

(b.) In Finland, according to the Prussian official publication just cited, there is no *exequatur*.

(c.) For the rest of the Empire, the effect of the Code of Procedure of 1864 is doubtful. V. Martens (J. v. p. 139) asserts that there is *exequatur*, and adheres to this position (Völkerr. ii. p. 351) in spite of Engelmann's allegations to the contrary (*ut cit. sup.* and translated, in part at least, in J. xi. p. 113), and a more recent judgment of the Russian senate. But the negative view is probably the correct view (see Wach's exposition, p. 245). The same code of procedure has been recognised since 1876 in Russian Poland. (See, too, Flamm, J. xi. p. 494, and the judgment of the Court of Warsaw of 11th June 1884 there referred to; according to it, *exequatur* is refused unless there be a treaty.)

(19.) In Servia there are no rules of practice, and no statutes to regulate civil judgments pronounced in foreign courts. Servia has, however, concluded treaties on this subject with Italy and Austria. Paulowitsch, J. xi. p. 150.

(20.) Spain gives execution on condition of reciprocity, by her Code of Procedure of 1881, § 951. Silvela, J. viii. p. 20; Daguin, p. 317.

(21.) Sweden and Norway do not give execution (Olivecrona, J. vi. p. 83). Danish judgments, however, are executed in Sweden in conformity with a statute of 1861, resting on a treaty.

(22.) In Switzerland, judgments of the cantonal courts are executed everywhere under the necessary conditions. In many cantons foreign judgments are executed; in many others the French rules prevail; in other cantons, again, a political official decides whether execution shall be given. Roguin, J. x. p. 113; Daguin, p. 361.

(23.) In the United States, the principles of English law are in the main recognised. Wharton, §§ 646 *et seq.*

We may also refer to an interesting paper by Salem in J. xv. pp. 603-619, entitled "*De l'exécution des jugements en Turquie.*" Judgments which have been pronounced in the country to which the unsuccessful party belongs require no *exequatur* in Turkey. They may be executed at once, because the matter of execution is one that is in the hands of the consular court of the country to which the unsuccessful party belongs. A foreign judgment, which should give or refuse to give a party a right over landed estate in Turkey, would have absolutely no effect; and if it were necessary

to execute a foreign judgment by selling real property, the aid of the Turkish officials would to a certain extent need to be invoked, but they would not investigate the merits of the judgment pronounced in the petitory action. If the unsuccessful party does not belong to the State whose courts have pronounced the judgment in question, then the officials of the State to which he does belong must declare the judgment to be capable of execution; whether his consular court has jurisdiction to do so, is a question for the law of the country to which it belongs. Judgments against Turkish subjects will not receive an *exequatur*, and judgments in their favour will only do so if the other party belongs to the country, the courts of which have pronounced the judgment in question.

THE PLEA OF *Lis alibi pendens* WHERE THE OTHER ACTION IS IN A FOREIGN COUNTRY.

§ 473. The common law allows a defender to plead *lis alibi pendens* against a new demand in a different court upon the same grounds. It is debated whether and under what conditions that plea is available in the case of a process in a foreign court.¹ The answer, as Wach (p. 246) has recently put it, must depend upon the recognition which may be accorded to the foreign process; that, again, will be determined by the recognition that may be given to its judgment; or, to speak more exactly—since a recollection of the capricious provisions of the statute law of different States forces us to take a distinction between a recognition of the *res judicata* and the execution of the judgment—it will be determined according as execution is given or refused by our country.² In cases in which the pursuer cannot reach any substantial result after he has obtained judgment abroad, *i.e.* cannot put it in force, but will be required to bring a new action, or in cases in which he must be content with an arbitrary revision of the foreign judgment, he cannot in fairness be denied the right, in order to obtain speedy satisfaction, of raising his new action forthwith, since he cannot in any event escape a double trial of his claim. That the same matter should be under discussion simultaneously in two States, or possibly even in three, no doubt puts the defender in an

¹ Among older authors who are in favour of the recognition of the dependence of an action before a foreign court, see Martens, § 94; Klüber, § 59; Feuerbach, *Themis*, p. 318 (Draft of a State treaty, § 21); Felix, i. §§ 181, 182, pp. 366 *et seq.*, and the extract which he gives from a judgment of the French Ct. of Cassation.

² Menger (p. 166) goes too far in his recognition of the *lis alibi*. He thinks it makes no difference whether we execute foreign judgments in this country or not, since it is always possible that the defender may not challenge more than one judgment on the disputed point, and may obey one judgment without the necessity of diligence being done. This possibility gives the pursuer no security that there will be a voluntary performance of what he requires. The defender would require first to bind himself by some legal obligation to obey the first judgment, and no obligation would be of any value for the territory of our State, unless by some voluntary submission we had an assurance that execution might take place there. We thus come back again to what we have demanded as essential in the text.

unpleasant position; but this is the inevitable consequence of a wilful refusal to recognise or to execute foreign judgments.³ Here, as in many other instances, we see the injustice and inconvenience of this maxim to the subjects of the States which act so exclusively, or, as they call it, nationally. If we were to recognise the *exceptio litis pendentis* in cases where there was no execution of foreign judgments allowed, that would very easily result in a simple denial of justice to the pursuer. He would in all probability obtain no decree on which he could do execution until the debtor had had ample time to remove all his assets into another State, where the same game would have to be played all over again.

But it is a condition of the execution of foreign judgments that the foreign court should have jurisdiction, as that is understood in international law. Jurisdiction may be given by implied prorogation in cases in which the subject matter is one that is at the free disposal of the parties.⁴ The pursuer, therefore, may always, looking to that condition of affairs, be met by the *exceptio litis pendentis*, if he has raised action in a foreign court, and, the defender having failed to plead want of jurisdiction, the court has entered upon the *materialia causæ*. If, however, the defender takes a plea of no jurisdiction, and this is repelled by the foreign court, that would not be enough to give the defender the right to plead *lis alibi pendens* in our courts, since the foreign judgment or jurisdiction cannot in any way affect the jurisdiction of our courts. But the defender may acquire a title to plead *lis alibi*, if he recognises in a legal way the competency of the foreign court.

These propositions have been more and more recognised of late, even in the law of England and of the United States.⁵ It is, however, easily understood that, as the *exceptio litis pendentis* is in any case only admitted in England and the United States subject to the discretion of the judge, or the pursuer has this privilege only, that he may choose between the

³ Moreau (§ 115) to the same effect.

⁴ If, following the new German doctrine, we hold that the recognition and execution of foreign judgments can never take place where these judgments proceed upon a voluntary subjection of the parties, we see at once to what serious disadvantages this strange theory exposes German defenders as regards the *exceptio litis pendentis*. Even Moreau (§ 115) recognises the plea, although there may be no treaty, when the pursuer has himself invoked the foreign court. French Ct. of Cass. 14th February 1882 (J. ix. p. 530). Frenchmen, who have voluntarily raised action before a foreign court, are bound by the *contrat judiciaire*, and are barred from raising action in the French courts.

⁵ See Wharton, §§ 783 *et seq.* and *infra*, note, p. 1008. Piggott, p. 69. English practice has allowed the English suit to proceed on condition that the foreign process is abandoned. This it does on equitable grounds, if the continuation of the English process seems, with a view to execution, to be simpler than a continuation of the foreign process, which was first in the field, would be. This power, which no German judge has, is one that is recommended by the conveniences of international intercourse and commerce, if there are very serious formal difficulties to be encountered before execution can be obtained upon the foreign judgment. Westlake-Holtzendorff, §§ 319, 320, adheres too closely on this point to the older decisions, which refused to admit the *exceptio litis pendentis* in the case of a foreign process. Foote alone (p. 580) holds that it is right to force the pursuer to choose between the English and the foreign action.

court to which he has first appealed and the other, these same principles are applied in the case of a *lis* which is dependent in a foreign court.

The grounds on which the recognition of the plea of *lis alibi pendens* has been opposed in the case of a foreign action, within the limits we have indicated, are entirely unsatisfactory. It is perfectly true to say that while foreign judgments can be recognised and executed here, a foreign process cannot; and that even foreign judgments require for their execution a special declarator of *exequatur* which can only be obtained in our courts, and cannot be obtained at all until the process is decided and over. But the plea of *lis alibi pendens* is certainly not to be placed on the same footing as the execution of foreign judgments. We have nothing to do here with the direct compulsitors of the law: the object is, on grounds of fairness, to protect the defender against a multiplication of actions. Accordingly, the non-recognition of the *lis alibi pendens* has no sort of connection with the maintenance of the sovereign rights of the State: this is in the present connection merely a vague phrase. The maintenance of an exclusive jurisdiction in our own courts is the only thing that will justify a refusal to give effect to the plea of *lis alibi pendens*: in so far as the foreign court has a concurrent jurisdiction, the choice of the pursuer, and the precedence in time of the one or the other action, must decide the question just as in a question between two courts, both belonging to this country. This last consideration has an important bearing on a case in which a defender who is domiciled in this country could make the action an action in the courts of this country by raising it here as pursuer. Again, it is a mistake to reject the *exceptio litis pendentis*, because it is a plea which rests upon a delimitation of jurisdiction to be made by the court itself, while no such delimitation can affect the courts of a foreign country.⁶

It is peculiar that on these and similar grounds some French lawyers⁷ still obstinately refuse to recognise the plea, and that even in Italy there is still some hesitation on the point.⁸

Lastly, it would be the height of absurdity to make the recognition of *lis alibi pendens* dependent on reciprocity, *i.e.* dependent on the law of the State, in which the other process is going on, recognising the plea as we do. The first effect of this demand for reciprocity would be to damage our own subjects who were defenders in this country. Again, if we may assume that every rational code of procedure will protect in one way or

⁶ Gianzana, ii. § 276, takes this ground. But his theory lands him in a host of difficulties.

⁷ See *e.g.* Ct. of Paris, 25th July 1877 (J. v. p. 163), and the illustrations given there. Ct. of Paris, 9th Aug. 1881 (J. ix. p. 202); the same Ct. 15th Jan. 1883 (J. xi. p. 65). See Moreau, § 115, on this doctrine.

⁸ K. S. Zacharia (in Crone and Jaup's *Germania*, vol. ii. Giessen 1809, p. 244) refused to recognise a *lis* in a foreign court, because the invocation and the recognition of a foreign court are simply, until final judgment is given, one-sided and revocable acts that any one may do at his own pleasure. But it is impossible to find in the institution of the action an entirely different significance from what is implied in the concluding act of it.

another the defender against double pursuit on the same grounds, this protection, as the law of England shows, need not absolutely take the form of a recognition of the *exceptio litis pendentis*, and a consequent dismissal of the second action. The precise course to be taken is a matter that the law of each court must determine according to its own rules of procedure.⁹

We can, however, pay no heed to the plea that the question is awaiting decision in one of the courts of our country, if that plea is urged as a reason for refusing *exequatur* to a foreign judgment, if the foreign court has jurisdiction in a sense known to international law.¹⁰ The decision of a court that has such jurisdiction has effect all over the world, and therefore furnishes a basis for execution in every other country, except those which have declared themselves on principle against the recognition of any foreign judgments, and gives the party a right to resist the repetition or the continuation of the action in any other court.

NOTE ZZ ON § 473. *LIS ALIBI PENDENS*.

[The plea of *lis alibi pendens* is a plea recognised in England as a ground which may give a defender a good cause of complaint. But, the question being one of the balance of convenience, it by no means follows that the mere fact of the dependency of an action in the English court and in the foreign court about the same matter, will induce the English court to interfere so as to force the plaintiff to abandon one or the other. It must be shown that there is vexation actually caused to the defender, and that without necessity for it. The court will be "very cautious" before it interferes in such cases, for it cannot fully appreciate the object which the pursuer may have in view, and the advantages he may hope to gain by his double pursuit. One obvious advantage is that he may be able, by arrestment on the dependence of the foreign action, to secure a fund for payment of his claim in the event of ultimate success. Where the English court is familiar with the procedure of the competing court, *e.g.* where that competing court is a Scots or Irish court, affording remedies of the same kind as are available in England, and where execution on the English judgment can easily be done, then the double proceedings will be more readily interfered with. *M'Henry v. Lewis*, 1882, L. R. 22, Ch. Div. 397; *Peruvian Guano Co. v. Bockwoldt*, 1883, L. R. 23, Ch. Div. 225, and other cases cited by Westlake, § 338, pp. 357 *et seq.*

The course to be taken is the same whether the English or the foreign proceedings are prior in date. *Peruvian Guano Co. ut sup.* *Wedderburn v. Wedderburn*, 1840, 4 M. and Cr. 596.

The Scottish rule is stated by Lord Neaves in the case of *Cochrane v.*

⁹ See German Sup. Ct. of Comm. 30th March 1876 (Dec. xix. pp. 417, 418, and Seuffert, xxxii. § 180).

¹⁰ See Fusinato, p. 104, and the judgments of Italian courts cited by him.

Paul, 1857, Ct. of Sess. Reps. 2nd ser. xx. p. 178, thus: "There seems no incompetency in a creditor bringing several suits against his debtor in several countries for the same debt, if there is jurisdiction in all, though there is always an equitable power and duty of control in each tribunal to see that there is not on the whole an improper and oppressive accumulation of litigation or diligence." In the case of *Young v. Barclay*, 1846, Ct. of Sess. Reps. 2nd ser. viii. p. 774, where the pursuers of an action raised in the Scots courts for declarator that a person had had at his death a Canadian domicile, and that the pursuers were entitled to his succession, proceeded, upon this action being defended, to take steps in Canada for uplifting the estate there, the Scottish courts interdicted them from following out these proceedings in Canada during the dependence of the suit in Scotland: this interdict the court had power to enforce, all of the pursuers being domiciled in Scotland. Where an action has been commenced in a competent court, which can dispose of all the questions raised, and another action is subsequently raised in Scotland, the Scots courts will not sist procedure, but will dismiss the second action. (*Ferguson v. Buchanan*, 1890, Ct. of Sess. Reps. 4th ser. xviii. p. 119.) It does not, however, by any means follow that an action, even under these circumstances, would be dismissed if it were the best or the only available means of securing funds within the jurisdiction of the Scots Court, which might eventually be required to satisfy the pursuer's demands.

It may be interesting to notice shortly the plea of *forum non conveniens*, a plea well known in the practice of the Scots courts. The import of this plea is that, although jurisdiction exists in Scotland, the court should not exercise it if they are satisfied that some other court can more conveniently settle the points at issue, although no action may as yet have been taken in any other court. This plea has most frequently been sustained in cases belonging to two classes, says Inglis, J. C., in *Clements v. Macaulay*, 1866; Ct. of Sess. Reps. 3rd ser. iv. 592, 593)—viz. cases in which executors have been called to account, and in cases arising out of the terms of copartneries. The court has regard to the interest of the parties generally. In such cases there is *ex hypothesi* a concurrent jurisdiction in the two courts. If no good object can be served by keeping the Scots action in court, if, *e.g.* it is an action for accounting against trustees who are willing to account, and who can be called to account in the *forum* in which they assumed administration, then the result of sustaining the plea of *forum non conveniens* will be to dismiss the Scots action.

If, however, the Scots court should see a prospect that it may aid the action and supplement the powers of the foreign court, so that full justice may be done, it will, in place of dismissing the Scots action, sist procedure, and refrain from interposing, until some stage in the foreign process is reached at which it can resume consideration of the case *cum effectu* (see Lord Watson in *Orr Ewing's Trs.* 24th July 1885, Ct. of Sess. Reps. 4th ser. xiii. H. of L. p. 1). It would seem that the plea is equally applicable to "all cases of double jurisdiction in which the ends of justice seem to require

its exercise" (per L. J. C. Moncreiff in *Williamson v. N. E. Ry. Co.* 1884, Ct. of Sess. Reps. 4th ser. xi. p. 596). In that case, the Scots court refused to entertain an action for damages against an English Railway Company, although their jurisdiction to do so was not doubtful, because the event from which the claim sprung occurred in England, the witnesses were in England, and a plea involving considerations of the English law as to right of way was raised. "Although jurisdiction exists," if "it appears that it is not convenient nor fitting for the interests of the parties" to try the question in Scotland, then the Scots court will not exercise its jurisdiction.

It may be very difficult to reconcile this rule with the maxim "*judex tenetur impertiri judicium suum*," i.e. that a judge who has jurisdiction is bound to give justice to those who come to ask it. The solution of the difficulty is to be found in an application of the principle which the English courts take as their guide in considering the plea of *lis alibi pendens*: there must be a risk of injustice being done, or of hardship or inconvenience falling upon the defender out of proportion to the advantage which the pursuer promises to himself by having the action tried in Scotland rather than in another country. The reasons in the case of *Williamson* (*sup. cit.*) seem slight enough for declining jurisdiction. The doctrine has been stated to the foregoing effect in the recent case of *Sim v. Robinow*, March 17, 1892, 29 S.L.R. 585.]

APPENDIX.

INTERNATIONAL COURTS OF ARBITRATION WHEN EXECUTION IS REFUSED.

§ 474. It is possible that, though all the conditions necessary for an *exequatur* are present, the courts of a State may erroneously refuse to give it. We have had occasion to notice this particularly in cases in which the foundation for allowing *exequatur* was a treaty, a fact which confirms what we have said as to the worthlessness of the doctrine if it has to rest upon treaties and the express provisions of statutes.¹ What is to be done in such cases? It has been proposed to set up a court of arbitration composed of eminent jurists belonging to the countries concerned.² But the bare conception of such a court is met at once by difficulties that are almost insurmountable. It would be difficult to bring about an agreement as to an oversman skilled in the law of both countries, who should make an uneven number, and so determine the opinion of the majority. The only remedy we have to suggest is to be found in the better understanding of the subject, which will by degrees grow up, so far at least as we do not make the mistake of constantly calling in artificial and inappropriate expedients, or of setting up treaties upon false bases. In questions that concern the domestic municipal law of a country erroneous judgments are often pronounced, and must now and again be borne by the parties. Could we hope that it could be otherwise in the sphere of private international law?³

¹ See Martin, *Du traité conclu entre la France et la Suisse*, 15th Juin 1869, et de la nécessité de la réviser (J. vi. p. 117).

² So Martin *ut cit.*

³ See Lehr (J. vi. p. 534) on Martin's dissertations.

Twelfth Book.

LAW OF BANKRUPTCY

I. INTRODUCTION.

THE DIFFERENT THEORIES. UNIVERSAL OPERATION OF SEQUESTRATION ?

§ 475. Procedure in bankruptcy is a fruitful source of difficulties in international intercourse. It is set on foot with a kind of judicial deliverance, pronounced either on the application of a creditor or of a person who is overloaded with debt. This deliverance has, however, peculiar effects. It does not decide any legal dispute. Its effect rather is to place the debtor under a kind of curatory: it bars his debtors from obtaining a valid discharge by paying their debts to him. It prevents the creditors of the common debtor from following out such means of execution as may have hitherto been open to them. It compels all creditors, putting out of the question any who may be fortified by some real preference, to put forward all their claims in one court, with a view to satisfying all alike, on pain of exclusion if they fail to do so. These are very complicated effects, which we shall not be able to regulate and control in a satisfactory manner in international relations, by any body of rules framed either on the footing that an award of sequestration is a judgment, or that it is an act of voluntary jurisdiction dealing with the *status* of the debtor.¹ On the other hand, the questions of international bankruptcy are the very questions which in our time press most urgently for solution. It is perfectly clear that we shall often find ourselves in a state of hopeless bewilderment, if an insolvent person has substantial parcels of property in different countries, while the courts of the one country are quite regardless of what the courts of the other may have ordered in the various sequestration proceedings: while, on the other hand, the necessities of commercial credit seem likely to be best

¹ For a long time the controversy turned upon the insoluble question whether bankruptcy procedure was a *statutum personale* or a *statutum reale*. See Rocco, p. 354. Most recently Norsa (Rev. viii. p. 627) has sought his starting-point in the answer to this question. Of course, the "incapacity" of the bankrupt tends to the theory of a personal statute, the end and object of the procedure—the division of the property—to that of a real statute.

served if the whole substance belonging to one and the same person is subjected to one uniform treatment.

§ 476. More modern German legal philosophy, after Savigny,² has hardly given sufficient attention to the subject of the international treatment of bankruptcy. The only thorough discussions of the subject to be found in Germany are in the careful judgments of the old Supreme Court of Commerce for the Empire, and now in those of the Supreme Court of the Empire.³ English law on many of the leading points has reached fairly satisfactory results, less perhaps by a discussion of general principles, than by the exercise of practical good sense. The French theory, however, has shown the most praiseworthy endeavours to find from various points of view a real solution of the difficulties of the subject, although, as Daguin in particular has pointed out (p. 169), it has in the end fallen into the greatest confusion. Lastly, the most recent Italian doctrine, which has found adherents in France, rises above all these difficulties. Identifying what it thinks desirable with what actually is, it simply sets up as an axiom the universal validity of the sequestration which has been instituted at the domicile of the debtor, a result which Savigny (§ 374, Guthrie, p. 261) had already attempted to show must necessarily flow from the aid which the courts of one country give to those of another in international questions.⁴ Of course, there are many others who in despair rush for the only harbour of refuge they know, viz. the conclusion of treaties: they are driven to this by the belief, which we think very doubtful, that what lawyers cannot make clear, may be revealed to the penetration of diplomatists.

The first and most obvious consequence of sequestration being awarded, or bankruptcy being ascertained, is that the common debtor loses his power of dealing with his estate. He is for the future represented by the trustee

* ² In older German law the question of the *vis attractiva* of the sequestration, as regarded property of the bankrupt in a foreign country, was often discussed. But the older writers reached no certain or abiding results. Pufendorff, *Observat. juris univ.* i. obs. 217, pronounces in favour of the universal effect of a sequestration even as regards property in another country. He makes this exception, however, that secured creditors may remain in the *forum rei sitæ*, if the law of the court of the sequestration would be unfavourable to them. Strube, *Rechtliche Bedenken*, seems to assert that, as a general rule, there was a separate sequestration *in foro rei sitæ*. Dabelow, *Ausführliche Entwicklung der Lehre vom Concourse* (1801), p. 746, endeavours to combat the views of those who hold that there must be separate processes at the places where assets are to be found. He thus defends the doctrine of the universality of bankruptcy, but has to confess in the end, that it is impossible to carry out this theory in practice, even as among the different German States.

³ Thus in Fuchs's work (Leipzig 1877) we find a few very scanty remarks based upon the German Ordinance for Bankruptcy (*Concursordnung*). But even these are wanting in Schultze's *Das Deutsche Conkursrecht* (Berlin 1880), although an enquiry into the international recognition of any doctrine of law is not unimportant as part of an enquiry into the truth of a general juridical theory of that doctrine.

Again, the most recent and somewhat more detailed discussion by Endemann (*Das Deutsche Conkurs Verfahren*, p. 640) does not wander far from the literal interpretation of the German Ordinance.

⁴ This aid, however, is not given unconditionally, but only on express conditions. The question is whether these conditions are present, and this point Savigny does not examine.

(*curator, syndic, or güterverwalter*). French law draws from this fact the conclusion, that the proceeding is one which shows something as to the *status* of the bankrupt, and is therefore dependent on a *statut personnel*, and as such claims universal recognition, and that too without there being any necessity for a special declaration of *exequatur* being pronounced upon a foreign award of bankruptcy,⁵ since in judgments which simply modify the *status* of a person this latter requirement is waived. It seems that an *exequatur* by the French Government is not necessary unless the foreign award of sequestration is intended to have some further direct compulsitor, *e.g.* to bar any special actions by other creditors in the courts of France.

But it is incorrect to treat the effects of an award of sequestration on the same footing as an alteration of *status*, *e.g.* as an interdiction on the ground of prodigality. The bankrupt does not become incapable of acting for any effect, as a pupil is:⁶ he simply loses his power of dealing with the estate attached by the sequestration. Our first enquiry then must be whether the foreign property at once falls into the sequestration; this argument, then, when we look closely at it, moves in a circle. The fact, however, which makes this view entirely untenable is that, in the theory which is now universally adopted in France—in our opinion a correct theory—the personal law, which is decisive in questions of capacity to act, is the law of a man's nationality; whereas there can be no doubt, on the other hand, according to the Franco-Italian theory, that it is the court of the domicile that has jurisdiction to award sequestration, and that it is the law of the domicile that must regulate that sequestration. This contradiction cannot possibly be explained away on any theory of *statut personnel*. Besides, what are we to understand precisely by a decree of *exequatur* upon an award of sequestration? what are to be its conditions, what shape is it to take, and what are to be its effects? Are its effects confined to the parties immediately concerned in it, *e.g.* to persons who are asked by the trustee to make payment of some outstanding debt due to the bankrupt, or does it affect third parties also? It would be more in accordance with the universality of the original award that it should affect third parties, the public in general; any restriction upon its operation would in truth be a mutilation of it. But to give it the larger operation would require substantially a public proclamation, and nothing of that kind is suggested by the French authorities. Again, on what points is it to be lawful to raise a debate when application for execution is made? On

⁵ But yet French law is more and more averse, and in our view rightly so, to hold that a foreign award of sequestration bars an award in this country. Cf. Ct. Bordeaux, 25th March 1885: Ct. of Paris, 11th Nov. 1886 (*J.* xiii. pp. 710, 711), and Clunet, *ibid.* The universality of bankruptcy is therefore not recognised in its principal feature.

⁶ See Norsa, *Rev.* vi. p. 272; A. G. Cöln, 22nd July 1870 (*J.* iii. p. 460). Calvo, ii. § 907, says: "*L'état de failli est régi par le statut personnel quant aux actes dont le failli devient personnellement incapable: mais il est régi par le statut réel quant aux actes qui ne sont interdits au failli que par rapport à ses biens et dans l'intérêt de ses créanciers.*" I cannot reconcile the latter part of this sentence with the former. The theory developed by Calvo (p. 413, note 1) cannot by any means solve all difficulties: undoubtedly what is said there is sound.

jurisdiction only, or may other conditions of the foreign decree be questioned? To none of these questions does the French law give us a satisfactory answer: its procedure does not seem to be guided by any definite plan.

In close connection with the theory of the personal statute is, on the one hand, the theory which attributes a certain universal operation to the sequestration in respect that the trustee, or trustees, holds the position of a mandatary,⁷ and on the other the theory which traces the same result, *i.e.* the universality of the sequestration, to the notion that, in the award of sequestration, the creation of a juridical person, into whose hands the estate passes, is to be descried.⁸ But the powers of the trustee are not merely those of a mandatary: the effects of the sequestration go much deeper, both as regards the creditors and the debtors of the bankrupt. To do justice to the theory of mandate, it would frequently be necessary, if we were to go strictly to work, to make a distinction in practice between a voluntary declaration of insolvency and a compulsory sequestration. Again, the theory of a new juridical personality is not in harmony with actually existing law, and besides that does not advance us at all, for this reason, that the rights of juristic persons that come into existence in a foreign country are by no means treated on the same footing in all respects as those of juristic persons belonging to this country. The question would necessarily arise, whether a juristic person would not have to be created in this country for the estate which is situated here, to correspond with the foreign person in charge of the foreign property.

Just as little satisfaction is to be got from another theory, which seeks to set up an indefinite kind of universality for an award of sequestration by declaring that all that is affected by this award is to establish a fact, *viz.* the fact of insolvency, and points to this as the effect of sequestration in France.⁹ This theory proceeds just as if all positive systems of law were content with establishing this simple fact of insolvency, and then left it to the creditors, after they had been advised of this fact by the decree of the court, to secure themselves as best they might; just as if the truth were not that every actual system of law associates very definite and very far-reaching effects with an award of sequestration, these effects undoubtedly in some degree bearing the character of the most direct compulsitors.

Further, the argument based by Fiore (*Fall.* p. 48) on an appeal to the idea of *res judicata*, is deceptive. He thinks that the award of sequestration is to be respected all the world over as a *res judicata*, and, on general principles, will only require a decree of *exequatur* in another country in so far as it is intended to be followed by direct compulsitors there. That decree of *exequatur* will apparently—but this is not quite clear—be pro-

⁷ So Massé, ii. § 809.

⁸ So Brocher, *N. Tr.* § 72.

⁹ So according to Haus, *Dr. pr.* § 146, on the authority of Merlin, *Rép. Vo. Faillite*, ii. § 2, No. 11.

nounced without any special enquiry, except, perhaps, an enquiry into the jurisdiction of the court that originally made the award.

A decree awarding sequestration is, however, a very different thing from a true decree pronounced *in foro contentioso*. It confers no definite right on any one. It involves a general measure of security for all concerned, and in general sets up rules for a *quasi*-curatorial administration. This is enough to warrant the rejection of the analogy between it and an ordinary decree. But there is another reason. A *res judicata* cannot claim general recognition, unless it applies to some legal relation, which was either from the first subject to the legal authority of the State whose court pronounced the original judgment, or became so subject by the voluntary submission of parties to the jurisdiction of that court. Can we say that of an award of sequestration? In our view this question must be answered in the negative, unless we are to make use of the wildest fictions. The judge in bankruptcy draws into his own court the obligations of the bankrupt, contracted in the most distant countries, and ruled, it may be, on that account by the most diverse systems of law. That will be the case, in the view of Fiore and of all those who uphold the universal operation of the sequestration, even if all the conditions for jurisdiction, and even for execution, are to be found in some other country. But that is a step far in excess of the conditions of *res judicata* in other matters; and while, in other matters, the pursuer has the choice among any concurrent jurisdictions that may exist, in this case he is not allowed his choice, but the jurisdiction of the court of the bankruptcy of the domicile is made an exclusive jurisdiction in so far as the bankrupt estate is concerned.

The whole of this argument, upon the idea of *res judicata*,¹⁰ is like a transparent sheet of glass behind which we get sight of the real argument, that the universality of the sequestration is postulated simply because it is desirable.

This is in fact the simple argument advanced by Carle and by Dubois, his French translator and commentator¹¹ (p. 54).

§ 477. Now, of course, it is true that a body of creditors cannot all be dealt with alike, except by subjecting the whole body to the same law in so far as the division of the sum of the estate is concerned, and by refusing

¹⁰ It had already been hinted at by Savigny, as we have pointed out.

¹¹ The law of England has struck out a kind of *via media*. It respects theoretically the universal operation of a foreign bankruptcy in so far as moveables are concerned, by treating the sequestration as an universal assignment of the estate to the creditors, *i.e.* a kind of succession; it applies to the case the rule "*mobilia personam sequuntur*." But this theory is but ill carried out. Moveable succession is subject only to one law, that of the domicile, but under certain circumstances bankruptcy is awarded in England against persons who have no domicile there, and without caring whether a similar award has or has not been made simultaneously in another country. On the law of England, see Westlake-Holtzendorff, §§ 118 *et seq.* The law of the United States does not allow a foreign bankruptcy any effect even upon moveables beyond its own territory. Story, § 403; Wharton, § 390.

to allow the accidental circumstance of this or that asset of the estate being beyond the territorial limits of the State in which the court of the bankruptcy is situated, to make any difference. There is every reason for attributing to the law which has to consider the award of sequestration a tendency to give it as wide an operation as possible.

But is it then so simple a matter that other States should recognise this claim of "*universale judicium*," as Carle calls it, without requiring any guarantees? Is it so obvious that creditors who belong to this country, and have contracted here with the bankrupt, and who were entitled to expect fulfilment of that contract here, should be robbed by a decree pronounced in some distant country—upon what grounds no one can say, for there are many places in which the awarding of sequestrations is a profitable branch of the legal trade—of the jurisdiction which has been established in the courts of this country, and of the assets in this country available for execution, and be forced to go to a distance in an uncertain search for their rights? Besides, we have to remember that an award of bankruptcy affects the legal position of the debtors, and of persons who then for the first time make contracts with the bankrupt, in a most marked way. All systems of law pay attention to this fact, and make provision for it by prescribing public advertisements, and setting up certain presumptions as to the knowledge or the ignorance of parties of the existence of the bankruptcy. Is it possible to extend the operation of these rules to other countries, which the advertisements of the court of the sequestration perhaps do not reach, which at least we have no guarantee that they will reach, and where no single member of the public knows or is bound to know the law which will rule matters in the distant foreign court in which the bankruptcy is pending? Indeed, it may be that bankruptcy has a certain retrospective effect. Is this to be so, to the prejudice of creditors who have contracted with the bankrupt in a foreign land? Another result of the universality of the bankruptcy would be, that it would cover the distant trading or manufacturing establishments of the bankrupt. If it is not desired to make so serious an extension of its operation, on what ground can it be excluded? Lastly, creditors living at a distance may actually be seriously prejudiced. It is quite possible to set them on a level with native creditors in so far as the letter of the law is concerned, and at the same time *de facto* to shut them out, by paying no attention to the difficulties of intimation to them. It is also possible to deprive them of almost every opportunity of taking part in the administration of the bankrupt estate.¹²

To maintain the universal validity of the bankruptcy in the face of these considerations, it has been argued that, if you contract with a person who lives in another country, you must make up your mind that it is quite possible

¹² It is plain, then, that it is not quite sound to look upon the universal operation of bankruptcy as the "*sauvegarde du crédit par la protection de tous les créanciers*," as Glasson (J. viii. pp. 126, 127) does.

that it may turn out that this debtor will become bankrupt in that foreign country.¹³ But this is precisely a thing that cannot always be foreseen: your debtor may change his domicile, while the creditor may not always be in a position to raise his action before he has done so.

If it should be possible successfully to conclude practical international treaties, the future may belong to the recognition of the universality of bankruptcy.¹⁴ We cannot, however, by any means treat that universal operation of bankruptcy as a doctrine of law that is positively recognised;¹⁵ it is all the less possible to do so that on careful investigation we shall perhaps discover that the advantages that belong to a recognition of this universal operation of bankruptcy may approximately, or to a certain extent, be attained through the remedies that are already at the service of existing systems of law.

Let us then, with this object in view, attempt to settle the character of the sequestration process in its main features.

II. SYSTEMATIC EXPOSITION ACCORDING TO THE PRINCIPLES OF POSITIVE LAW.

A. THE PRINCIPLE: BANKRUPTCY A GENERAL EXECUTION OF DILIGENCE:¹⁶ AWARD OF SEQUESTRATION A GENERAL ARRESTMENT.

§ 478. Procedure in bankruptcy is simply a general execution of diligence against the whole estate of the bankrupt for the purpose of due ranking and payment of all creditors: this process is carried on where the law places the centre of the bankrupt estate—*i.e.* at the domicile of the bankrupt.

To this end, the whole estate is laid under a general arrestment in favour of the whole body of creditors, and by this means the bankrupt loses all power of alienation, although he retains his general legal capacity of acting¹⁷—so that, for instance, he is able to take up or to renounce a succession falling to him, which no one who had lost his capacity of

¹³ So Despagnet, § 626.

¹⁴ So Lyon-Caen et Renault, *Dr. c. ii.* § 3138.

¹⁵ See to this effect Bard, § 254, and Rivier (*Asser-Rivier*, § 123, note), who declares against Asser on this point. Asser maintains the universal validity of bankruptcy.

¹⁶ See German Sup. Ct. of Comm. 13th June 1871 (*Seuffert*, xxvi. No. 1); App. Ct. of Celle, 29th Feb. 1872 (*Seuffert*, xxvii. No. 1); Sup. Ct. at Stuttgart, 29th Nov. 1879 (*Seuffert*, xxxv. No. 90).

¹⁷ Neither does bankruptcy give the creditors an universal succession to the estate of the bankrupt, who does not lose his radical rights to the estate until it is realised and alienated by the trustee, just as any other debtor retains his right of property in articles given by him in security until they are sold. If the law of any country should set up the theory of a transfer of the property on the analogy of a succession, no effect would be given in any other country to this theory. See German Imp. Ct. (i.), 11th Dec. 1884. *Blum. Ann.* i. p. 298, No. 170. App. Ct. Cöln, 22nd July 1870 (*J. iii.* p. 460).

acting could do, although, of course, he cannot lay the bankrupt estate, which consists of his whole present property, under any obligations. The estate is sequestrated by a representative of the creditors (*curator bonorum*, syndic, trustee), who also represents the bankrupt, and, where it is necessary, is managed by him and realised with the assistance of the court, while all the creditors are called upon by public notice to give in their claims against the bankrupt.

But, since it is assumed that the estate is not sufficient to pay all its debts, any claim which may be made affects the interest of every creditor, and, therefore, any creditor who believes that his interest is endangered by the claim of another creditor, he is entitled to interpose in the suit of this creditor against the bankrupt, and to lay claim to the subject under sequestration, which may either be the whole estate or a part thereof, so as to operate his own payment either preferentially or *pari passu*. This right to interpose, in which the bankrupt has no interest, leads to special suits between individual creditors for preferable rankings.

B. CONCLUSIONS.

POWER OF THE BANKRUPT TO DEAL WITH FOREIGN PROPERTY. LEGAL POSITION OF THE TRUSTEE. COLLECTION OF FOREIGN PROPERTY BY THE TRUSTEE.

§ 479. The first result that flows from the nature of a general execution of diligence is that, without regard to the nationality of the debtor, it will take place where the centre of his dealings with his property lies, *i.e.* at his domicile. All actions whose conclusions can be expressed in money's worth—and with such actions only are we concerned in bankruptcy—may be brought there. This is a view which is not disputed by any one.¹⁸ Those, however, who refer the universal validity of bankruptcy to the fact of its being a *statut personnel* cannot make this assumption any more than those who reason from its being a *statut réel*.¹⁹

¹⁸ See Carle-Dubois, § 23; Fiore, *Fall.* p. 13; de Rossi, *Studi*, p. 184; Gerbaut, § 344; Bard, § 224; Asser-Rivier, § 224; Lammasch, p. 443. The jurisdiction of the *judex domicilii* is a matter that of course admits of no dispute in the laws of England, of Germany, and in that of the United States, which take domicile and not nationality as their principle in all matters of international law. An interesting judgment of the Sup. Ct. of Austria, reported in J. xv. p. 285, holds an application for sequestration in Austria to be inadmissible if the debtor, although an Austrian subject, is domiciled abroad.

By article 6 of the Franco-Swiss treaty of 1869, the place where a trading establishment is situated settles the question.

Since it is the *forum* for actions upon debt that has to be taken into consideration here, it follows that, where a distinction is taken between authorised and non-authorised domicile as it is in France, a non-authorised domicile is not enough. So Ct. of Paris, 23rd Nov. 1874 (J. ii. p. 434). The Trib. Comm. at Brussels, 7th Dec. 1885 (J. xiv. p. 360), has decided, and rightly decided, as we think, in certain circumstances, that a mere *résidence* is sufficient to give jurisdiction.

¹⁹ Of course, "*ordre public*," "*ordine pubblico*," is used to compel conviction here. See de Rossi, *Studi*, p. 186.

From the nature of arrestment, it follows that the withdrawal of the power of disposal from the bankrupt does not extend to property belonging to him which is situated abroad,²⁰ and, therefore, that he is in a position to grant perfectly valid conveyances of property so situated, so long as it is not withdrawn from him by a special decree of arrestment on the part of the foreign judge, and that whether the property is real or moveable property.

Goods, however, which are despatched after an award of bankruptcy by the bankrupt to a foreign country, do not really become the property of the receiver.²¹ That is not because the incapacity of the bankrupt follows him to that extent into the foreign country,²² but because articles which have been attached in this country by the general arrestment implied in bankruptcy, pledged, that is, to the creditors, cannot simply shake themselves free from that real burden, by passing the frontier. (See *supra*, pp. 497, 498.) If, again, the bankrupt is a juristic person (*e.g.* a limited company), any alterations which, according to the *lex domicilii*, are effected by the award of bankruptcy upon the way in which that juristic person is represented in law, must *ipso facto* be recognised abroad.²³ For alterations, which the *lex domicilii* introduces into the constitution of a juristic person, are effectual beyond the territory. The question is not, as it is in the case of physical persons, what legal consequences are to be attributed to a *factum* which is independent of law altogether: we are here considering an organisation, which is necessarily attached to some particular local centre. Again, the bankrupt does not necessarily, as a result of an award of bankruptcy in another country, lose his capacity of suing. At the same time, the trustee named by the court of the bankruptcy may appear, if the foreign bankrupt can competently be sued in this country, as a party in that process, the trustee's interest being that nothing shall be withdrawn from the estate by means of diligence following on that process: and he may as representative of the bankrupt conduct that process to its conclusion. A remarkable judgment of the German Imperial Court proceeds on these views of the law (iii. 28th Mar. 1882. Dec. vi. No. 125, pp. 401 *et seq.*, particularly pp. 407, 408).

It must, however, be conceded that it is an object which the law under which the general execution is awarded must necessarily have in view,

²⁰ Mevius, *in Jus. Lub.* iii. tit. 1, arts. 10 and 56; Pufendorf, *Observ.* i. obs. 127; J. Voet, *Comment.* xx. 4, § 12; Massé, No. 324; Merlin, *Répert. Faillite*, sect. 2, § 2, art. 10; Judgment of the Faculty of Law at Göttingen in Böhmer, *Rechtsfälle*, i. No. 82, p. 648, note 17; Gand, No. 628; Judgment of the Supreme Court of Appeal at Lübeck, 19th Jan. 1824 (Seuffert, v. p. 439); Supreme Court of Appeal at Cassel, 1st March 1834 (Striethorst, iv. 1, p. 186); Supreme Court at Berlin, 16th July 1857 (Striethorst, xxvi. p. 131). Norsa, *Rev.* viii. p. 639, relying on a judgment of the App. Ct. of Turin, 3rd April 1870.

²¹ So Ct. of Milan, 14th Aug. 1868, an extract of which is given by Norsa, *Rev.* vi. p. 273.

²² So Norsa, *ut. cit.*

²³ See German Imp. Ct. (i.), 21st Jan. 1885, and 28th Sept. 1885 (Dec. xiv. No. 116, p. 417, and xvi. No. 78, p. 338).

that the operation of this execution shall be as broad as possible. The theory of the universality of bankruptcy, viewed as a tendency in this direction, has a direct practical value. Accordingly, the trustee in the sequestration must, by virtue of his appointment, and without the necessity of any special *exequatur*, as a consequence of the award of bankruptcy in a foreign country, be held to have a title to have arrestments laid on the property which he finds in the foreign country,²⁴ ²⁵ for the benefit of all the creditors who are concerned in the sequestration, and to collect generally all the debts due to the estate, except in so far as a separate process of bankruptcy has been instituted or an arrestment laid on from some other quarter.²⁶ It is because the administration by a foreign trustee is merely an exercise of the right of arrestment, belonging to the foreign bankruptcy, that actions against foreign trustees, by means of which it is sought to enforce some personal obligation undertaken by the bankrupt, must be thrown out.²⁷ It would be impossible to allow such actions to interfere with the preferential right which the creditors who take part in the foreign sequestration have acquired in virtue of the arrestment implied in it; and thus the pursuers of such actions would take nothing by them, as they desire to do, until the whole body of creditors who have taken part in the foreign sequestration have been satisfied.

Indeed, unless the execution of arrestments laid on by a foreign court is forbidden by some general rule, such as for instance we find that the German *Civilprozessordnung* erroneously enacts, the trustee may obtain a decree of *exequatur* upon the general arrestment, imposed by virtue of the foreign award of bankruptcy, wherever property belonging to the bankrupt happens to be.²⁸ This will not, of course, be carried out in the form of a general public notice. Such a method would imply a direct recognition of the extra-territorial operation of the bankruptcy, and would necessitate the framing of rules as to the form of such notices, which could only be done by positive legislation: any existing rules of the court regulating similar

²⁴ Even English law recognises the right of a foreign trustee to administer the moveables that happen to be in England. Westlake-Holtzendorff, § 125 (p. 155). We must also hold that any asset of property vindicated for the estate by the administrator of it, is at once subject to this right of arrestment or security. If not, we should make it impossible for a foreign bankrupt estate to carry on business in this country. The judgment of the German Imp. Ct. (iii.), 13th Jan. 1885 (Dec. xiv. No. 117), is to this effect, although substantially based on the words of the 207th section of the Bankruptcy Ordinance.

²⁵ The right of the trustee to take up a succession for the bankrupt, and so to make it part of the trust-estate, must be determined by the law of the court of the bankruptcy, not of the court which in other respects deals with the succession. See German Ct. of Comm. 23rd Oct. 1874 (Dec. xiv. p. 344).

²⁶ See Ct. of Brussels, 13th May 1879 (J. viii. p. 79); Ct. of Liège, 24th May 1879 (J. viii. p. 80).

²⁷ So, too, English practice. See Westlake-Holtzendorff, § 127.

²⁸ The practical difference [between recognising his title to apply for arrestment and granting such an *exequatur*] may not be great, and if the forms for obtaining an *exequatur* involve much delay, it may be found advisable to make an independent application for arrestment. The fact of bankruptcy is sufficient proof that there is risk of loss.

notices could in themselves only be applicable to bankruptcies within the territory. If, however, the bankruptcy was awarded on the motion of the insolvent himself, or without any opposition on his part, then it might well be held that the trustee, as agent for the bankrupt, was entitled to deal with any assets of property that were in the possession of the bankrupt, or to raise and prosecute an action against a debtor of the bankrupt.²⁹ Still more certain is it that the *persona standi in judicio* of the foreign trustee must be recognised, if he is asked to surrender some asset of property which he has reduced into possession, or if an arrestment which has been laid on by him is disputed. Although the foreign bankruptcy by no means renders the bankrupt incapable of raising or prosecuting, without the co-operation of the trustee, a suit in our courts, and although it does not interrupt any such process (as, by § 218 of the German Ordinance, an award of bankruptcy in Germany interrupts a German action), still we must allow the foreign trustee, in virtue of his appointment, to sist himself as a party to any such action,³⁰ since he represents the interests of the creditors who are concerned in the foreign bankruptcy, and the issue of any action, although conducted by the bankrupt in a foreign country, has an effect upon the dividend that will in the end be available for them.

OPPOSITION TO THE WITHDRAWAL OF PROPERTY IN THIS COUNTRY WITH A VIEW TO PLACE IT UNDER A FOREIGN BANKRUPTCY PROCESS.

§ 480. If we do not proceed upon the theory of the universality of bankruptcy, which is open to dispute as a matter of positive law, unless there be some express provision in its favour in any legal system that may be in question, it is a point of the highest interest to consider, whether and under what conditions creditors, and in particular creditors belonging to this country, are entitled to resist the withdrawal of property belonging to a foreign bankrupt from this country to be placed under a foreign administration in bankruptcy.

The answer to this question must simply be to this effect, that they are entitled to do so in so far as the law of this country secures them a juris-

²⁹ It is generally held in France that foreign trustees may, in virtue of that appointment, sue in name of a foreign bankrupt. Gerbaut, § 20; Dubois, J. i. p. 452. Ct. of Paris, 28th Feb. 1881 (Liquidation of a foreign company, J. viii. p. 263). As Clunet (J. x. p. 161) remarks, in reference to a judgment of the Ct. of Toulouse of 16th April 1883, French law is always tending more and more in that direction. In Belgium, too, it seems to be a constant rule that it is not necessary to obtain an *exequatur* on the foreign award to entitle the trustee to sue in Belgium. See Trib. Comm. Mons. 14th Feb. 1874 (J. ii. p. 447); Trib. Comm. Brussels, 1st Dec. 1873 (J. i. p. 137); Trib. Civ. Arlon (J. v. p. 516); Court of Liège, 24th May 1878 (J. viii. p. 80); Humblet (J. x. p. 471); see also Gianzana (iii. § 211), in support of our view.

³⁰ See German Sup. Ct. of Comm. 28th Feb. 1871 (Dec. ii. p. 68). I cannot join in the doubts raised by the Sachs (Rev. vi. p. 258) as to the soundness of this decision.

diction in which to sue out their claims in this country, but no further.^{31 32} In that case they have in the nature of things a right to vindicate that jurisdiction by applying for arrestment of the funds in this country, and against that arrestment any application for arrestment subsequently made by the foreign trustee would be ineffectual.

If, then, the *forum obligationis* is reduced to its proper limits (see *supra*, § 424), and if the computation and division of the dividends among personal creditors is not in a legal sense allowed to be at all disturbed by real rights being advanced in a *forum* distinct from that in which the bankruptcy depends, it is plain that the operation of a sequestration which has been awarded *in foro domicilii* cannot be effected by prosecution of any special execution or diligence, or arrestment of particular articles in a foreign country, save to a very limited extent. In many cases, and in the most important aspects, the result will be to give an universal operation to the sequestration, without the necessity of any special rule of law to that effect. This explains how in older practice the evils, which, as it seems, must spring from the want of a special rule of law establishing the universality of a bankruptcy, were not so much felt, and how, on the other hand, these evils have come prominently to the front in very recent times. For it is to these very recent times that we owe the enormous extension of the *forum contractus* over matters of international law, which we have already noticed, and also the discovery of these arbitrary kinds of jurisdiction, with as many arms as a polypus, such as we find in art. 14 of the Code Civil, and § 24 of the German *Civilprozessordnung* (see *supra*, § 419, note), [which gives jurisdiction to the German Courts

³¹ On the other hand, the view which was at one time maintained, and in the Hannoverian *Proceßordnung* of 1850, § 605, sanctioned by law, was that in all cases in which a sequestration had been set on foot in a foreign country, a separate process should be started in this country to deal with the property that was situated here (see Schmidt, *Zeitschr. für Deutschen civilprocess.* vol. vi. p. 1). If, for instance, there was only a single creditor in this country, it would be absurd to set on foot a separate process; again, if in ordinary circumstances a process of bankruptcy cannot be set on foot by the court without a motion being made to that effect, neither should a separate process be so started in the case we have put. The German Ordinance in bankruptcy, § 208, very properly will only allow a second formal process of bankruptcy in Germany in cases where there is some aggregate of property, *e.g.* a manufactory or trading house within the empire; but in other cases it contents itself with sanctioning (§ 207) execution of the decrees of the foreign court of bankruptcy. From this it follows, as a matter of course, that an action in the German Empire is competent, as that may be the initial step towards execution, provided always that there is some court within the empire with jurisdiction to entertain the action. The omission to mention the competency of raising action is explained by the force which is attributed to the *vis attractiva* of the bankruptcy. Even a German bankruptcy does not prevent actions being raised in a court other than that of the bankruptcy, although it does prevent execution being done on any of the property belonging to the bankrupt estate.

³² French courts have in many cases refused to allow a French creditor to oppose an *exequatur* of a foreign sequestration, if he has taken part in the foreign sequestration, particularly if he has received dividends in it. Ct. of Rennes, 19th February 1879 (J. vii. p. 476); Trib. Seine, 28th July 1881 (J. ix. p. 200); in this latter case an agreement concluded in the foreign country had, at least by implication, been ratified by the representative of the creditor.

in respect of the existence of any property of the defender within the territory, irrespective of its value.] These throw the greatest difficulties—how could it be otherwise?—in the way of a satisfactory settlement of the question. Claims of jurisdiction of such a character, dictated simply by national exclusiveness, set a judicial warfare on foot in the domain of the law of bankruptcy as well as elsewhere.

POSSIBILITY OF A PLURALITY OF BANKRUPTCIES. SEVERAL BUSINESS CENTRES, OR TRADING ESTABLISHMENTS. SHARES IN PUBLIC TRADING COMPANIES. PLURALITY OF DOMICILES.

§ 481. The consideration that those creditors only whose claims can competently be dealt with by the courts of this country have a right to say that the estate in this country shall not be made forthcoming in the foreign bankruptcy, leads naturally to the solution of the further question, viz. whether there should not be several bankruptcies, where a man has trading establishments in several countries, or has a share involving personal liabilities in several trading companies. The question must be answered in the affirmative.³³ The creditors, who have given credit to a particular trading establishment, in their view may fairly demand that this, with all its appurtenances, should be primarily available for their satisfaction. It would be unjust to send these persons, who might well expect that all their claims should be worked out in connection with this business in this country, away to a court that may be a long way off. If we reflect that in many cases one and the same person has interests in trading establishments, or firms, in different countries very far removed from each other, the only practical course will be seen to be, in such cases, that separate bankruptcies should be set on foot. Doubts, too, might easily arise in such cases, if there was any attempt to transfer the whole procedure to the *forum domicilii*, as to where in truth the domicile of the person was, and it might, as a matter of business, be quite immaterial where it was, as, for instance, if a man on account of health lives with his family in some place other than that in which he carries on his trade.

From what has been said, it follows that a process of bankruptcy against a public trading company must be set on foot at the place where the company has its seat, and not at the domicile of the individual partners.³⁴ We do not need in order to produce this result, so obviously called for by

³³ Norsa, Rev. viii. pp. 633, 634; Ct. of Paris, 17th July 1877 (J. v. p. 271), 2nd August 1883 (J. xi. p. 63). This is in accordance with Swiss practice. See on that subject Feigenwinter (p. 65); he combats the practice from the point of the universality of bankruptcy. One should, however, notice the express provision of the German Ordinance, § 198; according to it, in the case of bankruptcy an independent sequestration is issued in connection with every public trading company, even although there are none but persons living in Germany concerned in it.

³⁴ See the report of the Commission of the Italian Congress. *Atti del Congresso*, p. 21, note 1.

practical necessities, to make the assumption, which in itself is untenable, that a public copartnery is a juristic person.

Now, since the bankruptcy must be set on foot at the place where the creditors were entitled to expect that their claims upon the bankrupt estate would be satisfied, it follows also that the bankruptcy has nothing to do with the nationality of the bankrupt, that the place where it is to be set on foot must be the bankrupt's domicile,³⁵ and that it is the actual domicile, the domicile which is accepted as the foundation of the ordinary *forum domicilii*, that must be taken, and that we should not insist upon the domicile being an "authorised" domicile, if, as is the case in France, a distinction is taken between "authorised" and "unauthorised" domicile.³⁶ This is the universal opinion, and, as regards this latter distinction, it is at least the ruling opinion. Indeed, since the point of interest here is not so much the voluntary subjection of the party to any particular system of law, as the actual security of the creditors, we may hold a long-continued residence a sufficient foundation for jurisdiction: provided that this residence is of such a character as to wear to other persons the appearance of a centre of business life.³⁷ Wharton (§ 794) goes so far as to say that "there can be as many bankruptcies as there are countries in which a man does business." If, however, we attempt to treat the operation of bankruptcy in connection with the doctrine of general incapacity to act, the results we shall reach will be, as we have already noticed, quite different.

If it shall happen that any one has more than one domicile, it follows from what has been said that there may be a bankruptcy at each of them; priority will not, as Feigenwinter thinks (p. 59), decide where it is to be.³⁸

³⁵ For Belgium, see Humblet (J. vii. p. 87). A judgment of the Ct. of Neufchateau reported by Dubois, Rev. vi. p. 280, recognises the competency of the court of a foreign domicile to declare a Belgian subject bankrupt. Glasson, J. viii. p. 126; de Rossi, *Esecuzione*, p. 138; Carle Dubois, § 23; Fiore, *Full.* p. 15. In the common law of Germany, as in the laws of England and of the United States, no doubt on this point can possibly exist, as in these systems all questions of private law are regulated by domicile, and not by nationality. The grounds on which domicile is supported by modern French and Italian writers, viz. that the question here is one of "*ordre public*" or of police matters "*loi de police*," seem to be too vague. Domicile is undoubtedly regulative in the law of Austria. See Starr, *Rechtshülfe*, p. 73; Vesque v. Püttlingen, p. 485; Supreme Ct. of Austria, 11th Jan. 1887 (J. xv. p. 285). As regards England, see Foote, p. 302.

³⁶ Ct. of Paris, 23rd Nov. 1874 (J. ii. p. 434).

³⁷ See Trib. Comm. Brussels, 7th Dec. 1885 (J. xiv. p. 360). By the English Bankruptcy Act of 1883 (46 and 47 Vic. c. 52), § 6(d), a creditor is entitled to present a bankruptcy petition in England, if "the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a place of business in England." [In Scotland, sequestration may be awarded when the debtor has within a year resided, or had a dwelling-house or place of business, in Scotland; or in the case of a company, if it has within a year carried on business in Scotland, or had a place of business there; or in the case of an unincorporated company, if any partner has resided or had a dwelling-house in Scotland.]

³⁸ Feigenwinter, no doubt, argues in the first place from the expressions used in the Concordat which is recognised in a great number of Swiss cantons. But his reasons seem to go deeper.

If it were so, this mischievous result would follow, that the most importunate creditors would obtain this practical advantage, that the whole process of bankruptcy would be carried through in their neighbourhood, and it might very well happen that we should thus start a premature race for bankruptcy, to the great prejudice of all concerned. At the same time, too, we should have to make all the more careful enquiry as to the true seat of the domicile, since from the answer given to this question would flow quite other consequences, than if a plurality of bankruptcies were sanctioned for the different business centres of the same person situated in different countries.³⁹ It is plain that, if there were such an exclusive and universal court, there would be a larger crop of divergent decisions from the courts of the different countries concerned on the question of domicile. For these serious consequences would dispose each court to stand up for its own jurisdiction. Instead of the unity and universality hoped for, we should have all the more insoluble conflicts.

On the other hand, however, just because our subject is to set up a *forum* where business is really carried on, we cannot allow any fiction to come in place of a true domicile or business centre.⁴⁰ International law, therefore, will not allow a bankruptcy process, in the case of a limited company, to be set on foot at the place where that company is as a matter of form constituted; it will take the place where the real centre of its business lay. The nominal seat of the company has no importance as a matter of international law.⁴¹ Thus, again, the "*élection de domicile*" for any particular business, as it is termed, cannot give the jurisdiction which is required in this case.⁴²

RELATIONS OF THE COURTS *inter se* WHERE THERE IS A PLURALITY OF BANKRUPTCIES. POSITION OF THE CREDITORS. SPECIAL AGREEMENTS.

§ 482. If we were in a position to dispute the jurisdiction of any foreign court, which had the conduct of a bankruptcy, we should, of course, not comply with any requisition which it might make,⁴³ and in the same

³⁹ This latter view is the view generally taken in France, Belgium, and Italy. See Trib. Seine, 11th March 1880 (J. vii. p. 135); Ct. of Ghent, 21st Sep. 1876 (J. iii. p. 305); Giansana, ii. § 240, and the judgments of Italian courts cited by him. See, too, *supra*, § 47.

⁴⁰ The view that a business centre of any kind is enough to warrant a special bankruptcy procedure in the German Empire lies at the bottom of the German Ordinance in bankruptcy.

⁴¹ Feigenwinter, p. 36.

⁴² It may, on the other hand, be right in conformity with the English statute of 1883, to lay down that the jurisdiction of the court in which a person has once had a domicile shall not cease at once upon that domicile being changed. The creditors must have time to advance their claims in that *forum*, if any property of their debtor remains in the State. The English statute provides that the jurisdiction to which we have already referred shall last for a year after the English domicile is given up.

⁴³ See §§ 6, 16, 17, of the Franco-Swiss treaty of 1869.

way the trustee named by an incompetent court will not be recognised in any other State as having a title to take legal proceedings.⁴⁴ Here, then, the question, whether the bankruptcy has been set on foot at the domicile of the person, or in the place where his trading establishment has its seat, is not without importance. The trustee appointed at the place where a trading establishment has its seat, to take charge of the bankruptcy there, can only recover in another State assets that are undoubtedly connected with that establishment: the rest of the assets must be left for the bankruptcy which has been set on foot likewise at the bankrupt's domicile.

But it by no means follows that there must be several bankruptcies in relation to the same person, because there may be. The attitude of the creditors who are interested will really settle whether there are to be. If the creditors who have a right of action, *i.e.* who have a *forum* for their claims, in some other country than that of the domicile, do not apply for a special bankruptcy, then the trustee appointed in the domicile can ingather any assets which he finds in that other country to enlarge the general estate. And even if a special procedure had been set on foot, there is nothing to prevent the creditors, who are concerned in it, from making, by means of a voluntary agreement, the estate forthcoming, as part of the general mass. It may be that it will be for the interest of such creditors to renounce their rights to a special process and special execution, if they hope by taking part in the general process which is pending *in foro domicilii*, to get more than they would get in a separate process. For of course it is impossible, and would offend all equitable principles, that a creditor should take part in several processes of bankruptcy against the same debtor simultaneously, to the same effect as if each of his appearances in these respective processes were his only appearance. The English practice follows a safe and sound course in refusing to allow any one to take part in an English bankruptcy, unless he throws into the estate in England anything which he may have got in a foreign process. We might indeed go a step further.⁴⁵ The creditor should not only throw in whatever dividend he has got, but should make up any sum which he has lost to the estate, *e.g.* lost to it by the comparatively severe expenses which he has caused by setting a separate bankruptcy on foot for himself alone.

Lastly, no creditors should be allowed to appear in any such special bankruptcy except those who can show that there is a jurisdiction in the courts of the country in which it depends to deal with their claims. Of course, nothing will justify us in putting foreign creditors at a disadvantage, and to do so would properly be described as a measure that would injure

⁴⁴ This deduction is properly made in a judgment of the Ct. of Orleans, 27th March 1885 (J. xii. p. 178); Clunet (*ibid.* p. 179) does indeed question the soundness of the decision. But although it is quite conceivable that the trustee in this country may be remiss in gathering in the assets, that is in my opinion no sufficient reason on which to base a different doctrine.

⁴⁵ Piggott, p. 86; Foote (J. xi. p. 231); Westlake, Rev. vi. p. 398. Of course, an exception will be made of anything realised by the sale of foreign real property.

the credit of the country that did it.⁴⁶ But a special process of bankruptcy is simply a kind of arrestment with a process of distribution attached to it. In place of applying for a special bankruptcy, creditors who have claims that establish a *forum* in that country may join in obtaining arrestments, and thus secure for themselves a prior opportunity of execution. But if a creditor cannot show that he has any special *forum* in this country, then, as in other cases, he must have recourse to the general *forum* of the domicile.⁴⁷

The priority thus given to claims which have their origin in this country, in any special process which may be set on foot here, is not in reality unfair. We say, no doubt, that the idea of bankruptcy requires that the whole property of the bankrupt should be impledged to the whole body of creditors in common. But if a man has a kind of business centre in country A, is it not quite reasonable that creditors, who gave credit with reference to that business, should rely upon the security of the property that actually is in the country? Or must they first make sure that their debtor, whose property here seemed to afford them abundant security, has not, it may be in some very distant country, a multitude of other creditors, whose participation in his bankruptcy here will swallow up that security? Many creditors, on whom the law of this country, on grounds of humanity, confers a right of preference, without any real right over particular assets,⁴⁸ would be most cruelly disappointed, if, in following out some abstract theory of the universality of bankruptcy, we should unconditionally transfer the whole assets to the foreign court, by whose law no such right of preference is given. Thus we reach this proposition: the application by the trustee of a foreign bankruptcy for delivery of the assets in this country, or for arrestment of them, must be refused if the foreign bankrupt has a business centre in this country, whether by way of a manufacturing or trading establishment, or by the ownership of landed estate or of a dwelling-house. In addition, every creditor who has a right to invoke the jurisdiction of one of the courts of this country, is entitled, either to anticipate the application by a foreign trustee for arrestment of the bankrupt's property, by obtaining from the court arrestments on his

⁴⁶ On the equality of native and foreign creditors in bankruptcy, see Bayer, *Theorie des concursprocesses nach gemeinem recht*, § 21. Decision of the English Ct. of Chancery, *Kannreuther v. Geiselbrecht*, 1884, L. R. 28, Ch. D. 175 (J. xiv. p. 212). The German Ordinance, § 4 (1) provides, "Foreign creditors stand on the same footing as native creditors." But (2) reserves a right of reprisals against subjects of a foreign State and their legal representatives. But no such reprisals can be put in force except upon an ordinance of the Imperial Chancellor, with the concurrence of the Federal Council (*Bundesrath*).

⁴⁷ In England, there has been much debate on the question whether an English creditor can be directly compelled to throw into the English estate what he has got in a foreign process. See Piggott, p. 332; Foote, J. xi. p. 231. If, however, we look not so much at the nationality of the creditors, as at the circumstances whether the claim arose abroad, and was intended to be satisfied abroad, we cannot help recognising some connection between the doctrine represented in the text and the tendency of the English law.

⁴⁸ See, e.g. the German Ordinance, § 54 (1) and (4), as to the preferential rights of servants, doctors, and druggists.

own account, or, within a certain time after arrestments have been used by the foreign trustee, to come into court to get rid of them.⁴⁹ This latter course he can only take if there is positive law permitting him to do so, a law which is recommended with the view of protecting creditors who belong to this country.⁵⁰

MOVEABLE AND IMMOVEABLE PROPERTY. FORMALITIES OF REALISATION.
OPERATION OF THE MODERN JURISDICTIONS IN RESPECT OF PROPERTY
WHICH HAVE BEEN CAPRICIOUSLY SET UP, OR AT LEAST EXTENDED.
OBLIGATION TO MAKE THE SURPLUS OF ANY SPECIAL PROCESS FORTH-
COMING.

§ 483. No distinction should be made between moveable and immoveable property in bankruptcy. Moveable property within the territory is just as much and just as little subject to the sovereign authority of that territory as real property is; and any such distinction is, in a practical view, discouraged by the large value which the moveable property, *e.g.* the fittings and implements on a farm, or the contents of a warehouse, may possess.

The formalities of realisation, however (*subhastation*), in the case of real property, are of course regulated by the law of the place where it is, that law being in this respect a coercitive law, and specially adapted to protect the interests of the creditors who hold real securities. It is possible that similar provisions may have to be considered in the case of the sale of moveables by auction. So far as possible, however, the rules of the court in which the bankruptcy depends, with regard to realisation, should be observed.

On the other hand, the sound view is that the regulations which we have deduced as logical and legal inferences are impossible, if the arbitrary polypus-like jurisdictions which every modern system of legislation has introduced as seemed good to it, without regard to principle, are to remain in force. One of these, which creates special confusion in bankruptcy procedure, is § 24 of the German *Civilprozessordnung*.⁵¹ If every creditor, without exception, can sue in any country in which he can find

⁴⁹ The old Prussian Bankrupt Ordinance contained a provision of that kind (§ 294). It was dropped because it seemed to be inconsistent with the principle of agreements between trustee and creditors. But this latter principle cannot claim absolute validity in the case of a separate bankruptcy process.

⁵⁰ A creditor belongs to this country, if the courts of this country have jurisdiction to deal with his claim.

In Austria (see Püttlingen, p. 486), the property of a foreign bankrupt which happens to be in Austria will be surrendered to the foreign bankruptcy. On the other hand, they proceed on the principle that, as regards real property, the bankruptcy belongs to the courts of the State in which that property lies. (See Ordinance, 1868, § 61.)

⁵¹ The German Imperial Court (iii.), 28th March 1882 (Dec. vi. No. 125, p. 405), has held that this jurisdiction exists even in the case of a bankruptcy process being set on foot in a foreign country.

any assets belonging to his debtor, it becomes impossible to divide the creditors into classes as we have recommended. Every creditor may appear in any place he pleases, and we are lost in a general chaos. Creditors, who had any sort of preference, would, by applying for satisfaction of their whole claim in this or in that place at their own good pleasure, in substance control the division of the assets situated in another country as they pleased, or as it might surreptitiously be made worth their while to do. Is it not the case that, if all creditors were allowed in this way to plead in different places, the best possible opportunity would be afforded for such an evasion of the law? What a much more simple shape things would take, if, in any special processes of bankruptcy that may be set on foot, only those creditors who are by the very nature of their claim assigned to that jurisdiction should be settled with there, while every creditor should at the same time have a right to resort to the proper *forum domicilii*, only on condition, however, that he should contribute to the estate which is being administered at the *forum domicilii* anything which he may have received elsewhere.

Of course, any surplus that may result in a special bankruptcy procedure, must be made over to the leading process if the trustees there ask for it.⁵² On the other hand, the bankrupt must be allowed to oppose this, just as he must be heard against the award of bankruptcy and every order in the process. The court will deal with these other matters of opposition according to its own law. As regards the transference of the surplus, all it will do will be to enquire into the jurisdiction of the foreign court of bankruptcy.⁵³ For the debtor is unconditionally subject to the *forum domicilii* in all patrimonial actions, all actions which eventually come to a money payment, and these are the actions with which one has to deal in bankruptcy matters.

RIGHTS OF SECURED CREDITORS AND OF PERSONS ENTITLED TO RETAIN, ON THE ONE HAND. RIGHTS OF THE TRUSTEE OVER PROPERTY BELONGING TO THIRD PARTIES.

§ 484. All secured creditors have a right to resist the things which they hold in security being made forthcoming in the bankruptcy.⁵⁴ Their

⁵² See the old Prussian Ordinance, § 294. This provision is wanting in the present German Ordinance.

⁵³ French jurisprudence makes a serious mistake in allowing itself a right of reviewing the merits of the case (cf. Despagne, § 635); this it does on the footing that it has here to deal with an ordinary foreign judicial decree. How can a court in country A profitably and rightly determine on the merits whether a court of country B has rightly awarded bankruptcy, *i.e.* of course, rightly according to the law of B?

⁵⁴ This is so, beyond all doubt, according to §§ 39, 40, of the German Bankrupt Ordinance: for these sections give secured creditors, even if their security is moveable, a right of instituting a separate process as against a process started in Germany. The *lex rei sitæ* must of course say to what extent rights of retention are equivalent to securities. The rule *mobilia personam*

rights, in competition with the arrestment of bankruptcy, which gives no more than a security right, are prior, and so preferable. They are entitled to ask that the *judex rei sitæ* (or, if their security consists in some claim of debt belonging to the bankrupt, the *judex domicilii* of that debtor) should decide their case, and should satisfy their claims out of the objects held in security, if need be, after a process of division. Any other court might refuse, in settling the ranking of creditors, to apply the *lex rei sitæ*, which they are entitled to have applied, and might decide according to its own law, whereby the rights of these creditors might suffer in consequence of their surrender of the subjects in question. After secured creditors have been cited in some convenient and public manner, and have been satisfied, the foreign trustee and the foreign creditors being entitled to come in and debate questions as to the liquidity of their claims and their rights to preferences, the surplus must be given up to the foreign bankruptcy court under the conditions which we have already mentioned.

On the other hand, we may find in some systems provisions by which, in the interest of public credit, assets of property may, under certain conditions, be made part of the bankrupt estate, although they do not belong to the bankrupt, but have been entrusted to him to assist him in his trade or manufacture. This is the "reputed ownership" of English law: see on it the English Bankruptcy Statute of 1883, § 44 (3). The primary point for consideration here is the rule of the *lex rei sitæ*: in truth, the matter we are dealing with is a peculiar extension of the general right of security or arrestment over things which are the property of another. Such an extension of the bankruptcy over the property of another person can, however, only take place if, in addition, the law of the bankruptcy process itself, the *lex fori*, allows it.

PREFERENCES AND EVIDENCE TO SUPPORT CLAIMS IN BANKRUPTCY.

§ 485. The law of the court of the sequestration will determine all questions of preference.⁵⁵ A right of preference is a right over the sum of the bankrupt estate as such, and is therefore subject to the law which holds that estate together, *i.e.* to the law of the court of the sequestration. In so far, however, as the ranking depends on the existence of any security right and its effect in questions with other competing securities,

sequuntur is not to be recognised to the effect of holding moveables which are not actually in the bankrupt's possession to be subject to the law of the bankrupt's domicile (see Laurent, vii. § 467). See Heuser (Ann. ii. pp. 534-554) as to the old practice in Hesse. The ordinance of 25th April 1826 introduced some alterations in this practice to the advantage of Hessian subjects.

⁵⁵ Judgment of the Supreme Court of Appeal at Dresden, 28th October 1859 (Seuffert, xiii. p. 321), and at Rostock, 19th October 1846 (Seuffert, xi. p. 3). Haus, *Dr. Pr.* § 130. See, too, Carle-Dubois, p. 64; Despagnet, § 641; German Imp. Ct. (i.) 11th Dec. 1884 (Dec. xiv. No. 115).

the law of the court of the sequestration must allow the ranking to be settled by the rules of preference which obtain in the law of pledge. This is the *lex rei sitæ* in the case of immoveable property and such moveables as are permanently intended to remain in some particular place, or which the debtor has not in his possession (goods delivered in pledge or property laid under arrestment), and the *lex domicilii* of the debtor in the case of all other moveable.⁵⁶ It may happen that it will be necessary to test the existence of the security rights by one law, but their relative ranking by another (see *supra*, p. 533). Ranking means simply the determination of the relation of one security right to another: that relation will always be regulated by the law of the place in which the thing last was, the law of the possessor's last domicile.

The proof of all claims must of course be taken in accordance with the law of the court of bankruptcy,⁵⁷ or with the *lex fori* of the special *forum*, in the case in which the claim is to be disposed of by a special *forum*. The general rules for regulating the application of foreign law, which are recognised in the court thus investigating the claims, will say whether and to what extent foreign law is to be used in the investigation, particularly as regards the forms of evidence required or admissible. The obligation of the bankrupt to pay interest is regulated by the law, which would regulate the question of interest in other circumstances. If, however, the law of the court of bankruptcy restricts claims for interest in any way, this restriction must receive effect,⁵⁸ although in other respects they must be regulated by some other law. On the other hand, however, any exclusion of a claim on the ground that it comes too late can have no effect, except in so far as the court which enacts it and the estate administered or collected by this court are concerned.

RIGHT TO RECLAIM GOODS THAT HAVE BEEN SENT AWAY; STOPPAGE *in transitu*. ARTICLES THAT CONTINUE TO BELONG TO THE BANKRUPT.

§ 486. Modern systems of law give a man, who has despatched goods

⁵⁶ In accord with this, Rodenburg, ii. p. 1, c. 5, § 16; J. Voet, in *Dig.* xx. 4, § 38; Ant. Matthæus, *de Auction*, i. c. 21, No. 35; Ricci, *Entwurf*, pp. 552, 560; Bouhier, chap. 32, No. 9; Boullenois, i. p. 553; Danz, *Privatr.* i. § 53, p. 179; Burge, iii. pp. 770, 771; Fœlix, ii. §§ 537, 538; Story, § 423a. An exception is, of course, admitted, if delivery of the subject can be refused by reason of some opposing right, or because there is another process of bankruptcy depending. Laurent, vii. § 404; Trib. Civ. Bordeaux (J. xi. p. 190). On this point, see German Imp. Ct. (iii.) 20th Oct. 1882 (Dec. viii. No. 28, p. 114), and judgment of the Swiss Federal Court of 1st Sep. 1877 (J. v. p. 66) as to the right of a creditor, who is in possession of a pledge, to have it dealt with on a separate footing. See, too, Brocher (*ibid.* p. 67), App. Ct. of Darmstadt, 1855 (Seuffert, xxii. No. 205).

⁵⁷ Cf. Fiore, p. 71. He discusses, in connection with this, the sound but quite independent doctrine that claims falling in to the bankruptcy estate, *e.g.* claims of succession by the bankrupt, are not appropriate to the court of bankruptcy. App. Ct. of Lübeck, 15th April 1867 (Seuffert, xxii. No. 113), is in agreement with the text.

⁵⁸ See German Ordinance, § 56: "In the bankruptcy process, no claim can be made for interest which has accrued since the outset of the process."

to a bankrupt, right, under certain conditions, to claim them for himself.⁵⁹ This is stoppage *in transitu*, or *droit de suite*.⁶⁰ This right exists absolutely and unconditionally, in so far as the law of the court of the bankruptcy sanctions it, for the rights of the general creditors can never be extended beyond what that law appoints. But it exists also in conformity with the law of the consignor's domicile, so long as the goods have not reached the territory of the court of the bankruptcy. For he may appeal to that law as the complement and the interpreter of his contractual intention, so long as that intention has not to give way to some unconditional command of the *lex rei sitæ*. The law of any intermediate stations can never affect the matter: it is not the object of these laws to protect either bankruptcies or consignors in another country.⁶¹

On the other hand, in considering the question what assets of the bankrupt's property are not liable to be taken by the creditors, the law of the bankruptcy, as well as the law of the place where these assets are, interposes for behoof of the bankrupt whichever of the two is the more favourable to him. On the one hand, the law of the bankruptcy can never drag any assets into its clutches, if it is forbidden to do so by its own *lex fori* on grounds of humanity; and, on the other hand, bankruptcy, as a general execution of diligence, is subject to the law of the place in which immediate execution has to be done.⁶²

CHALLENGE OF ACTS ALREADY DONE. (*Actio Pauliana*.) RETROSPECTIVE EFFECT OF BANKRUPTCY.

§ 487. Systems of law give, sometimes to creditors who have suffered prejudice—*i.e.* who have not been paid in full—sometimes to the trustee the

⁵⁹ A right to claim any particular article from the bankruptcy can, so far as moveables are concerned, never be exercised beyond what the law of the court of bankruptcy permits. This is a result of the doctrine that the right of the general creditors, as a right of arrestment or security, defeats even any real right that may have been founded in another territory, if the former is, according to the law of the place in which the article last was, the stronger (see *supra*, p. 499). It is besides in accordance with the requirements of credit, especially as regards the wife's right to claim certain property, in cases in which the bankrupt has changed his domicile. Muheim, p. 224, thinks differently. On the other hand, the wife has only a claim to the articles that she has brought to her husband, if that claim is sanctioned also by the law, on which the law of the married persons is in other respects dependent. A simple right of preference in a wife is a thing that must be determined exclusively by the law of the court of the bankruptcy, without regard to the law of the spouses' property which is ruled by some earlier personal law. App. Ct. Darmstadt, 9th November 1885. (Seuffert, xli. No. 322.)

⁶⁰ See *Code de comm.* § 576. German Bankruptcy Ordinance, § 36.

⁶¹ The question is much debated. The practice of England and of the United States seems to have regard exclusively to the law of the consignor (Wharton, § 535); according to Dubois, note 160, and Despagnet, p. 618, the law of the court of the bankruptcy must alone decide. A decision of the Sup. Ct. of Comm. 7th June 1872 (Dec. ii. p. 299, and J. i. p. 231) gave a consignor in Hamburg this privilege according to the law of Hamburg, but also gave it to a foreign consignor in accordance with the law of Hamburg, so long as the goods were in the territory of Hamburg, even although they were bound for some third place.

⁶² See on this point judgment of the Sup. Ct. of Stuttgart, 29th November 1879. (Seuffert, xxxv. No. 90, p. 134.)

right of challenging acts done by the bankrupt, or, it may be, diligence that has been done against him,⁶³ and thus of compelling one who has got something from the bankrupt to restore it to the estate. The general security of commerce is the object of these enactments, and hence we find that this right of challenge, like the Roman *actio Pauliana*, is generally used against persons who knew, at the time at which they got the advantage in question, that the person, who afterwards became bankrupt, was already overloaded with debt, and who knew therefore that the payment or performance in question was done to the prejudice of the equal division of the estate in bankruptcy, which was then in sight. Accordingly, the right of challenge is, as a rule, exercised when, in other words, it can be said that there has been some unfair dealing *in fraudem creditorum*. German law draws from this circumstance the inference, that this is a case of obligation *ex delicto*, and thus they have applied to it, in its international relations, the rules which are generally applied to obligations *ex delicto*.⁶⁴

We cannot say that such a construction of the matter as this, where the essence of the thing is left out of account altogether, and the course of argument seems to be "*delus*, ah then *delict*!" leads to results that are satisfactory in practice. The place of the action, purely accidental as it is, decides whether an act done previously, and done under the control of an entirely different system of law, was or was not valid.⁶⁵ Cosack⁶⁶ has very properly pointed out that this theory of delict or of *quasi*-delict is not satisfactory for modern German law and procedure, putting international questions out of view altogether. He has recourse to the simple method of construing the right as an *obligatio ex lege*, *i.e.* he gives up all attempt to construe it philosophically. But in such a pure and hopeless positivism we can find no foundation for an international treatment of the case.⁶⁷ But, as I pointed out in my first edition, we need not thus give up all hope. The whole right of challenge rests upon an antedating of the effects of the decree in bankruptcy to some extent. If there were no such retrospective force in the decree, the whole process of bankruptcy might be

⁶³ See German Bankruptcy Ordinance, § 23 (2), and Wilmowski's comment on it, No. 8.

⁶⁴ See Sup. Ct. at Stuttgart, 3rd January 1871 (Seuffert, xxv. No. 115); Sup. Ct. of Comm. 24th May 1875 (Dec. xvii. No. 63): in this latter decision the ground put forward is rather "possession without legal title" on the part of the defender. Förster-Eccius, § 11, No. 10; West, *Archiv. für die civil. Praxis*, vol. lx. p. 358. Francke, *Archiv. f. d. civil. praxis*, lxii. p. 487. Of course, our old friend, the *deus ex machina*, the appeal to the coercitive character of the law, has opportunity for coming into play. Thus, for instance, in the judgment of an older date, viz. 19th October 1846, of the Ct. at Rostock, reported by Seuffert, xi. No. 4, in which, in as few words as possible, almost all the conceivable theories touching international bankruptcies—coercitive law and universality of the process—are mixed up together.

⁶⁵ West reaches a peculiar result (see *ut cit.*); he first delivers a far-reaching assault on my position, and then turns round, and tries to show that the delict produces its effects at the domicile of the disponent, and that thus the *lex domicilii*, *i.e.* as a rule, in practice the law of the court of bankruptcy, must be applied.

⁶⁶ *Das Anfechtungsrecht der Gläubiger eines zahlungsunfähigen Schuldners nach Deutschem Reichsrecht*, Stuttgart 1884.

⁶⁷ Cosack leaves this important side of the question untouched.

made illusory before it ever had begun.⁶⁸ The right of challenge is limited to the case of fraudulent conduct, not with the object of punishing that conduct. It arises from an equitable and necessary consideration for conduct that may have been in perfectly good faith. We can see what the leading idea of making the date of the bankruptcy draw back was very clearly from the remains of the *actio Pauliana* of the Romans, which are still to be found in modern systems of law.⁶⁹

§ 488. The Franco-Italian lawyers accordingly take the point of view that the retrospective effect is the thing that must be attained, and that the law of the court of the bankruptcy must rule these questions.⁷⁰ They overlook, however, the fact that when anything has once been well acquired by another, his acquisition of it cannot be annulled or be laid open to challenge, by a change of domicile on the part of his author, in consequence of which he becomes subject to some new system of bankruptcy procedure. Further, they forget that the bankruptcy can only have over estate situated in some foreign country, and still in the direct possession of the bankrupt,⁷¹ such effect as it is allowed to have by the law of the place where the estate is situated, that is if the question is as to an attempt directly to annul a disposition of any immoveable property. In the same way, in any attempt to give this retrospective action of the law the direct effect of an obligation to refund or to furnish an equivalent, it can only operate as the *lex domicilii* of the person who has taken the disposition allows it to operate.

If the defender changes his domicile, he may appeal to the provisions of the law of his former domicile, if they are more favourable to him; for

⁶⁸ To this effect Petersen's discussion in the *Zeitschr. für d. civilproc.* x. p. 66. See, too, Jäkel, 2nd ed. 1889, p. 19. This last author has in part misunderstood what was said in the first edition of this book.

⁶⁹ See e.g. *Code de comm.* § 443: "*Nul ne peut acquérir privilège ni hypothèque sur les biens du failli dans les dix jours qui précèdent l'ouverture de la faillite.*" § 444: "*Tous actes translatifs de propriétés immobilières, faits par le failli, à titre gratuit dans les dix jours qui précèdent l'ouverture de la faillite sont nuls et sans effet relativement à la masse des créanciers.*" The present French law dates from 28th May 1838. By this law, an earlier point than the stoppage of payment may be fixed by the court. Certain transactions entered into after this period are null, or may be reduced, e.g. gratuitous dispositions, payments of debts before they were due. Instead of the fixed point of the Code of Comm. in every case a point of time is fixed, back to which the power of challenge on the nullity extends.

See § 53 of the English Bankruptcy Act of 1883, which provides that the title of the trustee shall date back to the commission of the Act of Bankruptcy. [In Scotland, by the Act 1621, c. 18, alienations without just cause by an insolvent person to "conjunct and confident persons" may be cut down on bankruptcy supervening. By 1696, c. 5, all securities granted within sixty days of bankruptcy may be reduced.]

⁷⁰ See Carle-Dubois, § 44 (p. 95), and Asser-Rivier, § 128; Despagne, § 640. To the same effect Weiss, Francke, Petersen, and Jäkel.

⁷¹ See Wharton (§ 802), who insists on the character of the bankruptcy as an execution. Judgment of the Supreme Court of Appeal at Lübeck, 15th December 1834 (Seuffert, v. p. 1): "The capacity of acquiring property in goods coming to hand after declared insolvency is determined, not by the law of the place where they were received, but by the law of the domicile of the person who is said to have acquired it." [By a decision of the Appeal Court of Milan, it is said to be by the law of the bankrupt's domicile (Sottocasa, 1868, J. vi. p. 82).]

what he has once irrevocably acquired cannot be taken from him again. Such a case will hardly ever occur, since the *inducia* of actions in such cases are very short.⁷²

The law of the place in which the transaction which is now to be challenged took place, will not, as such, be of any consequence.

But, even although in other matters we do not recognise the operation of a foreign sequestration in this country, it is still quite possible that that sequestration may be accepted as a fact in any process of challenge which is to take place in this country,⁷³ in so far as such a challenge must be rested upon insolvency in the disponent. This is declared by the foreign sequestration.

RIGHT OF COMPENSATION (*Set-off*). ASSIGNATIONS MADE WITH THE VIEW OF REARING UP COMPENSATION.

§ 489. Difficulties may arise, again, from the question of compensation. In the first place, the question of compensation must be kept entirely distinct from all questions as to the substance of the claim, which is put forward to found compensation.⁷⁴ Apart, then, from the circumstance of bankruptcy, the creditor has, in conformity with the rules laid down, *supra*, p. 612, the right of compensation on the footing that compensation is allowed either by the law to which the bankrupt's claim is subject, or by the law to which the counter claim is subject. Any one who desires to plead compensation may appeal to the law which is more favourable to him. Compensation is, on the one hand, a kind of discharge of the obligation; on the other hand, it is a right bound up with the counter claim. The necessary result is that in bankruptcy the same law obtains; the counter claim is subject to the law which prevails at the place in which the bankruptcy court has its seat (*i.e.* generally the *lex domicilii* of the bankrupt); the bankrupt's own claim, now pleaded by his trustee, is subject to the *lex domicilii* of the person who pleads compensation. If, however, the bankrupt has changed his domicile, or the counter claim should become in some other way subject to some law other than that of the bankrupt's domicile, the trustee would be required to allow any compensation, which might be sanctioned by one of these laws, to be pleaded by the person who has a counter claim. But no one who declines to renounce his claim to take in

⁷² App. Ct. of Celle, 29th February 1872 (Seuffert, xxvii. No. 1), is completely in accord with the doctrine of the text. See, too, the judgment of the Ct. of Köln, noticed in the decision of the German Imp. Ct. of 6th July 1886 (Dec. xvi. No. 13, p. 62). See, too, Förster *Eccius ut cit.* Eccius thinks that the law of the place in which the transaction took place is in a secondary sense the law that should be consulted.

⁷³ See judgment of German Imp. Ct. (ii.), cited in the last note.

⁷⁴ So decided by Sup. Ct. of Comm. 25th January 1873 (Seuffert, xxviii. No. 246, and Dec. ix. p. 7).

a foreign sequestration shall be allowed to appeal to any other law than that of the court of the bankruptcy.⁷⁵

It is plain, from what has been said, that the bankrupt estate may be prejudiced by assignments of claims of creditors to persons who are domiciled in another country, if the foreign law admits compensation to a greater extent than the law of the court of the bankruptcy does. It may also be prejudiced by the alienation of claims in the sequestration, if the law which prevails at the domicile of the person who acquires the claims, gives him a right to keep back on his claim some article of property which would otherwise fall into the bankrupt estate, or to claim a preferential satisfaction out of the thing conveyed to him before giving it up. If the law lays upon the cedent or the disponent in such cases (as the German Ordinance, §§ 49, 42, does) an obligation to make good to the bankrupt estate any loss it may suffer, this is an obligation *ex quasi delicto*, which delict must operate at the seat of the court of the bankruptcy. The obligation to pay damages will be recognised in so far only as it exists both according to the law of the cedent's domicile and the law of the court of the bankruptcy.^{76 77}

Beneficium Competentiæ. DISCHARGE OF THE DEBTOR IN THE PROCESS OF BANKRUPTCY. OPERATION OF A COMPOSITION-CONTRACT (*Concordat*).

§ 490. Systems of bankruptcy generally give the bankrupt under certain conditions some indulgence (*beneficium competentiæ*, an indulgence until he shall have again acquired some property) or a final release from all claims against him that have not been satisfied in full in the course of the bankruptcy process. The international effect of such indulgences and releases is most keenly debated.

The first thing that meets us is, as we can well understand, the far-reaching set of conclusions drawn from the principle of *ordre public*, with which we are so familiar.⁷⁸ It is said that no laws dealing with exceptional releases of this kind can claim an extra-territorial operation, because they

⁷⁵ To this effect the grounds of judgment of the Ct. of Comm. already cited. These grounds of judgment seem to hold that the last-mentioned effect will be produced by appearing in a foreign sequestration. I should not care to go so far. The creditor who is sued by the trustee might for a time look upon the claim of the bankrupt as extinguished by a compensatory claim, and might advance another claim altogether in the court of the bankruptcy. It seems fair that his power of choice should not be cut off by anticipation.

⁷⁶ As to the *beneficium separationis*, see *supra*, p. 842.

⁷⁷ See *supra*, § 287, and the resolutions of the Institute of International Law on the criminal aspects of this conduct, 1883 (*Ann.* 7th year, p. 156). See, too, a case of this kind which was decided on general grounds by the Ct. of Nancy, 13th May 1884, in the way laid down by § 42 of the German Ordinance, against a French creditor, and that without any special enactment enjoining it, as in Germany. Kauffmann (*J.* xii. p. 44), where a report of this judgment is to be seen.

⁷⁸ So *e.g.* the grounds of judgment given by the App. Ct. of Brussels on 3rd Jan. 1860, reported by Picard (*J.* viii. p. 481). In its result, the decision may be justified on other perfectly sound grounds. See also Ct. of Paris, 2nd July 1881 (*J.* vii. p. 381), but see Clunet (*ibid.*) to the opposite effect.

belong to the sphere of *ordre public*, or are of a coercitive character. It will not be necessary to refute the attempt to apply this reasoning to the doctrine of releases at any length. Laws and systems of bankruptcy have each and all to do with public order: if this reasoning were sound, foreign bankruptcy laws could never have any extra-territorial operation, even where it is indispensable that they should.

It will be quite unsound to make any distinction between indulgence and final release.⁷⁹ Any such indulgence is not a mere bar to action in the sense of a rule of procedure to that effect, so that it should as such be dependent on the *lex fori*, and should only be capable of having its due effect within the limits of that law. Action in such circumstances is not barred as a rule of process; the debtor must first plead the *beneficium competentie* as an answer to the action. What is desired is to give the bankrupt a protection that shall be a real protection, such as might be afforded, as regards particular creditors, by a *pactum de non petendo intra certum tempus*, possibly within a time fixed by reference to some specified condition. If we must allow the law of the bankruptcy the stronger privilege of finally discharging all claims in all countries, we should be the less able to refuse it the lesser privilege of extending an indulgence merely to the bankrupt.

Further, it will be obvious that the law of the court of the bankruptcy must desire to include all foreign claims under this particular operation of its processes, and that, within the State in which the court of the bankruptcy is situated, they must be allowed to have this effect, and that without reference to whether the particular creditor whose claim is struck at has appeared, except, that is to say, in cases in which it requires the assent of all the creditors to give the indulgence. Any other view would give foreign creditors an intolerable privilege, which would defeat the whole object of the bankruptcy statutes. We can all the less allow any such privilege, as the case of the bankrupt having contracted debts abroad, and of foreign creditors being interested in the bankruptcy, is so common. The legislator, who desired any such exception, would hardly forget to mention it.

§ 491. Those who maintain the universal operation of the bankruptcy justify the universal validity of the discharge, which they also maintain, on the one side, by arguing that the discharge operates by way of a contract (*concordat, accord*), and by appealing, on the other hand, to the consideration that what you have to deal with here is a judgment pronounced by the only competent court, the court of the bankruptcy, which must be generally recognised. Carle (§ 50) takes the former ground; his translator, Dubois,⁸⁰ takes the latter. But the weakness of the one is as easy to see as that of the other. We cannot speak of a contract, as Dubois very soundly points out, in connection with creditors who have refused to accept

⁷⁹ So Supreme Ct. of Comm. 25th Jan. 1873 (Dec. ix. p. 7).

⁸⁰ Also Despagnet, § 645. Modern German law as yet hardly recognises this argument. A trace of it is to be seen in an older judgment (Sup. Ct. of Kiel, 1840, Seuffert, viii. No. 109).

part payment of their debts, and whose claims have, notwithstanding their opposition, been disposed of on such part payment. The term will only apply to creditors who have agreed to take a part for the whole of their claim. We may add, that the discharge of the English law (Bankruptcy Act, 1883, §§ 28 and 30), by which the bankrupt is set free, cannot fall under any idea of an agreement or contract, for the creditors do not require to assent, but are only looked upon as persons who may be able to give information. But, again, the court of the bankruptcy has not exclusive jurisdiction to decide upon the claims that have been advanced: its jurisdiction is exclusive only in so far as these claims are put forward with the view of obtaining a share of the estate collected by the trustee in the bankruptcy. So soon as we have several bankruptcy estates and processes, completely independent of each other, the argument fails, and the question we are dealing with postulates that, subsequently to the discharge, some new estate is brought to light in some other quarter. The argument leads us back to the *petitio principii* of the universality of bankruptcy. Lastly, it is very clear that the release of the debtor in a bankruptcy process is a very different thing from a release by some other judicial decree, by which the claim of the creditor is declared to be unfounded, instead of a perfectly good claim being declared to be extinguished.

§ 492. The law of England and that of the United States, on the other hand, only recognise the discharge of claims in the bankruptcy beyond the territory, if the obligation on which the claim depends is, on its merits, subject to the law of the court of the bankruptcy.⁸¹

No objection can be taken to this theory on principle. It requires, however, to be qualified on one side, and to be extended on another.

It needs extension in this respect, that every one who desires to share in the advantages of a process of bankruptcy must accept any disadvantages that are necessarily connected with it into the bargain. That is to say, if a man has taken dividends as a creditor in the bankruptcy,⁸² or

⁸¹ Story, § 333; Burge, iii. pp. 925, 926; Wharton, §§ 531 and 804; Westlake-Holtzendorff, § 225a. (Westlake, however, as he says in § 225, would personally be in favour of the universal operation of the discharge, if the bankruptcy had universal operation.) Foote (p. 459) is in favour of the *lex loci contractus*; see also Piggot, p. 341. In form the law of England and of the United States often says that it is only creditors, who are by reason of their domicile subject to the law that gives the discharge, that can be affected by its provisions. (So, too, Sup. Ct. at Stuttgart, 7th Dec. 1882, Seuffert, xxviii. No. 100.) In truth, however, it is meant to cover all claims which are on their merits subject to the law of the place of bankruptcy; other considerations, besides the creditor's domicile, will go to determine this. See in particular Wharton *ut cit.*; Field, § 684. See, too, judgments of the Belgian courts in this sense, referred to by Piccard, J. viii. p. 480. The grounds of decision, no doubt, frequently go further in the direction of rejecting the foreign law.

⁸² So Trib. Seine, 23th Feb. 1886 (J. xiii. p. 331). See on the tendency of the law in California to go in this direction, J. xiii. p. 378. See also Field, § 684. The judgment of the German Sup. Ct. of Comm. of 13th June 1871 (p. 3 of Seuffert, xxvi. No. 1) leaves the question open whether a mere admission to the process of sequestration and the acceptance of certain percentages can be held *per se* to involve the subjection of that creditor to the law of the court of the bankruptcy.

has even appeared in it, he must afterwards acquiesce, even in a foreign country, in his claim being docketed in consequence of the procedure in bankruptcy.⁸³ A contract of composition often presents undeniable advantages to creditors. It cannot be, and in our view is at variance with good faith, that particular creditors, although they claim dividends from the composition in the sequestration, should also demand a privileged ranking for a subsequent prosecution of the remainder of their debts, although that claim is asserted in a foreign country. They may, by these very means, in certain circumstances, prevent a conscientious debtor from working to improve the condition of his finances with the object of satisfying all his creditors alike.

§ 493. On the other hand, we cannot extend the operation of a composition contract, or of a discharge which is granted by the direct operation of the law, so as to cover sequestrations which are set on foot simultaneously in other countries. It cannot be held that the law of the court of the bankruptcy is desirous of extending the discharge which it gives so as to exclude the prosecution of claims over estates, or over individual assets of property, which it would itself have applied in paying creditors, had it not been prevented by the territorial limits of its jurisdiction.⁸⁴ No one can say in this case that the prosecution of the claim in another court is contrary to *bona fides*. It is rather a step in supplement of the operations of the court of the principal bankruptcy, and has not these mischievous consequences which the prosecution of claims upon estate subsequently acquired by the bankrupt involves. In our view, too, it would be quite immaterial, in the case of a process of bankruptcy set on foot in a foreign country at the same time as the principal process, whether the individual creditor had assented to a composition. For his consent to the discharge involved in the composition has reference to any property the bankrupt may have in the future, and not to what he at present has, the latter being, as a matter of fact, only excluded from the grip of the sequestration by being beyond the limits of the territory.^{85 86} It is not

⁸³ In San Francisco it is held, in accordance with the Insolvency Act in force there, that a foreigner who is creditor for purchase money is not *ipso jure* bound by the discharge of the debtor under the Insolvency Act. But if the creditor takes part in the sequestration, the debtor is freed as regards the remainder of his indebtedness. See the report in J. xiii. p. 378, taken from the French *Moniteur de Commerce*.

⁸⁴ Accordingly the limitation must receive effect, even although the laws of both territories agree upon what is required for the discharge of claims in the sequestration.

⁸⁵ Stobbe, § 330, note 31, agrees with the view taken in the text.

⁸⁶ German law is not much inclined to give any extra-territorial effect to the discharge of obligations by bankruptcy. See e.g. judgment of the Sup. Ct. of App. at Lübeck reported in the *Göttinger gelehrte Anzeige*, 1868, p. 312; Förster-Eccius, § 11, No. 10; Sup. Ct. of Comm. of Germany, 25th Jan. 1873, 7th Nov. 1874 (Dec. ix. p. 7, and xv. p. 8), and in particular German Imp. Ct. (ii.) 20th March 1888 (Dec. xxi. No. 3, p. 10). In this latter decision it is specially remarked that it deals with property which is not touched by the foreign bankruptcy. That is the point of view last noted in the text. An interesting judgment of the Sup. Ct. at Brunswick, 31st March 1882 (Seuffert, xxxviii. No. 336), goes decidedly further in the

very easy to see how the international operation of the discharge of all claims in the sequestration is to be made dependent on the grant of *exequatur* to the foreign sequestration. The recognition of the plea of discharge is not really a measure of diligence, or a compulsitor of any kind.

DELAYS GRANTED TO THE BANKRUPT. SIST OF DILIGENCE AN INITIAL RULE IN BANKRUPTCY.

§ 494. A general *moratorium*, or delay, granted to the bankrupt, be it sanctioned by the court or granted by the creditors, which, for a time, without securing the creditors in any satisfaction of their claims, stays the bankruptcy or prevents it from being awarded, can have no effect beyond the territory, unless the judge of the other country is directly bound, *i.e.* by virtue of a treaty, to refrain from setting up an independent process of bankruptcy, unless, therefore, the universality of bankruptcy is recognised in an eminent degree in both countries. A *moratorium*, or *sist*, such as we speak of has this meaning and effect, that for the present an award of bankruptcy is refused. Such a refusal cannot, as a rule, of course stand in the way of the general execution of bankruptcy, or of a special execution on account of any special claims in a foreign country.⁸⁷ Of course, the individual creditors, by giving their consent, could invest the *moratorium*, or *sist*, with an extra-territorial operation in so far as their claims are concerned: and if, as may be the case with limited companies, a suspension of payment to which the judge interpones his authority is a step preparatory to an award of bankruptcy, this must be respected abroad as much as the award of bankruptcy itself would be.⁸⁸

SUBSEQUENT CHANGE OF DOMICILE BY THE BANKRUPT. OBLIGATION OF THE CAUTIONER.

§ 495. If a bankrupt, after the sequestration is brought to an end, changes his domicile, he cannot on that account lose any defence of

international recognition of the effect of bankruptcy as a discharge. A judgment of the Sup. Ct. at Berlin, 15th April 1875 (Seuffert, xxxi. No. 105), recognised the general operation of a discharge on a composition contract, in cases where the question was one as to different systems of law in different provinces of the same State. But there is nothing in that circumstance (see *supra*, pp. 87-94). In my first edition (§ 78) I laid down that the discharge must have a general operation. In the Munich Critical *Vierteljahrschrift für Gesetzgebung* (xv. p. 36), I subsequently modified this opinion.

⁸⁷ Asser-Rivier, § 131, denies all effect to such a *sursis*. In illustration of the operation of the Franco-Swiss treaty of 1869, see the mutually contradictory decisions of the Trib. Civ. Seine, 21st Nov. 1883, and the Trib. Comm. Lyon, 4th May 1882 (J. x. p. 620). The former refuses effect in France to a Swiss *sursis*.

⁸⁸ See art. 657 of the Swiss law of obligations. The French courts, however, as we see from several decisions reported in J. xi. p. 620, and xii. p. 180, do not respect any such orders of the Swiss courts: they insist on the words of the treaty. See from this what small advantage there is in such treaties in many cases. While the creditors in Switzerland cannot touch the property of the company that is going into liquidation, the creditors in France get their debts paid out of any of the property of the company that happens to be in France.

discharge which he has once been entitled to plead against a claim, nor can he lose the *beneficium competentiæ* which has once been his. For, as we have noticed, if these objections are good for anything, what they are good for must be the estate that is subsequently acquired.⁸⁹ Conversely, if the bankrupt had no such *beneficium* by the law of the court of the bankruptcy, he will not get it in his new domicile, although the law of that domicile would give it to a bankrupt in a like case.⁹⁰ This latter law takes no account of any sequestrations save those that are set on foot within its own territory. It cannot be directly applied to sequestrations awarded in any other country, in which it may well be that the want of such a humane provision is made up by some other advantages that are secured to the honest bankrupt or to all bankrupts.

The operation of the award of bankruptcy upon the obligation of the bankrupt need not have any effect on the obligation of his surety or cautioner. The simple question is, what import is attached to the subsidiary obligation of the cautioner? Is it only to be valid in the event of the principal debtor being, as a matter of fact, merely unable to pay, or is it to be valid also in cases in which, on account of the actual insolvency of the principal debtor, the principal obligation is held in law to be lost? This is not in substance a question of private international law.⁹¹

CLAIMS THAT ARE EXCLUDED. CHALLENGE OF DISCHARGES OR OF COMPOSITIONS.

§ 496. The exclusion of a claim, so far as that implies merely that it is thrown out of account, but not that it is destroyed,⁹² cannot in itself exclude it from a sequestration which is opened in another country. It simply means that it will not be taken into account in the division of the estate which is before the court. Objection can only be taken to the claim, if it primarily in its essence belonged to the foreign bankruptcy, while the creditor, by advancing it here, would prejudice the creditors in some other process of bankruptcy that has been awarded concurrently in the affairs of the same person. In our view, no such objection can be taken where a creditor, who has not followed out the personal claim that was open to him in the *forum domicilii* of the debtor in the bankruptcy proceedings that have been begun there, now sets up an action upon some hypothec which he holds for the same obligation in the subsidiary process of bankruptcy that has been opened *in foro rei sitæ*.⁹³

⁸⁹ Judgments of the Sup. Ct. of Lübeck, 21st March 1867 (Seuffert, xxii. No. 114), and of the Sup. Ct. at Brunswick, 21st March 1882 (Seuffert, xxviii. No. 336), agree with our view as regards the *beneficium competentiæ*.

⁹⁰ So Sup. Ct. of App. Berlin, 23rd Oct. 1869 (Seuffert, xxiii. No. 204).

⁹¹ That seems to have been overlooked in the judgment of the Sup. Ct. at Stuttgart, 7th Dec. 1872 (Seuffert, xxviii. No. 100).

⁹² In this case the principles which regulate the matter of the debtor's discharge in a bankruptcy fall to be applied. See a case of the kind, App. Ct. Kiel, 5th Dec. 1840 (Seuffert, viii. No. 109).

⁹³ Sup. Ct. of App. Cassel, 5th Dec. 1829. Strippelmann, iv. p. 184.

The question whether and under what conditions a composition contract, in virtue of which all the claims in the bankruptcy have been abated, or any other sort of discharge can be challenged, the question, therefore, whether this can be effected only by an application to be presented in the court of the bankruptcy or may be done *incidenter*, must in all cases be determined by the law of the court of the bankruptcy.⁹⁴ But an exception, as in the case of regular judicial decrees, must be made where there is gross and palpable injustice, and in particular where there is any fraud in which the judge in the sequestration process is involved. For although, putting special processes of liquidation and ranking out of view, we are not dealing with judicial decrees in the strict sense, we are still concerned with an act of the judge, affecting the claim, which, by reason of the *dolus* of the judge, can have no international effect.

EFFECT ON THE LEGAL CAPACITY OF THE BANKRUPT. HIS REHABILITATION.

§ 497. A bankruptcy may involve some alteration on the legal capacity of the bankrupt. *E.g.* he loses right to appear on 'Change, his political rights of voting, or is required to surrender certain offices of honour. Are these effects involved in an award of bankruptcy issued in a foreign country? It seems that we must answer this in the negative,⁹⁵ as a necessary consequence of the general doctrine of legal capacity which we have already laid down (*supra*, pp. 305, 320, 321), and all the more so as, in the case in question, the diminution of the legal capacity is imposed by a judicial decree. At the same time, the import of these legal rules may merely go this length, that persons who cannot satisfy the demands of their creditors, a thing which no doubt must first be established by a judicial sentence, shall not be allowed to exercise these honourable privileges, in which financial integrity is an indispensable condition. From this point of view it is possible to look upon the award of bankruptcy in a foreign country as a fact, and to attach to it the same effects as that award would have in this country, instead of the effects which the award would have in the country where the bankruptcy was set on foot. The financial integrity of the person in question will be just as much damaged by a foreign award of bankruptcy as by an award in this country. Of course, the bankrupt must be allowed the right of showing to those officials who superintend the exercise of these honourable privileges in any particular case, that the award of bankruptcy in the foreign country was unfairly made.

A formal rehabilitation of the person who has lost such rights in consequence of an award of bankruptcy, or of the sequestration being brought to an end without full payment having been made to the creditors, can of course only be obtained from the courts of the State in which the

⁹⁴ See Carle-Dubois, § 51.

⁹⁵ Piggott, pp. 348, 349, says that such effects of foreign bankruptcies are not recognised in England.

bankruptcy and sequestration took place.⁹⁶ The matter to be dealt with is a formal recall of an order made by the sovereign authority of the State, or of the consequences of such an order. No other sovereign authority can do this. But if the law of any State makes the restoration of these privileges dependent simply on the fact⁹⁷ that the bankruptcy procedure has come to an end, then, on the general principles of regulating legal capacity, that result shall not be hindered because the foreign State, in which a man happens to have been made bankrupt, requires a formal process for his rehabilitation, or sets up some stricter conditions for the reacquisition of full legal capacity.

EFFECT OF A BANKRUPTCY AWARDED IN A FOREIGN COUNTRY ON
SUBSEQUENT ACQUISITIONS OF PROPERTY.

§ 498. The recognition of a foreign bankruptcy can, lastly, never have the effect of preventing an award of bankruptcy being made subsequently in this country, if circumstances within the territory of this country should take a shape, which the law of this country says justify an award of bankruptcy. A law, which draws into the sequestration property that has been acquired after the sequestration has been begun, or even after it has come to an end,⁹⁸ has no extra-territorial effect unless a legal rule of the same kind is recognised in the territory to which the bankrupt has transferred his domicile after the bankruptcy has come to an end. But, conversely, the operation of a bankruptcy awarded in a foreign country can never reach further than it is extended by the *lex fori* of the court of the bankruptcy. Nor does a prior award of bankruptcy in a foreign court stand in the way of an award of bankruptcy in this country, even if the law of this country, differing from the foreign law, does not require a new process to be begun, but requires the old process to be revived and carried on.⁹⁹ Any other view would lead to a simple denial of justice, if, for instance, the law of country A, in which the bankruptcy was awarded excludes all subsequent acquisitions of the bankrupt from the sequestration (as section 1 of the German Ordinance does), while the law of country B, on the other hand, to which the bankrupt has subsequently betaken himself, follows the converse principle.

⁹⁶ See Carle-Dubois, § 72, for the right view.

⁹⁷ Carle-Dubois overlooks this possibility.

⁹⁸ In French law this happens if the bankruptcy process is sisted for want of sufficient assets. See Bernard, J. ix. p. 379.

⁹⁹ See Bernard (J. ix. p. 370) on the cases on this point, and on what I consider the by no means satisfactory treatment of them by the French Court of Cassation, interpreting the letter of the Franco-Swiss Treaty of 1869. Bernard, in holding the doctrine of the French Court of Cassation to be satisfactory, is in my opinion in contradiction with the position which he also takes up (p. 399), viz. that he thinks that the propositions previously laid down should not be applied, if the trustee who has been appointed in a foreign country will do nothing to assist subsequent French creditors to obtain their rights. The rest of Bernard's acute discussion of the matter shows, on the one hand, that in the case of a sequestration process it is out of place to require an *exequatur*; and, on the other hand, that the prosecution of parties' true rights may easily be prejudiced by a treaty, unless the conception of the treaty is free from fault.

NOTE AAA ON §§ 475-498. LAW OF INTERNATIONAL BANKRUPTCY IN SCOTLAND AND ENGLAND.

[As regards the grounds on which it is held competent for the court of any country to award sequestration against an insolvent, it may be remarked that the exigencies of commerce have established a recognition of the authority of the courts of another country in matters of this kind, in circumstances which many legal systems would hold insufficient to give jurisdiction for other matters. We have seen that nationality or domicile, personal service and arrestment, are the usually recognised modes of constituting a jurisdiction over a defender, and that in questions of status a permanent relation between the parties and the country whose courts are called upon to adjudicate is universally required. The sequestration of any person may, in so far as it affects the capacity of disposition, be regarded as being a question of status, but yet the necessity and high convenience of dividing the assets at the place where the claims upon them have arisen, have established a generally recognised rule, that an individual may be sequestrated where he has been domiciled or has traded, a company where it has traded.

By § 13 of the Bankruptcy Act of 1856 (19 and 20 Vict. c. 79) it is provided for Scotland that sequestration may be awarded when the debtor is subject to the jurisdiction of the Supreme Courts of Scotland, and, in the case of an individual, has within a year resided, or had a dwelling-house or place of business there; or in the case of a company, if it is subject to the jurisdiction and has within a year carried on business in Scotland, or had a place of business there; or in the case of an unincorporated company, if, the company being subject to the jurisdiction, any partner has resided or had a dwelling-house in Scotland. The Supreme Courts will have jurisdiction in respect of domicile, of the ownership of real estate, or residence in Scotland in one locality for forty days. If any one of these conditions is present, the court has jurisdiction, and may award sequestration if, in addition, the conditions as to residence or business are fulfilled. In the case of an incorporated company registered in Scotland, the courts of Scotland have the same jurisdiction as over an individual domiciled there.

In the case of foreign incorporated companies, it has been held in England that a company not technically domiciled, but carrying on trade in England, may be wound up there, but cannot be dissolved by the court. The criterion seems to be that it is under the control of persons domiciled in England, and this criterion has been applied to bring a Spanish railway company, a German mining company, a Mexican mining company, and a Belgian railway company to be wound up in England (Lindley on Partnership, p. 912, and cases cited there; Buckley on the Companies' Act, p. 218). There seems to be no reason to prevent the Scots courts exercising, in the case of foreign incorporated companies, the same jurisdiction as the English courts exercise.

To determine the extent of the operation of a sequestration once awarded, the courts of Scotland have, so far as moveable estate is concerned,

applied the rule "*mobilia sequuntur personam*." The rule is thus stated by Lord President Inglis in *Phosphate Sewage Co. v. Lawson and Sons*' Tr. 1878, Ct. of Sess. Reps. 4th ser. v. p. 1138: "The great principle that moveables follow the law of the owner's domicile is not more firmly settled in the case of intestate succession than it is in the case of bankruptcy. Hence, whenever the court of the domicile has, by proceedings in bankruptcy, vested the moveable estate of the bankrupt in a trustee or assignee for the purpose of equal distribution among his creditors, no part of the moveable estate, wheresoever situated, can be touched or affected except through the bankruptcy proceedings, and by the orders of that country in which those proceedings take place. The jurisdiction of that court is exclusive. This proposition is fully supported by the cases of *Strother v. Read*, 1803, *Morrison's Dict. of Dec. Voce Forum Competens*, App. No. 4; *Maitland v. Hoffman*, 1808, *Morrison's Dict. Voce Bankrupt*, App. No. 26; *Goetze v. Aders*, *Preyer & Co. Ct. of Sess. Reps. 4th ser. ii. p. 150*." For the same statement of doctrine, reference may be made to *Bell's Comm. ii. p. 376 et seq.* and *p. 571 et seq.* The rule is applied indifferently, whether the person seeking to save the goods in Scotland from the operation of the foreign bankruptcy is a Scot, or a foreigner who has come to Scotland and arrested the goods there.

It will be observed that his lordship uses the word "domicile" in the same sense in bankruptcy law as that which it bears in the law of intestate succession. This can hardly be maintained to be a sound criterion for settling the *locus* of a mercantile sequestration. Lawyers are familiar with the difficult investigations that so often take place in cases of succession as to a person's domicile, investigations which not unfrequently result in the conclusion that the domicile of origin has never been lost, because the person whose domicile is being sought has had so many "homes" in succession, without any intention of settling permanently in any, that it is impossible to find a domicile for him in fact, and it is necessary to give him the domicile which legal presumption assigns to him, *i.e.* the domicile of origin. But he may never have visited the country of his origin since infancy. Is that country to supply the *forum* for the administration of his estates if he become bankrupt? Surely not. Add to these considerations the jurisdiction which the 13th section of the Bankruptcy Act claims for the courts of Scotland (*i.e.* jurisdiction by reason of the ownership of real property or residence for forty days, combined with occupation of a dwelling-house or place of business), and which they therefore must hold to be a reasonable jurisdiction if claimed by any other court, and the result will be that "domicile" in the cases on this subject must be read as equivalent to "home or trading establishment."

This is the criterion which is taken in the cases of trading companies: the Lord President, in the case of the *Phosphate Sewage Co.*, to which reference has already been made, goes on to say: "When the bankrupt is a trading company having two trading domiciles . . . the same principle is still applicable. The process of distribution of the effects may be instituted

in either domicile, but where it has been instituted in one of the domiciles, and the estate has been vested in a trustee or assignee, no claim can be made effectual against the estate, and no part of the estate can be touched or affected except through those bankruptcy proceedings, and the jurisdiction of the bankruptcy court of that domicile is exclusive even of the courts of the other domicile. See *Royal Bank of Scotland v. Ass. of Stein, Smith, & Co.* 20th Jan. 1813, F.C., and the judgment of Lord Eldon in the case of *Selkrig (Fairholmes' Tr.) v. Davies and Salt*, 1814, 2, Dow's H. of L. Reps. p. 230, approving the judgment of the court in the former case."

If I am right in thinking that, in the case of the individual trader, "domicile" in questions as to the *forum* of bankruptcy must be read in a different sense from the sense it holds in questions of succession, then individual traders will be able, as well as companies, to have several domiciles—a conclusion that seems to be consistent with actual fact—and the rule for determining the *forum* will then be the rule of priority.

But if "domicile" is to be taken in this wider signification, what becomes of the principle of "*mobilia sequuntur personam*," which is put forward as the foundation for the doctrine of the universality of bankruptcy? That brocard cannot have, even as matters stand, any application to the case of trading companies: it is not the principle on which the *forum* is settled in their case, for, *ex concessis*, they have several domiciles, and an arbitrary rule, viz. that of priority, must be invented to determine which of those domiciles the moveable estate is to follow. Nor can it apply to individual traders, if "domicile" is to have the same meaning in their case as that which it bears in the case of trading companies. That priority must in the end furnish the rule of preference seems to be recognised by Lord President Inglis himself, in the case of *Goetze v. Aders*, *sup cit*.

The principle of the universality of bankruptcy is then left to depend on general considerations of convenience and equity. That indeed is the ground on which it is put in the leading case of *Strother v. Read*, already quoted. It is there said: "As to cases of bankruptcy, the interests of commerce, as well as the regard which all nations ought to pay to the principles of general law, point out the necessity of adopting one uniform rule; and nothing can be more expedient than that we should follow out the principle already noticed, of moveable effects being subject to the disposition of that law which binds the person of their owner. . . . It is perfectly fair and equal that when an English merchant, who happens to have personal effects here, becomes bankrupt, the law of his own country should be allowed to take his whole effects, wherever situate, into its custody for the purpose of distribution among his creditors, according to the rules of the English law, while we are permitted, in the case of a Scots bankruptcy, to do exactly the same thing in England." The argument from reciprocity is thus brought in by the concluding sentence which I have quoted, to supplement the general argument based on mercantile convenience.

If, however, the case for the universality of bankruptcy has to be put

upon general grounds of convenience, there is great force in the argument used by the author for allowing each centre of activity, each country where business has been carried on, to establish a *forum* for itself. The arguments in favour of this course have, perhaps, been obscured in Scotland by the fact that the earlier cases were cases in which the two competing jurisdictions were those of England and Scotland, creditors in either of which countries would have ready access to the courts of the other, some knowledge of the law of the other country or ready means for learning it, and an assurance of reciprocity. These considerations are not always present in questions arising with foreign countries.

In Scotland, the retrospective effect of a Scots bankruptcy will be recognised to the effect of cutting down a preference given by a Scots bankrupt to a foreign trader within sixty days of bankruptcy, the period up to which bankruptcy has, by the law of Scotland, a retrospective effect (*White v. Briggs*, 1843, Ct. of Sess. Reps. 2nd ser. v. p. 1148). But the Scots courts, again, will not recognise the retrospective force of a foreign adjudication in bankruptcy so as to defeat measures of security, taken during a certain period before bankruptcy by a Scots creditor for his protection, over property of the debtor situated in Scotland (*Hunter v. Palmer*, 1825, Ct. of Sess. Reps. 1st ser. iii. 586). "There may be regulations in different countries necessary for giving preference among the creditors which can receive no effect *extra territorium*. It is only as operating a conveyance of moveable estate that the foreign bankruptcy proceedings receive effect," *per* Lord Pres. Inglis in *Goetze v. Aders*, quoted *supra*.

If a creditor has by means of a prompt use of diligence, or through a sequestration awarded in a foreign country, obtained part satisfaction of his claim out of estate, real or moveable, from which the other creditors in the Scots sequestration have been excluded, he cannot claim subsequently in the Scots sequestration, until the creditors there have been placed upon an equal footing with him by receiving an equalising dividend. (*Stewart v. Auld*, 1851, Ct. of Sess. Reps. 2nd ser. xiii. p. 1337.) The two sequestrations, if there be two, are treated as one, so that no creditor, by appearing in both, shall obtain a double ranking.

While, as above stated, regulations "for giving preference among the creditors can receive no effect *extra territorium*," in so far as these are regulations of a positive and artificial nature as to the retrospective effect to be given to the award of sequestration, it may quite well be that the rights of a creditor, who has attached moveables in accordance with the laws of their *situs*, will be recognised in the court of the bankruptcy so as to give him a preference over other creditors claiming in the sequestration. The possibility of such a preference is carefully saved in the case of *Goetze v. Aders* (*supra*) and in the case of *Lindsay v. Paterson* (1840, Ct. of Sess. Reps. 2nd ser. ii. p. 1373). The vesting clause of the Bankruptcy Act of 1856, § 102 (1), provides that the vesting of the moveable estate in the trustee is to be subject "to such preferable securities as existed at the date of the sequestration, and are not

null or reducible." This would seem to entitle a creditor to plead security rights well acquired by him by the *lex situs*, subject always to the operation of the *lex fori* in so far as the retrospective effect of the award of sequestration is concerned. The *lex fori* which creates and defines the sequestration is entitled to carry back its operation so as to cut down foreign securities, if the creditor who holds these comes into the sequestration voluntarily, or if the law of the country where the moveables are situated recognises the trustee's title as universal, and therefore hands over the moveables in its territory for distribution under this foreign process. There is no question as to the validity of the securities when originally granted: the law of the sequestration cuts down securities granted in its own country, and valid by the law of this country, under the scope which it attributes to the award of sequestration. Moveables coming from another country, if they are brought under that sequestration, must *inter alia* submit to the regulations of the *forum* as to the period when it began.

In competing bankruptcies within the United Kingdom, it is provided, as regards Scotland, by a statute of 1860 (23 and 24 Vict. c. 33, § 2), that the Court of Session may recall a sequestration awarded in Scotland, where a majority of the creditors reside in England or Ireland, or where the court shall be of opinion that the Bankrupt or Insolvent Laws of England or Ireland should regulate the distribution of the estate (cf. *Cooper v. Baillie*, 1878, Ct. of Sess. Reps. 4th ser. v. 564).

As regards heritage, the 102nd section of the Scots Bankruptcy Act of 1856 vests heritage in the United Kingdom in the trustee of a Scots bankruptcy, and similar provisions exist in England and in Ireland. But in the case of other foreign countries, the *lex situs* will apply, and will exclude the operation of the sequestration as such. No doubt the character of a foreign trustee will be recognised in Scotland so as to give him right to take steps for making up a title in Scotland to Scots heritage: he will not be required to have himself appointed trustee in a bankruptcy process in this country, but the estate will not, like moveable estate, vest in him *ipso jure*.

The discharge of a bankrupt by a court in Scotland, at the close of the proceedings in a Scots sequestration, will by statute (Bankruptcy Act, 1856, §§ 140 and 147) receive effect within Great Britain and Ireland, and all Her Majesty's other dominions. In a question with any other foreign country, it is held that where a bankruptcy includes the whole of a debtor's estate, heritable and moveable, a discharge in it will operate as a discharge everywhere. (*Royal Bank of Scotland v. Ass. of Stein, Smith & Co.* January 20th, 1813, F.C. and Bell's Comm. ii. p. 577.) If, however, there is no such universal extension of the bankruptcy over the whole estate, then, on a claim being made after discharge by a creditor, and resisted on the head of that discharge, the question will be whether the courts of the country which granted the discharge had, on principles of international law, authority over the obligation upon which the creditor claims. If they had, the discharge will be good; if not, then the debtor is not in the position of

having been released by a court competent to do so, and consequently may still be sued by his creditor (Bell's Comm. ii. pp. 576, 577, and Goudy on Bankruptcy, pp. 591, 592).

The jurisdiction of the English courts in bankruptcy, the extent of the operation of an adjudication in bankruptcy and the effects of a discharge, have in part been dealt with in the text, and will be found fully discussed by Mr Westlake, pp. 138-163, and again, pp. 281-283; Foote, p. 208 *et seq.*, and Piggott.

The principal propositions are as follows, viz.: A creditor may present a petition in the English court for the sequestration of a debtor on the commission of an act of bankruptcy by him, if the debtor is domiciled in England, or has, within a year before the date of the presentation of the petition, ordinarily resided in England, or had a dwelling-house or place of business there (46 and 47 Vict. c. 52, § 6). This jurisdiction is much the same as that of the Scots courts. The act of bankruptcy may in many cases be committed out of England, *ibid.* § 4.

The English courts do not recognise the universality of bankruptcy, so as to hold it incompetent to award a sequestration there, if a foreign sequestration is already pending. They will make such an award if, in the whole circumstances, it appears to be for the interest of creditors that they should do so. But, if no such order is made in England, the English courts will recognise the title of a foreign trustee to ingather the property, so far as moveable, belonging to the bankrupt in England, in preference to the title of any individual creditor. The title of an English trustee will not, however, give him a right to compel the bankrupt to execute conveyances of foreign immoveables, nor will a foreign award of bankruptcy operate upon immoveable property in England.

A creditor who has obtained payment of part of his debt in a foreign sequestration, out of the moveable estate situated there, will not be allowed to rank in England until the claimants in the English sequestration have received an equalising dividend. But where a creditor has got part satisfaction of his debt out of foreign real estate, it is held—and, in this, English law differs from that of Scotland—that he need not bring any such part payment into account in claiming in the English bankruptcy. He will rank for the remainder of his debt *pari passu* with the other creditors as though he had not received any proportion of his debt, although of course he will not receive more than twenty shillings in the pound on his whole debt. Thus, suppose a creditor for £1000 has got payment of £500 from foreign real estate, he will claim on the remaining £500 in the English sequestration, and, if a dividend of ten shillings is paid, will receive £250 in England, thus getting £750 in all; while the English creditor to the same amount, £1000, who has claimed in England only, will only get £500. This doctrine is defended on the ground that the former creditor has, by his diligence, obtained something that did not and could not form part of the English fund. The order of preference of the creditors, after their claims are ascertained to be valid, depends on the *lex fori*; a priority

conferred by the law of the place of the contract on which the claim is founded will not be recognised.

A company technically domiciled in England may be sequestrated and wound up there; a company not technically domiciled, but carrying on trade in England, may be wound up there, but cannot be dissolved by the court. The criterion seems to be that it is under the control of persons domiciled in England, and this criterion has been applied to bring a Spanish railway company, a German mining company, a Mexican mining company, and a Belgian railway company to be wound up in England.

A discharge granted in a court in the British dominions will operate as a discharge in all other parts of these dominions. But where the discharge has taken place under a foreign bankruptcy, it will not be held in England to discharge the debtor of obligations on which the courts of that country had not jurisdiction to adjudicate. The discharge of an obligation—even under a bankruptcy—must be by the *forum loci contractus*, whether that be the *locus actus*, the *locus solutionis*, or the *locus delicti commissi*.]

FINAL OBSERVATIONS.

THE UNIVERSALITY OF BANKRUPTCY AS A MATTER TO BE DEALT WITH BY LEGISLATION AND BY TREATIES.

§ 499. We believe that we have shown that, apart from any positive legislative provision, there is no such thing as any general and universal operation of sequestration introduced *ipso facto* by an award of bankruptcy, although the award of bankruptcy and the process following on it are by no means without some indirect effect in foreign countries.¹⁰⁰

¹⁰⁰ The proper legislative formula in my opinion is that contained in §§ 207 (1) and 208 of the German Ordinance in Bankruptcy. In its legal form and logic these sections may be described as a triumph of German legislative ability. On § 208, see *supra*, § 480. In § 207, it is simply said: "(1.) When a debtor whose foreign assets are affected by a bankruptcy possesses assets in the empire, execution may be had against the latter. (2.) Exceptions may be made to this rule by an order of the Chancellor of the Empire, with the consent of the federal council." In the first subsection not a word can be spared, and to it not a word can be added. The legislator has very properly guarded himself against saying that an award of bankruptcy in a foreign country will have no effect at all in Germany; all that is said is that in itself it will not prevent execution in Germany. Thus it is admitted that a foreign trustee may get arrestments imposed on German property belonging to the bankrupt, or bring them into the bankrupt estate by means of other actions; but then the trustee must anticipate other creditors. The foreign bankrupt does not *ipso jure* become incapable of disposing. But as a matter of fact the foreign trustees may bring about the same result, if they make haste to lay arrestments upon all the assets situated in Germany; and, if any one else has laid on arrestment or done execution in Germany, then, on the motion of the foreign trustee, the surplus of the sum produced by the realisation of the property in Germany may be handed over to the foreign bankruptcy, as indeed was expressly provided by § 294 of the old Prussian Ordinance in Bankruptcy. On the other hand, the public of Germany cannot be expected to respect the foreign bankruptcy, of which it need really know nothing; nor is any such duty of respect involved on an *exequatur* of the foreign bankruptcy being granted, the effects of which are undefined,

Would it then be desirable to replace this state of matters, which is, as I believe, in accordance with the positive law on the subject as it at present exists, by a simple rule that the sequestration shall have universal operation, with the limitation, it may be, that a foreign sequestration shall have no higher effect than a sequestration in this country? The modern Franco-Italian school answers this question in the affirmative, and the second *Congresso Giuridico Italiano internazionale*, assembled in 1880 in Turin, attached itself to the same theory to this extent at least, that it recommended the execution of international treaties on this basis. It did not, however, pronounce entirely without hesitation that legislation in the future would certainly take this point of view.

I should not like to support this doctrine except under the most substantial limitations.

In the first place, it would be a very serious matter indeed, to set up the principle of the international universality of bankruptcy by legislation alone, apart from treaties altogether. Let us remember that the question is quite a different one from the recognition of *res judicata*, or even the execution of foreign judicial sentences pronounced in other civil processes. On the one hand, that recognition and execution have reference solely to disputes which in their nature, or by the voluntary subjection of parties, are referred to foreign judges. On the other hand, the *vis attractiva* of bankruptcy is to have the effect of sweeping away to all practical effect jurisdictions which would otherwise exist in this country, and of sending away creditors belonging to this country, against their well-founded expectations, to foreign and perhaps very distant courts.¹⁰¹

and of which the public may be just as ill informed as of the original decree. Still less can it be supposed that in the German Empire the foreign award of bankruptcy will have any retrospective effect, a thing which is dangerous to admit. The question of retrospective effect, was, as Lammasch (p. 449, note 9) reminds us, one of the points on which in 1879-1880, in the proposals for the conclusion of an Austro-German treaty, the parties could not agree.

We have already said all that we need say as to an award of bankruptcy separate and distinct, after the German award. The only faulty point is the retrospective effect, which the provisions of the *Civilprozessordnung* (much less successful in details than the bankruptcy ordinance) lay down with regard to the jurisdictions which it recognises (see *supra*, § 483), and thus it would be desirable to have some such provision as the old Prussian Ordinance had, ensuring official public intimation before the estate should be handed over (see *supra*, p. 1028, note 49).

In my opinion, too, a more extensive operation may be allowed to the foreign bankruptcy under the necessary conditions. The second subsection of § 207 of the German bankruptcy Ordinance is faulty in so far as it appears to be based on the theory that it is possible, by a simple declaration that execution in Germany is not to be allowed, to introduce in a satisfactory way a treatment of the foreign decree or award of bankruptcy which will fit in with the universal operation of the sequestration. But if we should give the foreign bankruptcy that effect as regards execution, we would find that we had made a series of other rules of law necessary, which could not very well be laid down by a simple order of the Chancellor of the Empire, but would require the interposition of the proper legislative authority.

¹⁰¹ The enquiry into jurisdiction has quite another meaning in bankruptcy from what it has in other processes. In bankruptcies it has reference—if the universality of the bankruptcy is recognised—to a fact, *i.e.* domicile, which may have no connection whatever with the nature of the particular matters in dispute. Again, in auxiliary processes in bankruptcy, we

Another effect will be to withdraw from the creditors assets of property which are at hand, and on account of which perhaps they gave credit for the sums or obligations for which they sue; possibly, too—if we go seriously to work with the doctrine of the universality of bankruptcy in its full sense, if, for instance, we do not recognise separate sequestrations for special trading establishments, but refer all the creditors to the foreign domicile of the debtor—the effect will be to allow a foreign legal system, which may be mischievous from its excessive laxity and from the ease with which it is made the instrument of fraud,¹⁰² to have the most direct influence on the credit and commerce of this country. But that is not all: the foreign sequestration is maintained to have the effect of preventing any further valid payments being made to the bankrupt. This last danger would be made less serious by a provision making the operation of a foreign sequestration dependent on public notice of it being given in this country. But the fact remains that the process is remitted to a foreign judge, and we must remember the reports which, in spite of our civilisation, apparently so far advanced, are circulated with more or less foundation as to the administration of justice in many “interesting” countries—how, for instance, the most valuable assets are swallowed up in expenses of process, not to mention other alleged miscarriages of justice. We need not enquire whether such reports are true or not. But so long as they are in circulation—and that may last for a considerable time still—if our legal system were to give, as a matter of course, the same effect to a foreign sequestration as to a sequestration in this country, it would seem to disclose a carelessness which admits of no excuse.

§ 500. The only expedient left is that of treaty, and treaties dealing with the recognition of foreign sequestrations can only be concluded with States, whose administration of justice commands special confidence and is not too costly, and in the case of such treaties regard must be had to the distance of the countries which are in question. Again, the method to be taken is not to give a simple recognition to the foreign sequestration, unless the parties are prepared under certain circumstances to expose the trade of this country to the greatest uncertainty. The incapacity of the bankrupt to dispoise, the incompetency of special executions, and the retrospective effect of the award of sequestration, would never be recognised to a higher degree than these effects attach to a sequestration in this country,¹⁰³ and in every case it will be the duty of the judge to see that

have no such safety-valve as the plea of “gross injustice” affords in other cases to put forward as an objection to the individual claims in the sequestration process; these cannot be investigated *ab ante* when the sequestration is first awarded. The possibility of injustice which strikes one most obviously is injustice to the bankrupt. At the same time, the recognition of the foreign sequestration and the consequent surrender of the estate is prejudicial to the real satisfaction of the individual creditors.

¹⁰² *E.g.* The foreign system of law might make it too easy for the debtor to get rid definitely of his debts.

¹⁰³ This limitation is as much a sound legal inference as a measure of practical utility. See *supra*, § 483.

there is jurisdiction in the foreign court, and to see whether or not a separate and subordinate sequestration should be awarded in this country—under the supervision of the public authorities, if the law knows such supervision—and to see that public intimation is given. The matter at issue, when sequestration has been awarded, although that may be in a foreign country, is the protection of the public and unknown creditors in this country, that they may not find out too late that their debtor's estate has been unfairly carried off to a foreign country. Of course, too, every interested party must be entitled to urge objections against the recognition of the foreign sequestration. This objection would have no effect in suspending proceedings except to the effect of preventing, for a time, the estate from being carried off to a foreign country.¹⁰⁴ But the trustees named in the other country would at once be entitled to apply in the name of the creditors who were taking part in the foreign bankruptcy for protective orders, in the same way as individual creditors outside the sequestration may. But these protective measures would prove abortive, if the jurisdiction of the foreign courts should come to be denied, or if a separate auxiliary sequestration should come to be awarded in this country. In the latter case, they might perhaps be allowed to subsist for the benefit of the subsequent bankruptcy.

In my view, then, treaties to recognise the extra-territorial force of sequestrations in conformity with the doctrine of the universality of bankruptcy can only be concluded with the greatest caution, and must not be concluded with all States indiscriminately. On the other hand, it may be pointed out that, more than forty years ago, the authority of Savigny sanctioned the doctrine of the unity and universal authority of bankruptcy, appealing to a series of treaties concluded for this purpose by Prussia. But the Prussian treaties which he cites, on close examination, do not prove much. In the first place, they recognise auxiliary sequestrations to a large extent. When we find that in one of these treaties¹⁰⁵ it is provided that an auxiliary process may be set on foot in any country in which the bankrupt has an establishment which, as a complete whole in itself, constitutes a separate group of rights and obligations, while in other treaties immoveable property is held to justify an auxiliary process, we see what the truth is as to the practice of these Prussian treaties of which Savigny so cleverly makes use. But, in the next place, the countries in question were adjoining German States, with systems of administration which were all equally trustworthy. There was, therefore, no question of sending off creditors to distant courts, doing their business in a foreign language, for whose learning and integrity no guarantee could be taken. But, lastly, Savigny's discussion of the subject is not thorough enough. This famous lawyer has covered some gaps in

¹⁰⁴ To the same effect the resolutions of the Italian Congress, No. ii. *ad fin.* See *infra*, pp. 1054 *et seq.*

¹⁰⁵ Treaty between Prussia and Weimar, art. 20; Krug, p. 34.

his chain of reasoning on this subject by the brilliancy of his reputation and the elegance of his diction.

RESOLUTIONS OF THE ITALIAN INTERNATIONAL CONGRESS OF JURISTS,
1880. PROVISIONS OF THE FRANCO-SWISS TREATY OF 1869. THE
EARLIER GERMAN STATUTE OF 1869.

§ 501. The Italian International Congress of jurists which assembled in 1880 at Turin¹⁰⁶ started, as we have already said, from the principle of universality as the principle that should be set up by future treaties. But, while it confined itself in the first place to commercial failures, it did not by its resolutions solve one very grave difficulty, viz.: what is the relation of the sequestration of the trading establishment of any person to the sequestration of the same person in his non-commercial character: whether in such a case there is, or is not, to be an auxiliary process. We may say, also, that by accident only persons who had already pronounced in favour of the principle of universality were included in the Congress.

Lastly, it may be that in Italy the principle of the universality of bankruptcy has not as yet led to any mischievous results. That, however, is accounted for by the fact, on the one hand, that the competency of an auxiliary bankruptcy in the case of trading establishments in that country has always, as far as we can see, been recognised in practice, and, on the other hand, by the fact that a declaration of *exequatur* has always been required. It has not been well settled what effects accrue to a sequestration awarded in a foreign country before this declarator of *exequatur*,¹⁰⁷ what persons must be cited to the process of declarator, and what persons are affected by this process. We thus find ourselves in what may be in certain circumstances a pleasant uncertainty, whereby it is open to us to meet the dangerous consequences of the foreign award of sequestration by an appeal to the fact that no *exequatur*, or an insufficient *exequatur*, has taken place.

The resolutions¹⁰⁸ of this Italian Congress, which has been so often alluded to, are as follows, viz.:—

“The Congress, considering that the interest of trade demands that the operation of mercantile bankruptcies should not be confined to the territory of any one country, but should extend over as many civilised

¹⁰⁶ The foreign Governments of France, Greece, the Netherlands, Roumania, and Russia, sent delegates, among whom were Asser, Renault, and Tuhr. The Commission consisted of Mancini, Carnezza-Amari, Esperson, Maurigi, Mecacci, Ottolenghi, Pierantoni, Regnoli, Schiatterella, Serafini, Spantigati, Vegezzi, Vidari, Zanardelli, and the reporter, Carle.

¹⁰⁷ Curti, however (p. 132), properly calls attention to the fact that if a declarator of *exequatur* is to be an indispensable condition precedent to the operation of a foreign sequestration to any effect whatever, a great part of the benefit of the universality of the bankruptcy is lost.

¹⁰⁸ *Atti del Congresso. Discussioni*, p. 18.

countries as possible, but that the existing differences among systems of bankruptcy law make it difficult to introduce an uniform international code on the subject, is of opinion that, for a while, we must be contented with the system of one or more conventions, the leading features of which would be the following, viz. :—

1. The court of the place in which the trader has his principal trading establishment is the court which has jurisdiction to award and wind up the bankruptcy procedure.

2. The judicial sentence awarding bankruptcy, and all the other decrees pronounced in the course of the procedure in bankruptcy, shall have the same force (*autorità di cosa giudicata*) in the territories of all the other countries that are parties to the treaty, as they possess in the country in which they were pronounced, and may be founded upon as warranting summary and provisional steps in these other countries, provided always that they have been published in conformity with the requirements of art. v. (a) *infra*.¹⁰⁹

In so far, however, as it is proposed to use any such decrees in a foreign country for the purposes of diligence, a judgment of *exequatur* must first be obtained from the judicial authority of the State in which the diligence is to be done.

The treaty will provide what court shall be competent to give an *exequatur*. It will proceed upon a simple application by parties interested, and contentious procedure shall not be necessary. The decree of *exequatur* shall not be refused unless :—

(a.) Some court that was not competent under art. i. shall have awarded sequestration, or

(b.) The decree is one that does not admit of execution in the State in which it is pronounced.

A decree of *exequatur* may be resisted, but opposition to it has no suspensory effect.

3. Limitations on the dispositive power of the bankrupt,¹¹⁰ the nomina-

¹⁰⁹ It was quite right, as we have seen from the discussion of the subject already submitted, that each and every effect of a foreign award of bankruptcy should not be made dependent on an *exequatur* being obtained (see Esperson, *Il secondo congresso Giuridico Italiano e il diritto privato internazionale*. Roma, 1880, p. 5). But it does not seem to be necessary to make any public advertisement, if all that is wanted is to impose arrestments in virtue of the foreign award of bankruptcy. An arrestment might very probably prove illusory, if it could only be laid on after such public notice.

¹¹⁰ This resolution is probably unsound. Where the bankrupt has concluded contracts, the question is not one as to his capacity to act; the point rather is that there is an arrestment operating over foreign territory, which cannot possibly be made independent of the *lex rei sitæ* in dealing with corporeal property, or of the law to which the claim is subject (*i.e.* as a general rule the *lex domicilii* of the debtor), when it is dealing with incorporeal claims. The question, *e.g.* whether the bankrupt is entitled to renounce a succession, cannot be dependent alone upon the law of the sequestration, but must be dependent primarily on the law which rules the succession. But, of course, the sequestration cannot extend to any asset of property which by the law of the sequestration is not covered by it. The trustee must therefore have a right to enter on the succession according to the law of the court of the bankruptcy.

On the other hand, the law of the court of the bankruptcy can alone determine the limits of the powers of the trustee, the court or the meetings of creditors, or of a committee chosen by the creditors, as the case may be, over assets already legally acquired, and forming part of

tion and the powers of the trustee, the forms of procedure, the competency, the conditions, and the effects of a composition contract, the realisation and division of the assets among the creditors, native and foreign, are all regulated by the law of the place where the sequestration is awarded.

4. Real rights, the ranking of real securities, preferable debts and pledges, rights of vindication, of lien, and claims for special articles, whether these rights are concerned with moveables or with immoveables, must be determined by the law of the *situs* of the things.

The treaty will declare what court of the country is to have jurisdiction over each class of questions of that kind.

5. The treaty will contain special provisions:—

(a.) For the publication of the judicial sentences pronounced in processes of bankruptcy in one of the States concerned within the territories of the other:

(b.) For the relations of the various courts of the States, that are parties to the treaty, to each other, as regards the performance of the enactments contained in these treaties.

6. Treaties will in the meantime be confined to commercial bankruptcies. The laws of the different States will remain in force for the bankruptcies of non-traders, for the punishment of fraudulent bankruptcy, and for extradition of fraudulent bankrupts.¹¹¹

The Franco-Swiss treaty of 1869 contains the following provisions as to trade bankruptcies, viz.:—

“Art. 6. *La faillite d'un Français ayant un établissement de commerce en Suisse pourra être prononcée par le tribunal de la résidence en Suisse, et réciproquement, celle d'un Suisse ayant un établissement de commerce en France pourra être prononcée par le tribunal de sa résidence en France.*

“*La production du jugement de faillite dans l'autre pays donnera au syndic ou représentant de la masse après, toutefois, que le jugement aura été déclaré exécutoire conformément aux règles établies en l'article 16 ci-après, le droit de réclamer l'application de la faillite aux biens meubles et immeubles que le failli possèdera dans ce pays.*

“*En ce cas le syndic pourra poursuivre contre les débiteurs le remboursement des créances dues au failli; il poursuivra également en se conformant aux lois du pays de leur situation, la vente des biens meubles et immeubles appartenant au failli.*

“*Le prix des biens meubles et les sommes et créances recouvrées par le*

the bankrupt estate. The question of the arrestment has by that time been disposed of, and the only further matter for consideration is the representation of the creditors, and the organisation of that representation. Provisions like that of § 124 of the German Bankruptcy Ordinance, that the validity of legal transactions of the trustee in questions with third parties is not to be affected by the want of the ratification required by the ordinance, can only be of force in the country that makes them. The security of commerce does not demand that they should be extended to foreign bankruptcies. Any one who deals with a foreign trustee is warned to inform himself of his powers. This is quite a different case from the case of foreigners who are minor by their own law, but major by ours, doing business in our country.

¹¹¹ For a French translation, see Bard, p. 342, and Asser-Rivier, pp. 238, 239.

syndic dans le pays d'origine du failli seront joints à l'actif de la masse chirographaire du lieu de la faillite et partagés avec cet actif, sans distinction de nationalité entre tous les créanciers conformément à la loi du lieu de la faillite. Quant aux prix des immeubles, la distribution entre les ayant droit sera régie par la loi du pays de leur situation; en conséquence, les créanciers français ou suisses qui se seront conformés aux lois du pays de la situation des immeubles pour la conservation de leurs droits de privilège ou d'hypothèque sur les dits immeubles, seront, sans distinction de nationalité, colloqués sur le prix des biens, au rang que leur appartiendra d'après la loi du pays de la situation des dits immeubles.

"Art. 7. Les actions en dommage, restitution, rapport, nullité et autres, qui, par suite d'un jugement déclaratif de faillite ou d'un jugement reportant l'ouverture de faillite à une époque autre que celle primitivement fixée, ou pour toute autre cause, viendraient à être exercées contre des créanciers ou des tiers, seront portées devant le tribunal du domicile du défendeur, à moins que la contestation ne porte sur un immeuble ou un droit réel et immobilier.

"Art. 8. En cas de concordat, l'abandon fait par le débiteur failli des biens situés dans son pays d'origine et toutes les stipulations produiront par la production du jugement d'homologation déclaré exécutoire conformément à l'art. 16, tous les effets qu'il aurait dans le pays de la faillite.

"Art. 9. La faillite d'un étranger établi, soit en Suisse soit en France, et qui aura des créanciers suisses et français et des biens situés en Suisse et en France, sera, si elle est déclarée dans l'un des deux pays, soumise aux dispositions des articles 7 and 8."

Art. 16 prescribes the requirements of the documentary evidence that must be produced when a demand for *exequatur* is made. It is then provided: "*Sur la représentation de ces pièces, il sera statué sur la demande d'exécution . . . il ne sera statué qu'après qu'il aura été adressé à la partie contre laquelle l'exécution est poursuivie une notification indiquant le jour et l'heure ou il sera prononcée sur la demande.*"

Art. 17 provides that the court to which application for an *exequatur* is made shall only refuse it in the following cases, viz.:—

- "1. Si la décision émane d'une juridiction incompétente;
- "2. Si elle a été rendue sans que les parties aient été dûment citées et légalement représentées, ou défailtantes;
- "3. Si les règles du droit public, ou les intérêts de l'ordre public du pays ou l'exécution est demandée s'opposent à ce que la décision de la juridiction étrangère y reçoive son exécution." This section contains a provision for appeal against the judgment on the application for execution.

It cannot be said that these provisions contain an adequate and exhaustive system for the regulation of international bankruptcy law. Still less was that the case with the German statute of 1869, §§ 13-18, which have been repealed by the introduction of a common law of bankruptcy for all Germany. The 13th section of that statute secured the operation of an award of bankruptcy in the whole of the territory of the federation, and § 14 ordained that all property found in other States of the federation

should be surrendered to the court of the sequestration, under reservation of separate sequestrations that might be awarded under the *lex rei sitæ*. *Quoad ultra* the sections referred to did no more than protect the interests of persons holding real rights.

These provisions will not be any guide to States which are less closely connected. Before we could introduce in the North German Federation, and subsequently in the German Empire, an uniform system of auxiliary procedure, which should work with certainty and with undeniable advantage to those concerned, we had to overcome many difficulties, which would not have been so easily disposed of if the States, or some of them, had been non-German.

Appendices.

I. LIMITS OF THE TERRITORY OF THE STATE IN QUESTIONS OF PRIVATE INTERNATIONAL LAW. (NARROW WATERS. INLAND LAKES.)

INTRODUCTION. EXERCISE OF VOLUNTARY JURISDICTION ACCORDING TO PAPPAFAVA.

§ 502. Every one knows that it is asserted that the territory of a State stretches from the shore into the sea as far as a cannon-shot will carry. The range of a cannon is taken to be three miles, which does not of course correspond with the actual range of modern cannon.¹

The question is, is this strip of sea along the coast of each country to be regarded as part of the territory of the State in matters of private law, or is that extension of the limits of the territorial sovereignty only good for certain other relations? If the former were true, then all merchant vessels, which have not the privilege of extra-territoriality, would be subject to the private law of the country to which the coast belonged, and to its jurisdiction, and, we may add, to its criminal law to this effect, that everything which might take place on board of them must be regarded as if it had taken place within the territory of the State. In certain circumstances, the question is of no small practical importance. While it is on the high seas, the ship counts as part of the territory of the State whose flag it carries, and the law of the flag is the *lex loci actus* for everything that takes place on board. But if our question is answered in the affirmative, we should have to affirm that all this underwent a fundamental change, the moment that the ship crossed the imaginary three-mile line.

Pappafava (J. xiv. p. 441 and p. 570) is the most recent writer on this subject. No doubt his main object was to establish that a notary of the

¹ See Calvo, i. § 356, on the proposal made in 1864 by Mr Seward, Secretary of State for the Government of the United States, to extend the limit to five marine miles.

country bordering on the sea may validly do official acts even on board of foreign trading ships within this zone, and in particular may execute instruments. But in all this discussion he does not once allude to the very obvious doubt, whether the sovereign authority of that State may perhaps not be a complete and absolute right, but may be restricted to the assertion and protection of certain specified rights and interests. Pappafava (*see especially* p. 446) seems simply to think that, because a cannon-shot may be fired over three marine miles, we must on that account hold that the State bordered by the sea has complete sovereignty for that distance, just as if the sea with its restless stormy waters were a part of the dry land. The question of the extra-territoriality of warships is the only question on which he bestows closer scrutiny. I have no occasion to deny that right of extra-territoriality.

THE ENGLISH TERRITORIAL WATERS ACT OF 1878.

§ 503. The whole foundation on which Pappafava builds, as if it were safe from all uncertainty,² seems open to very serious doubt, as the proceedings in connection with the English Territorial Waters Jurisdiction Act of 1878 [41 and 42 Vict. c. 73] have shown. In the year 1876, the German steamer *Franconia* came into collision with the English steamer *Strathelyde* off Dover, within the three-mile limit, and a passenger on board the *Strathelyde* was killed. The captain of the German vessel was in the Central Criminal Court sentenced to be punished for manslaughter, but the Court of Queen's Bench held that the jurisdiction of the British Crown had not been shown to extend to the case in hand. Hence the statute which we have cited.

It declared that British courts had jurisdiction to punish all offences committed within the "territorial waters of Her Majesty's dominions," *i.e.* "any part of the open sea within one marine league of the coast measured from low-water mark," irrespective of whether the offender is or is not a subject of Her Majesty, and although the offence may have been committed on board or by means of a foreign ship. Proceedings are not to be instituted in the United Kingdom for the punishment of an offender who is not a British subject, except with the consent of one of the Principal Secretaries of State, or in any other part of Her Majesty's dominions, except with the leave of the Governor.

This statute has excited much attention, and raised much criticism in England itself, as well as in other countries. Most of the lawyers of the Crown, and among them Sir R. Phillimore, have pronounced decidedly against it. But we find no discussion of it on the ground of principle. Substantially the whole discussion consists in pointing out that this or that important result of the statute is unsound or unjust, and, of course, there

² See on this point Westlake, *Rev.* x. p. 548; the thorough critical observations of Perels, p. 86. So, too, Stoerk (*v. Holtzendorff's Handbuch*, ii. p. 465).

has been no lack of citation of authorities, although on this subject the authorities generally go to work with a set of rules which are as arbitrary as the exceptions which they make to these rules, and are not remarkable for distinctness. We hear constantly of "territorial" or "proprietary" waters, but never get a definition of these terms: we find these waters assimilated to harbours, and an endeavour made to escape from the awkward consequence of such an assimilation, viz. that ships merely passing over these waters must for all intents and purposes be subject, with all that in them is, to the sovereign authority, the laws, and the jurisdiction of the State, along the borders of which these waters lie. The expressions used by some writers seem to make the question depend on whether the ship is in motion or not, as if this circumstance could really affect the rights of sovereignty.³

The introduction, too, of the brocard which is so well known, but is not perhaps universally obeyed, viz. "*respect au malheur*," is quite superfluous. This maxim forbids the institution of any process against shipwrecked persons, who have at some earlier period committed crimes against the maritime State on the coasts of which they are cast, although a process would certainly be instituted against them if they had been given up by way of extradition, or had come of their own free will into the territory of the State.⁴ But the attitude of the criminal law towards persons reaching the country in such circumstances, in consequence of offences previously committed against that country, has absolutely nothing to do with the question of jurisdiction over ships which are still at sea.

THE RULING PRINCIPLE. THE RIGHT OF THE MARITIME STATE NOT A COMPLETE SOVEREIGN RIGHT.

§ 504. Let us try to discuss the matter on principle. The sovereign power of a State, if it is to be placed beyond question, must rest on the possibility of actual mastery or dominion. Can we say that this exists as regards the territorial waters? The ordinary answer is "Yes," because these waters are within cannon range. But as a matter of fact, so long as the shores of a country are not bristling uninterruptedly with cannon, cannon-shots can only be fired at spots of particular importance here and there along the shore. Even if there were cannon everywhere, the

³ Cf. in this connection Harburger's sound observations. (*Der strafrechtliche Begriff Inland und seine Beziehungen zum Völker- und Staatsrecht*, Nordlingen 1882, p. 18.) Stoerk, in Holtzendorff's *Handbuch*, ii. p. 467, note 7, takes the same view.

Read literally, Phillimore, too, i. § 350, seems to attach importance to whether the ship is "lying" in a harbour or in territorial waters.

⁴ See, e.g. Heffter, § 79, v. : "Every foreign vessel, which enters the harbours or proprietary waters of a State, becomes subject to the maritime police, the maritime tolls or duties, and the jurisdiction of that country. Ships on board of which are foreign sovereigns or their representatives, if the ships are dedicated to their use exclusively, foreign ships of war, and ships which are simply in transit, or whose captains are driven to land in any territory against their will, are not subject either to duties or to the jurisdiction of that country."

dominion which the State would have to undertake to exercise in conjunction with the stormy waves of the ocean, would never amount to the same thing as the dominion which the State exercises quietly on dry land. How would the State, *e.g.* manage to prevent this three—or perhaps five—mile space being constantly trespassed on by ships? and even if they were willing to ask submissively for leave, like land travellers, who may be searched and examined at the frontier by customs and police officers, would the ocean, which drives the strongest ships about like nut-shells, obey any such “thus far and no further” paper arrangement? Sovereignty, however, is something more than a right; it also involves duties. Can the State discharge its duty of protecting persons and property on its territorial waters, as it can on shore? Are its police and constabulary ready at any moment, so soon as a ship crosses the three-mile line, to leap upon her, and to correct, if necessary, any disorder on board? Are there judges and notaries always prepared to see contracts and wills executed on board? There is no doubt that the answer to these questions is “No.”

It is plain that, both as regards rights and as regards duties, the necessary foundation for the complete dominion of the sea-coast State over its territorial waters is wanting. But would it serve any useful purpose to assume the existence of such a dominion? This question, too, must in our view be answered most distinctly in the negative. It is much nearer the truth to say that any such notion, whether in theory or carried out in practice, would be mischievous.

On the high seas, the ship, as we have said, is counted part of the territory the flag of which it carries. Thus we know, in any questions as to the *lex loci actus* that may arise, to what private and to what criminal law we have to look, and to some extent, too, what is the authority that must control the civil or the criminal procedure that may be necessary. It would be absolutely irreconcilable with legal security, we might almost say ridiculous, to affirm the claim of the maritime State that, every time a ship crossed the imaginary line, with a few turns of the screw, or with a strong blast of wind, all this should be changed. What interest has the maritime State in any legal occurrences on board a ship, the sails or the smoke of which one can barely see from the shore as a white or a black spot? If there were dominion in the full sense, it would follow that the maritime State could, at any moment when it desired to do so, prevent the passage of ships of foreign nationality, just as a State has not unfrequently put forward a claim to prevent inconvenient or, as the expression now-a-days generally is, “troublesome” (*lästige*) persons from entering on its land territory, and to turn them out of it if they have entered.

It would be useless to cite authorities to prove that the maritime State has no such prohibitory right as regards territorial waters. Indeed, on the contrary, it is certain that narrow seas in which, as a matter of fact, the passage of trading vessels can at any moment be barred, are as a matter of right open to general maritime traffic. We are always confronted by the difficulty of justifying such exceptions as that, if we seek to set up any

theory of a complete dominion as the theory on which to proceed, and we are continually in danger of drawing inferences from that assertion of sovereignty, which are in the highest degree injurious to the common interests of all in uninterrupted passage by sea.⁵

Let us then be done with this figure of the imagination,⁶ since we have seen that there is no legal foundation for the alleged sovereignty of the maritime State over its territorial waters. There is no such thing as sovereignty over any part of the open sea, or any part of the sea about the coasts of a country.⁷ But the maritime State has a right to legislate, a right of police, and a right of jurisdiction in these territorial waters, so far as this is indispensable for its own security, and at the same time compatible with the common use of the sea by all nations, or is established by undoubted usage. The two alternatives will not perhaps give different results, except perhaps in some quite special circumstances, in which, as a general rule, international treaties are called on to play a part.

LOGICAL INFERENCES. RIGHT OF FREE PASSAGE. INCIDENTS PASSING EXCLUSIVELY ON BOARD OF SHIPS. CRIMINAL OFFENCES WITH DIRECT RESULTS BEYOND THE LIMITS OF THE SHIP. MARITIME COLLISIONS.

§ 505. There is no need, then, for laying down any special rules of law to establish a right of free passage for the ships of all nations over territorial waters. These rules of law are, so far as their contents go, perfectly correctly laid down by Bluntschli (*Völkerr.* § 322). But, if they are represented as constituting exemptions from the territorial sovereignty, they are open to obvious attack.

Putting aside, then, the right of maintaining establishments and enforcing rules to prevent surprises by an armed enemy or possible violations of neutrality, matters which lie altogether outside the territory of private international law, we require nothing more, in order to ensure the safety of the country that claims those territorial waters, than a right to maintain a coast police to protect navigation in general, and navigation by the ships

⁵ Thus, the Lord Chancellor of England of the day [Lord Cairns] in introducing the Territorial Waters Act in the House of Lords, enunciated the theory, that the passage of ships in the channel along the English coast was a mere "concession" by England, which of course might be recalled or restricted at any time, if it began to be inconvenient. On the other side, see the excellent remarks of Perels (p. 87), and Geffcken, note 7, on Heffter, § 75.

⁶ Stoerk, too, in Holtzendorff's *Handbuch*, ii. p. 454, refuses to acknowledge any right in the maritime State corresponding to its dominion on shore. I think, however, he goes too far, and is somewhat vague in proposing to extend the rights of the maritime State over the territorial waters, so far as this seems to be convenient for the administration of the State concerned.

⁷ Nothing can depend on what a cannon's range is, so long as the water continues to be a liquid element. Wharton, § 818, truly says, "If . . . we speak of municipal control, so as to give jurisdiction over all matters, three miles is as unreasonable as ten miles."

of that nation in particular, to watch the fisheries, and to look after the customs.

Criminal acts, which are done altogether within the limits of any particular ship, and still more certainly incidents connected with matters of private law which happen there, have nothing to do with the security of the country that claims the territorial waters.⁸ It is far better that they should be subject to the laws and to the jurisdiction of the State from which the ship hails,⁹ except in so far as the law and jurisdiction of the country to which the parties concerned belong call for application. Accordingly, *e.g.* officials, and persons commissioned by the country of the flag, may act as officials of that country in matters of voluntary jurisdiction within the three-mile limit of another State. An instance of this would occur, if the State to which the ship belongs should commission ship-captains to perform certain functions proper to officials who are charged with the superintendence of matters of *status*, or, under certain safeguards, should allow them to execute testaments, if circumstances make it necessary that some such official acts should be performed in the course of a voyage.¹⁰

Again, it would be unjust to apply the law of the State bounded by the territorial waters as a territorial law to individuals who leave the ship in a boat,¹¹ or who perhaps have been thrown up on a sandbank left temporarily dry by the waves. The impossibility of making any sharp demarcation of the zone that belongs to the coast is against an extension of the territorial law of the State which abuts upon the coast. If we attempt any such extension, we lose all certainty as to the application of the law, particularly as on many coasts the shore is continually shifting. The exclusive application of the personal law of the individuals concerned affords far more satisfactory and certain results.

But it is altogether different in the case of incidents which are in close connection with matters of coast police. In such matters, the maritime State whose coasts are in question is entitled to demand that even foreign ships should be subject to regulations which it has established. It could not otherwise maintain those regulations, and a subjection of this kind is a matter which serves the general interest. Such a subjection may be directly asserted by force, as it may be by criminal law and civil responsibility. The application of the criminal law in itself is no part of our subject: it is necessary, however, since liability in damages and criminal liability to a certain extent run parallel to each other, to test a little further the

⁸ Wharton, *Dig. i. § 32 ad. fin.*, remarks that the question is still open whether the English Territorial Waters Act can be maintained with reference to injuries at sea, in contrast to injuries on shore, inflicted by a foreigner on an English subject.

⁹ Wharton, *Dig. i. § 32* (p. 113): "A vessel may pass in its voyage along the shore of another nation, without subjecting itself to the law of the littoral sovereignty, and retain all the laws given by the law of its flag."

¹⁰ If maritime commerce extends further, this might be a very useful arrangement in big ships.

¹¹ Even in matters of public law, boats should be regarded as pertinents of the ship.

applicability of the criminal law. All that we need note is, that no State hesitates to subject mariners of foreign nations on its coasts to the penal provisions, the object of which is to protect navigation, establishments along the shore, submarine cables, etc.;¹² but, on the other hand, by reason of the strict interpretation to which criminal law from its very nature must be subjected, it is by no means a matter of course that the criminal law of the territory should be applied to the seas round the coast. On the other hand, it cannot be said to be incompetent to apply even the general criminal law to foreigners, who have, in breaking some of these police regulations, at the same time committed some offence against the general law: *e.g.* in the case in which a foreign shipmaster, transgressing the rule of the road laid down for the territorial waters, rams another vessel, sinks her, and so incurs a charge of manslaughter in consequence of having caused the death of some of the crew. The application of the general criminal law in such cases is simply a supplementary sanction in the more serious cases of a breach of the police regulations in the seas near the coast of any country. Indeed, by public law, the State will be entitled to visit any injuries done to persons or property according to its general criminal law, even although there may be no offence against any special maritime regulations or marine police, provided there be a neglect to observe precautions necessary for security in the maritime belt surrounding the country: such would be the case of a foreigner murdering some one on a sandbank, or of a person being wounded or killed on board one ship by a shot fired from another ship, a foreigner. The maintenance of public and general security may be reckoned a part of the police of the adjoining coast. But delicts, which do not encroach upon the security of the public, cannot be so reckoned. If they were prosecuted according to the law of the adjoining country, the result might be that injustice might be done both substantively and as a matter of procedure, *e.g.* arrests might be made which could not be justified and which would involve hardships, and then international conflicts might arise. In addition, it is only fair that, where it is intended to extend the criminal law of the territory to the territorial waters, this should be distinctly expressed in the statute.¹³ This is a rule which is generally followed in English practice,¹⁴ and the legislation of the German Empire has hitherto followed the same model. Accordingly, it cannot be said to be a matter of course that the criminal law should extend to the territorial waters.

But it may be at once conceded, as warranted by the nature of the case,

¹² See, however, art. 8 of the international treaty for protection of submarine telegraph cables. By its provisions the State to which the ship or the individual, as the case may be, who does the damage, is competent to punish it. [This treaty is incorporated in 48 and 49 Vict. c. 49.]

¹³ See Harburger, p. 20.

¹⁴ See *e.g.* Merchant Shipping Acts (17 and 18 Vict. c. 104, § 527; 36 and 37 Vict. c. 85). Foreign Enlistment Act (33 and 34 Vict. c. 90). See German Ordinance of 14th Aug. 1876 *ad. init.*

that rules of the civil municipal law dealing with damages in case of a collision, with salvage and with pilots, including compulsory pilots, may be applied within these waters. It is a charity to commerce to apply all along the coast one uniform law for the protection of ships of different nationalities, and also for defining their duties. The Institute of International Law without any difficulty adopted, in its resolutions of 1888 on *abordage maritime*, i., the rule that in territorial waters the law of the adjoining territory should rule.¹⁵

The application of the law of the flag, or flags, as the case may be, in the case of collisions on the high seas (*supra*, p. 721), is a last resort, which involves many inconsistencies. To appeal within territorial waters to the law of the flag, which might in the most unfair fashion reject all claims of damages, would be simply to imperil the most valuable property, and might cost the lives of many men. If the adjoining State could not apply its own territorial law, it would have to look on with folded arms while foreign steamers, without fear of consequences, sank many of its fishing boats and coasters.

VOLUNTARY JURISDICTION ON BOARD OF MERCHANT SHIPS WITHIN TERRITORIAL WATERS.

§ 506. Although, however, it is in our view quite incompetent to apply the territorial law of the adjoining State to occurrences which take place entirely on board of a foreign ship which happens to be within the territorial waters,¹⁶ still we must recognise an exception in the case, in which

¹⁵ See the report, Rev. xx. p. 602. The resolutions of the Congress at Antwerp (*Actes*, i. p. 145) gave no special answer to the question. The whole matter discussed there was "*abordage dans les ports fleuves et autres eaux intérieures*," on the one hand, and "*abordage en mer*" on the other.

¹⁶ From what has been said in the text, we may deduce the judgment which public law should pass on the English "Territorial Waters Jurisdiction Act," described in England by Bowyer, in Germany by Perels, as contrary to the first principles of public law, and as an excess of jurisdiction. Stoerk (v. Holtzendorff's *Handbuch*, ii. p. 451) has recently defended it. In our opinion, there is undoubtedly on the principles of public law an excess of jurisdiction in subjecting to the law of England acts which pass entirely on board of a foreign ship and have no physical effect beyond it, even although it may be required that an English Secretary of State should approve of any procedure that is to be taken. This was the point at which Bowyer chiefly directed his attack. On the other hand, on principles of public law, no objection could be raised against the exercise of the jurisdiction of an English court over the *Franconia*, because the manslaughter there was caused by the collision of the *Franconia* with another ship. (The question whether it needed an express extension of English jurisdiction by an English statute to cover the case, is not a matter of public law; it is a simple question of English municipal law.) The statute was to some extent a matter of necessity, and justified as such, in view of the great traffic on the English coast, and the special danger in which small English coasters stand. But it goes beyond the mark. Stoerk thinks that a maritime State may assert its authority, wherever in its opinion the sphere of its interests is affected. This proposition, which turns interest into a right, and that, too, when the interest is asserted *ex parte*, is one to which I cannot assent.

The consciousness of an excess of jurisdiction is, however, betrayed by the provision of the English statute that a Secretary or Governor should give his sanction, as a condition precedent

some official or notary of the maritime State is required to do some act of voluntary jurisdiction on board a foreign vessel. The matter here is not one of compulsory subjection; it is simply an act of philanthropic charity, as, for instance, where a person lying seriously ill on board ship desires to execute his will in regular form. It seems to be impossible that there can be any substantial objections to the formal validity of such an act regularly performed by an officer of the maritime State, the act being in substance simply a privileged attestation. We cannot help thinking that, according to general principles of public law, the maritime State must be competent to take up the *nobile officium* of giving assistance in legal formalities where its assistance is asked. Thus, although by another route, we come to the same result, as Pappafava attained through his assertion of the complete sovereignty of the maritime State, to the proposition, namely, that notaries, and generally officials of voluntary jurisdiction, can validly execute the duties of their office on board foreign ships in territorial waters, if the parties interested ask them to do so.

There is no difficulty in subjecting to the territorial law occurrences which take place in estuaries, in waters which are truly territorial, or in harbours. The parties concerned can in such cases not have much doubt that they are in the territory of a particular and definite territorial sovereignty.

RESULT, IF THE PLACE OF THE SHIP AT THE TIME OF THE EVENT IN
QUESTION CANNOT BE EXACTLY ASCERTAINED.

§ 507. In the case of any real doubt, the decision must be against the subjection of a ship to a territorial sovereignty. The hull of the ship presents at once to the mind the notion of the subjection of that ship to the law of her flag: we cannot regard that subjection as removed, unless some sensible and unmistakable cause for its removal has intervened. Any other determination of the question would involve legal relations in uncertainty and confusion.

LANDLOCKED LAKES.

§ 508. On landlocked lakes, surrounded by several States, the same principles as regulate the application of territorial law on dry land must rule, in so far as there are distinct boundary lines recognised. The well-known rule for fixing these is that the centre of the lake determines them, just as is the case with rivers. But if there is a *condominium* of the surrounding

to any prosecution. There is no doubt that that is a sort of safety-valve for unpleasant questions. But if the Statesman makes a mistake, or if the national spirit is excited, the matter will be made all the worse for the introduction of a political authority.

Renault (J. vi. p. 242) is in substantial agreement with the criticism given above. See, too, Wharton, § 818.

States,¹⁷ we are then forced to consider a ship in matters of civil law, while she is on a voyage on the lake, as a part of the territory from which she hails, just as we do in the case of a ship upon the high seas.¹⁸

As regards contentious jurisdiction, there is something to be said for the rule of priority being allowed to prevail,¹⁹ if, *e.g.* there is a question about arresting a ship. But this expedient seems not to be desirable, because it might very easily be abused, and would be exceedingly apt to lead to a small warfare of jurisdictions.

We can hardly at present say that there is any legal interest in the question whether the air, on the analogy of the Roman theory of private property, is to be regarded *in infinitum* as the property of the different territories which it covers, and is only invested with an international character in so far as it is above the surface of the sea.²⁰ It is even more impossible to exercise dominion in the air above a certain height than it is to do so over the ocean.²¹

NOTE BBB ON §§ 502-508. TERRITORIAL WATERS.

[The whole law of England on the subject of sovereignty or jurisdiction within the three-mile limit will be found discussed in the case of the *Franconia* (The Queen *v.* Keyn, 1876, L.R. 2, Ex. Div. 63, referred to *supra*, p. 1066). The discussion of the matter there is so complete that it would be impossible to add to it.

An interesting case was recently decided in the Scots courts (Lord Advocate *v.* Clyde Navigation Trs. 1891, Ct. of Sess. Reps. 4th ser. xix. p. 174). There the Trustees of the Clyde were in use to deposit the dredgings taken from the navigable channel of the river in Loch Long, an arm of the sea, running up a distance of twenty-four miles into the Argyllshire

¹⁷ Rettich, *Die völker-und staatsrechtlichen verhältnisse des Bodensees* (Tübingen 1884), p. 119, assumes such a joint right in the surface of the Bodensee. But see Martitz in Hirth and Seydel's *Annalen des Deutschen Reichs*, p. 278.

¹⁸ This is the footing on which the agreement of Austria, Baden, Bavaria, Switzerland and Würtemberg in 1880, as to the Bodensee, proceeds. It provides for registration of births and deaths which take place on shipboard, and not in the immediate neighbourhood of the shore, with the authorities of the parish or district (Bezirk) in which the ship or other conveyance generally lies. On practical grounds, Rettich prefers to lay down that priority must rule: the official of the State to whose knowledge the fact first comes shall register. It is possible, however, that such a rule would leave individual caprice too much to say in the matter.

¹⁹ According to Rettich, priority will determine criminal jurisdiction also.

²⁰ In criminal law, with which we have nothing to do in this place, the matter stands differently.

²¹ Heffter (§ 79 *ad fin.*) proposes to lay down for aerial navigation principles analogous to those adopted for maritime navigation in harbours or territorial waters: he seems to look on the atmosphere as a pertinent of the territory. V. Holtzendorff (*Handb.* ii. p. 230, and v. Heyking, p. 4) propose to treat the atmosphere on the analogy of territorial waters. It is to be regarded as a pertinent of the territory to the highest point which can be reached by fire-arms, reckoning from the highest point in the territory. V. Holtzendorff thinks that it would be convenient to fix that point by international agreement at 1000 meters, or 1093 yards. In my opinion, the question cannot be settled in all its aspects by any such simple principle; there are just the same difficulties as in the case of the territorial waters.

coast, and averaging a little more than a mile in breadth. The Crown raised an action to compel them to put an end to the practice. In this action, it was not alleged that any damage was suffered by fishing interests or by navigation, or that the operations resulted in discomfort or nuisance to any one resident on shore. The Crown relied solely on a proprietary right which it alleged it possessed in the *solum*, even although the *solum* at the place was constantly covered by many fathoms of water. It will be observed that the *locus* was not on an open sea-coast, but was landlocked: on this fact the Lord Ordinary (Lord Kyllachy) proceeded, and held that the *solum* and the water covering it belonged in property to the Crown, who were thus entitled to prevent the defenders from doing what they did as being trespassers. On appeal, the court affirmed the judgment, holding that whether the Crown's right were a trust merely, or a right of property, they had a right sufficient to warrant them in stopping the defenders' operations without any allegations of damage to the public purposes for which the water was available. The Lord Justice Clerk, Lord Young, and Lord Trayner expressed an opinion that the right was one of property. Lord Young, too, along with Lord Kyllachy, expressed an opinion that the *solum* of the open sea-coast, out to the three-mile limit, also belonged to the Crown in property.]

II. EXTRA-TERRITORIALITY OF AMBASSADORS IN MATTERS OF PRIVATE LAW, AND IN QUESTIONS OF PROCESS.

INTRODUCTORY. ERRONEOUS ATTEMPTS TO FIND THE FOUNDATION FOR THE PLEA OF EXTRA-TERRITORIALITY.

§ 509. The sovereign rights of the State, which is represented by the person who claims the privileges of extra-territoriality, are often put forward as the foundation on which these privileges depend. These consist principally in what is to a certain extent undoubtedly conceded, viz. a right to be exempt from the jurisdiction and the compulsitors—we use general and indefinite expression in the meantime—of the State in which the person in question is staying. It is said that one sovereign power cannot be subject to the other, and by consequence neither can its representative.¹

But this involves a confusion of ideas. It is quite true that a sovereign power which was subject to another would cease to be sovereign, and that no one State can command another to do or not to do or to suffer anything: just as little can one State sit in judgment upon another. We shall use this proposition later, when we come to enquire whether action can be raised in the courts of one State against the ruler of another. But

¹ See *e.g.* Heffter, § 54; Phillimore, ii. § 158.

we must not omit to notice that, in questioning the privileges of extra-territoriality, it is not proposed to submit to the power of one State the government of the other State *quoad* its sovereign and essential functions as a government. The privilege claimed is, on the contrary, a right to withdraw from the operation of the sovereign power of one State, the government of the other, not in its character as a government, but as invested with certain subsidiary relations of private law.² This comes out plainly, if we look for a moment at the position of the government or sovereign in its or his own country. The government does not cease to be sovereign, because in all relations of private law it is subject to the courts of law. To go further, the chief power of the State would not cease to be a sovereign power, even if the person who wore it should be made answerable to the criminal law. In the Middle Ages, the German king could in this way be made personally answerable. The subjection of the State in all its relations of private law to the courts of the country is, according to Germanic legal theories, no concession that may be recalled at pleasure, but stands in close connection with the whole conception of legal order and of the constitution of the State.

IMMUNITY OF THE AMBASSADOR AS THE SOURCE OF THE PRIVILEGE OF EXTRA-TERRITORIALITY.

§ 510. There is no doubt that, as a matter of history, the whole doctrine of extra-territoriality sprang from the immediate necessities of public intercourse with other peoples. Before there were any distinct conceptions of sovereignty or of the State as a person, it was often necessary to enter into negotiations with other peoples. It is not the person of the king, in cases where there is one, that stands forward as entitled to special international respect; it is his ambassadors, who, even in ancient times, are accorded immunity from all harm.³ Whatever mention there may be in this connection of the king or of the people who sent the ambassador, occurs merely in this way, that the king or the people is described as the avenger of any evil that may befall the ambassador, or so describes himself or itself. The king or the people will look upon a wrong done to the envoy, and will follow it up as if it had been done to the king

² Thus, for instance, the whole discussion given by Beach-Lawrence, iii. p. 421, is dominated by a confusion between the matter of privileges, and the question whether jurisdiction against another State or a foreign sovereign can be founded *ratione materiae*.

³ So late as the 17th century, when the privilege of ambassadors had been long established, it was not held altogether inadmissible to arrest foreign princes. See Pufendorf, *De jure nat. et gentium*, viii. 4, § 21. He concedes extra-territoriality to the foreign sovereign, but remarks that he recommends no prince to set foot on foreign territory without leave first asked and obtained. See also Bynkershoek, c. iii. Chr. Wolff, too (*Jus gentium*, § 1059), has no idea that the extra-territoriality of sovereigns is necessary as a legal conception. He thinks it is merely the fruit of an implied or express bargain; the king is only a king in his own country, abroad he is a private gentleman. The constructions put upon the law of nature reflect the ideas of the time and of tradition. It is turning the historical order of development upside down, if we rest the privilege of ambassadors on that of sovereigns.

himself or to the people. The representative relation is therefore not the source of the immunity, but its sanction. Accordingly, in ancient times we never hear of the immunity of a foreign ruler as such; we only hear of it if he is at the same time an ambassador, or if he has entered the foreign territory as an invited guest, a position which in fact is not easily distinguished from that of an ambassador.

The necessity of holding one who is treating with another nation inviolable needs no demonstration. If he has reason to fear direct violence, he will hesitate about coming at all, and if he cannot negotiate in perfect freedom, *i.e.* without fear of violence, then any promise given by him will not bind the sovereign whom he represents.

But in old days ambassadors, besides safe conduct, were allowed exemption from all criminal and civil execution. Foreigners generally in those days were not subject to the legal system which ruled in the case of natives. That first came to be the case in the later days of the Roman Empire, when that empire had put on the character of a world-wide dominion, embracing peoples of the most different types. Revenge and "Help yourself" were the rules that prevailed against foreigners. Such a direct use of force, which might, no doubt, have afterwards to be justified by the person who employed it, was inadmissible in the case of ambassadors because of their safe conduct. The true problem of extra-territoriality could not arise until rights and duties founded on territorial legal systems were made, as a general rule, applicable alike to foreigners and natives. That is the case in our time, but it was not so in ancient times. It was not always so easy as it now is to distinguish in civilised States between purely capricious acts and acts proceeding from a settled jurisdiction, for there were in those times no established judges; the sovereign could in his own person enunciate the law. If the ambassador was to have a safe conduct on which he could rely, it was necessary that his office should protect him from the exercise of all jurisdictions. All privileges have a natural tendency to extend themselves. The privilege of an ambassador, in order to ensure complete protection, must extend to his establishment of servants, and to the house which he occupied. It was easy to maintain, that for greater security a certain precinct must be included, and even that persons who did not belong to the embassy might at times be rescued from the territorial jurisdiction, by the protection of the privilege accorded to the ambassador's house. The ambassador's master, of course, saw with satisfaction the extension of the privileges of his representative: in certain circumstances they constituted a valuable foothold for interferences with the internal affairs of the other State. Great princes could secure a hearing for the demands of their ambassadors, and then others could appeal to the precedents thus created. Thus embassies began to constitute States within States. Theory had to supply a name that would cover all their privileges, and Hugo Grotius (ii. 18, § 4, No. 5) hit upon the fiction, as he himself expressed it, that the ambassador lived *extra territorium*.

GROTIUS, BYNKERSHOEK, VATTTEL.

§ 511. Grotius, however, was far from taking this fiction as the groundwork of his discussions; it merely serves him as a comprehensive and graphic form of expression. We find that he, like Bynkershoek, who, as is well known, has given us a very thorough, probably the best dissertation on the extra-territoriality of ambassadors, has other sources from which to deduce the exemption of ambassadors from the jurisdiction of the territory in which they are resident. Grotius finds a foundation for exemption from criminal jurisdiction by referring to the ease with which an ambassador might be suspected of having committed a crime, and the performance of the duties of his office might be thereby made impossible for him; exemption from civil jurisdiction he finds in the argument that it is impossible to poind moveables, which are, as it were, an *accessio* of the person, because, in order to ensure the most complete security to the ambassador, all compulsitors must be kept far from his person.

But from his concluding proposition in § 9, we see that Grotius holds it to be possible to do diligence upon immoveables, if the ambassador should happen to have any within the territory. But it is by no means intended to approve of any attachment of the house in which the ambassador lodges: that would be a very serious attack upon the person: Grotius seems rather to contemplate the case of the ambassador possessing other real property in the country.

Bynkershoek goes so far as to maintain that a man is only subject to jurisdiction by reason of domicile and possession of property within it. But an ambassador cannot, of course, have a domicile in the country. He thinks, however, that an ambassador will be subjected to the jurisdiction by reason of owning immoveable property in the country: the same result may be effected by an arrestment of moveables, which are not directly connected with his person, or, as it might be better expressed, do not serve for his personal use. On this latter head Bynkershoek pursues an exhaustive enquiry. He finds special difficulties as regards money and outstanding debts. In so far as these are necessary for the support of the ambassador, Bynkershoek declares himself rightly in favour of immunity from arrestment, and he is also right in holding that, in cases of doubt, we must recognise such an immunity. On the other hand, he is indifferent as to the nature and origin of the debts for which claims are made against the ambassador. Even although the ambassador has carried on a trade, that does not subject him to the courts of the country to any greater extent (c. iv.): this proposition he defends in the teeth of a judgment of the Dutch court in 1721 (c. xiv.).

In truth, the whole of Bynkershoek's discussion rests on the distinction between jurisdiction and execution: according to the principles then recognised in civil procedure, jurisdiction was for the most part founded on the possibility of execution, and therefore Bynkershoek is not himself fully

conscious of the distinction. For, on the one side, he recognises it as a leading principle (c. viii. § 2) that the same jurisdiction exactly may be used against an ambassador, as could be used against him if he did not happen to be in the country; on the other hand, again, he holds that jurisdiction can only be founded against foreigners by possession of real property and by arrestment (see c. ii. §§ 4 and 5), and that the latter, as had been determined by the Dutch court on 19th Dec. 1644, may be used against an ambassador, so long as no violence is done to his person (or, as Bynkershoek thinks, so long as no violence is done to his person or any force applied to property which serves the personal requirements of the ambassador). It is plain that this is a correct representation of Bynkershoek's theory, when we consider his view as to the citation of foreign princes, to whom he concedes the same privileges as to ambassadors (c. iv. § 4). In conformity with the practice of the higher courts of Holland, he finds no difficulty in citing a foreign prince, whose property has been laid under arrestment at the instance of a creditor, to answer in these courts. The case which he cites in § 5 proves that these courts, if they thought that there would be any difficulty in executing citation in the ordinary way, simply resorted to edictal citation.

Vattel, too (ii. ch. 8, §§ 110 *et seq.*), agrees with Bynkershoek on this question. He insists on the freedom of the person, and of everything which the ambassador requires or uses for his own support, from all kind of arrestment. But he at the same time describes it as a necessity (§ 114) that, if our ambassador carries on trade, he shall subject to the jurisdiction of the territory, in all his possessions of which he makes use in that trade, the exemption of his person being always maintained; further, the ambassador can claim no exemption as regards his landed property. Lastly, however, he says that the ambassador may voluntarily subject himself to the jurisdiction of the territory; that is the case in all processes in which he appears as pursuer.

[Lord Stair, I. i. ii, writing in 1681, recognises as part of the law of nations, and therefore obligatory, "the safety of ambassadors though more guilty of the common quarrel than the rest of the nations from whom they are sent; yet for common utility's sake, while they act in and conform to that capacity, they are safe; otherwise there could be no commerce, orderly indiction of war, or pacification."]

VIEWS OF THE MORE MODERN JURISTS: IMMUNITY FROM ALL JURISDICTIONS IN THE TERRITORY.

§ 512. In more recent times discussions as to the freedom of ambassadors from judicial compulsitors have become more superficial. The subject is one which can only be thoroughly treated by keeping in view both public law and the development of civil procedure. Most writers, however, who have concerned themselves with public law, have no familiarity with civil procedure. Bynkershoek was familiar with both

subjects; then, again, he had exceptional opportunities of testing theory by the experience of actual practice, from the peculiar position which the Netherlands held in diplomatic intercourse during the second half of the 17th and up to the middle of the 18th century, enjoying as they did at the same time a system of legal administration which was as independent as it was scientific.

The superficiality we have mentioned shows itself specially in the confusion of actual jurisdiction with direct execution. Bynkershoek and Vattel laid stress on direct compulsitors and immunity from these: there is no doubt that, in accordance with the principles of civil procedure which then obtained, and with a view to the practical working out of the privileges of ambassadors in connection with these principles, they asserted an immunity from jurisdiction for ambassadors, in so far as jurisdiction required, as a precedent to its exercise, the use of the compulsitor of an arrestment, or the existence of a domicile, which of course no ambassador could have. Lawyers then began, with a superficial imitation of Bynkershoek and Vattel, to speak quite generally of exemption from jurisdiction,⁴ to disregard the real necessity of giving ambassadors the most complete freedom, in which we find the historical origin of their privileges, and to put the existence of the privilege in many cases on the fact that the ambassador represented the foreign sovereign, and that one sovereignty could not extend over another. We find, then, that the exceptions which are made from the immunity of the ambassador, in which therefore the jurisdiction of the State in which he is resident is recognised, are frequently entirely capricious, or are of such a character as must, if logically carried out, destroy the doctrine of immunity altogether. In such a state of affairs, we cannot wonder that some think themselves forced to declare that the inhabitants of the country are helpless to protect themselves against an ambassador, while others, on the other hand, throw the whole privilege overboard altogether, as an institution which is quite superfluous where there is a well-ordered administration of justice, and is besides mischievous and untenable.⁵ It is difficult to give a sufficiently clear idea of the confusion which prevails on this subject.⁶ It is peculiar,

⁴ Vattel no doubt (§ 113 *ad init.*) speaks in this tone. But his further argument shows that he does not by any means deny all territorial jurisdiction as against ambassadors.

⁵ See *infra*, p. 1096 *et seq.*

⁶ Let us consider the following examples:—

Klüber, in his day well known and respected as an authority, says in § 209 of his *Europaisches Völkerrecht*: "His extra-territoriality gives him (the ambassador) freedom from all the police laws, and from the jurisdiction of the State in which he is residing as ambassador." We do not comprehend why the ambassador should enjoy an immunity from material laws. No proof of the assertion is given. Bynkershoek, who is naturally the first authority to whom appeal is made, says nothing of the kind. But this immunity, thus liberally given by Klüber on the one side, is taken back again, on the other side, by means of exceptions, to such an extent that we are obliged to ask, what remains? The first thing for consideration is police regulations: "Obedience to certain (which?) regulations of police, and particularly those, the object of which is to maintain public security (what regulations of police are there which have any other object?) are almost universally, by implication at least,

unless we look for an explanation in the perfunctory study of Bynkershoek and even of Vattel, and in the failure to pay sufficient attention to the leading principles of the law of procedure, that not one among the more modern writers reproduces the principles of these two authors, which are so simple, and which yet satisfy so completely all real necessities, and applies them to the altered condition of modern rules of procedure.

made applicable to ambassadors." Thus it is laid down that the ambassador tacitly submits himself to police regulations, *i.e.* he is subject to them. What, then, is left of the immunity? The whole course of his discussion, in which one proposition takes back what its predecessor laid down, is almost ridiculous. This discussion, however, apparently serves to bolster up the false proposition (§ 203) from which Klüber tacitly sets out, *viz.* that the ambassador as the representative of his sovereign, is identified with the supreme power of the State.

Again, with reference to his immunity from civil jurisdiction, it is said that this "only belongs" to the ambassador "regarded as an ambassador." § 210 explains the meaning of this dark saying. The immunity does not apply to questions about immoveables, nor does it apply to chattels in the possession of the ambassador as a manufacturer, a trader, a landed proprietor, a manager of property belonging to foreigners, "and the like;" nor does it apply, if he is a subject of the State, to which he is accredited, "in some other respect" (what is the meaning of being a subject in some other respect?); nor if he has in some recognised fashion (?) challenged the jurisdiction of a court of the country which is not competent. (Is this to be done expressly or tacitly?) "In all these cases, the courts of the country may proceed against him according to their law, and may even arrest his property and his person (!) as the law allows. On the other hand, no arrestment can be used against him or his property, if, and in so far as, he falls to be considered simply as the ambassador of a foreign State." The meaning of this statement, in other words, is: for debts, such as an ambassador ordinarily contracts, expenditure on subsistence, or house-rent, he cannot be sued in the country, but if he contracts any other debts, he is responsible even with his person! A more meaningless privilege can hardly be imagined. The creditors who have the best claims to prompt payment in the territory, are refused all right to sue there; but other creditors can put an end to the personal freedom of the ambassador, in the event of his not paying them. Compare for a moment with these rules the provisions of the Roman law, with reference to jurisdiction against members of embassies from *municipia*. Of course, in Rome there were no questions of public law involved. But still the object in view was to allow these representatives of the *municipia*, while they remained in the capital, to discharge the duties of their office with as much freedom as possible. These persons were very properly secured an immunity from jurisdiction in all legal relations which were unconnected with their stay in Rome; but, on the other hand, they must submit to the law of Rome in Rome all debts which fell to be discharged there, in particular, debts relating to their lodging and maintenance in Rome (L. 2, §§ 3 and 4; L. 25, D. *de judiciis*, 5, 1; L. 3, *de legationibus*, 50, 7). The Roman law, therefore, in an analogous case, proceeded on exactly the opposite principle. Klüber, however, is driven to the absurd result which we have indicated, because he confuses the question of the origin of the debts with that of real compulsitors against the person of the envoy, and upon the articles which serve for his own personal uses.

Vesque v. Püttlingen (p. 147) concedes that extra-territorial persons must be free from any exercise of Austrian jurisdiction. But he proposes, again, to take a distinction between the public and the private relations of the person. (What does that mean? Of course, a foreign ambassador cannot be called to account in Austria for the exercise of his functions as an ambassador.) Then, again, the territorial jurisdiction claims a right to interfere, not merely in reference to real rights in immoveables, but also in all cases in which the ambassador has expressly submitted himself to the courts of the country, or "if he does acts to which either the character of these acts themselves or the constitution of the country has attached, as a consequence, that he shall be held to have submitted himself to the territorial law." But other persons, belonging to other countries, who have no claim to extra-territoriality, are not absolutely subject to the jurisdiction of Austria, but only in so far as that is involved in the character of their acts; if this be so, then, according to the last paragraph, the privilege

The double meaning of the word "jurisdiction" has contributed not a little to the general confusion of this subject: in using it we think now of the competency of a court to judge, now of its competency to put compulsitors directly in force. In English legal terminology especially the word "jurisdiction" implies not so much the competency of the court to decide, as the territory within which it can make direct use of its compulsitors.⁷ But, in the English law, that confusion is more easily explained, and is less mischievous in practice, because the competency of the court is closely bound up with its capacity to enforce its decrees. But in French law, and in the most modern German law of procedure, this connection has almost

of extra-territoriality has no meaning at all. V. Püttlingen, however (§ 127), quite superfluously tells us that logic requires that, if a process has gone on against one who is entitled to extra-territoriality, then execution may be done against him according to the rules of the territorial law, and that even to the extent of poinding his furniture. But still, if the furniture happens to be in the extra-territorial residence or office, the consent of the ambassador must first be obtained. (The house is thus in itself invested with a high degree of extra-territoriality, a result which is hardly consistent, on the one hand, with the real jurisdiction which our author claims for the territorial State, or with the decision in a particular case reported by himself (p. 389, note 3), in accordance with which an ambassador may be removed by force from a house which he has hired.) Besides that, what is the meaning of diligence, one of the compulsitors of the law, if the person on whom diligence is to be done must first consent to it?

Slatin's article (J. xi. p. 329 and p. 463) comes to the same results, although they are somewhat better defined. In it, however, more importance is attached to the character of the things on which diligence is to be done. (See especially p. 466.)

On the other hand, Lorimer (i. p. 248) proposes to make a sharp distinction between the ambassador as such, and the ambassador as a private gentleman. In the former character, territorial jurisdiction will not touch him, although in the latter it will, if, *e.g.* the ambassador speculates. (Is there any juridical mark of distinction between the two classes of cases?) Lorimer thinks that Bynkershoek's lines of distinction tend in the same direction. We have already seen how far Lorimer was justified in holding any such opinion.

Stoerk (v. Holtzendorff, *Handbuch*, ii. p. 656, *praes.* p. 659) concedes generally to extra-territorial persons immunity from the jurisdiction of the country in which they are. On this account, the provisions of §§ 18 and 20 of the German constitution seem to him entirely sound, perhaps as the minimum of protection to be given to an ambassador. Stoerk traces (p. 657) the immunity to the necessity of allowing the authority of the foreign State to operate in our territory, a necessity which springs from the requirements of commerce. I do not, however, understand in what sense the authority of the foreign State can be said to operate in our territory through the communications made to our Government by the foreign ambassador (and that is an essential part of his duties), or because that ambassador puts his visé on passports which are to operate within the territory of the State which he represents. I hold that it is only in special and exceptional cases that the acts of an extra-territorial person involve the actings of a foreign sovereign authority within our territory.

In these paragraphs of the German constitution, the provision is simply this: "§ 18. The jurisdiction of this country does not cover the chiefs and members of missions accredited to the German Empire. In the same way, where they are accredited to one of the States of the Empire, they are not subject to its jurisdiction."

"§ 20. Sections 18 and 19 do not touch the provisions as to the exclusive jurisdiction of the courts in questions of real right arising in civil suits." (§ 19 deals with the members of the ambassador's family and his servants. § 201 of the appendix to the General Prussian Ordinance on Procedure used more correct language as to the incompetency of arrestments against foreign ambassadors accredited to the Prussian Court.)

⁷ See Schuster, *Die bürgerliche rechtspflege in England*, p. 78.

altogether disappeared, and accordingly the confusion is often all the more prejudicial and all the more bewildering.⁸

THE TRUE PRINCIPLE: THE IMMUNITY AN IMMUNITY FROM COMPULSITORS ONLY (*imperium*). INDIRECT EFFECT OF THIS ON JURISDICTION IN THE NARROWER SENSE; NO DOMICILE FOR THE AMBASSADOR IN THE STATE WHICH RECEIVES HIM.

§ 513. If we put the simple question whether the independence of the ambassador will be imperilled by reason of the dependence of a process to which he is a party, in the country in which he is to act as ambassador, we must inevitably get a negative answer. The dependence of a process and its conduct are in themselves a piece of business, which demands nothing more than the expenditure of a little time: if a party does not desire to carry on the process, he can, by admitting some of his opponent's allegations, escape in any event with the loss of his case. His person, however, so long as there is no question of execution, remains absolutely free. If the court, in which the process depended, has exceeded its jurisdiction, then, if no execution can follow on this either in this country or abroad, it is of no practical importance.

But it is a very different matter when we come to deal with execution, or generally with any of the compulsitors of the law. These may, even if personal arrest is no longer recognised as one of them, incommode him in the exercise of his functions, *e.g.* if his furniture be poinded. Besides, if the compulsitors of the law are thus put in force against him, secret documents, and generally speaking, documents which belong to the State which he represents, will be endangered. It is quite possible that the officers of the law might in such matters go outside their duty. It might even happen that a civil process might be utilised to seize the confidential documents of an ambassador under certain circumstances; for in countries in which the administration of justice is not altogether independent, national hate and national excitement may exercise an influence, it may be an unconscious influence, on the courts of justice and their administration. Accordingly, all measures of compulsion must be excluded, not merely from the person of the ambassador, but from everything which serves his personal or official use.⁹ The presumption, too, as Bynkershoek long ago noticed (*c. xvi.*), must always be in favour of such exemption.

⁸ Wetzell, *Civilprocess*. § 39, on note 1, clearly and distinctly pointed out the contrast between compulsitors and jurisdiction in the proper sense, and I believed that I was bound to follow him in this distinction, whereas, in the most modern German treaties, the contrast is not brought out sufficiently to show the full bearing of the principle. See, *e.g.* Planck, *Lehrb. des deutschen Civilprocessrechts*, 1887, p. 102.

⁹ It is not necessary that the ambassador should actually have the thing in use at the moment. It is sufficient if it is regularly used by him. One of his carriages sent to a coach-builder for repairs must be regarded as safe from arrestment and execution. Lovisoni (p. 49) thinks otherwise.

For these reasons, the officers of the executive may not enter the ambassador's house for the purpose of executing a poinding. In general, too, this rule operates as a bar to the exercise of all jurisdiction, so far as it is founded on an antecedent arrestment, since this is a measure of direct compulsion.

In the same way, according to the general rule,¹⁰ the ambassador cannot possibly have a domicile in the country. No doubt, a person may hold the office of an ambassador for many long years in the same country, and there is therefore a temptation to hold that he may thus acquire a domicile as much as any official in that country who may be superseded at any moment. But although allegiance, which is generally considered indispensable to the character of an ambassador, does not now, as it once did, form the basis of domicile, still a man, in removing his domicile to any country, does in any case commit the circle of his legal existence to a very large extent to the jurisdiction of that country, and, according to the law which prevails in England [Scotland] and the United States, and which rules in Germany for the time at least, makes his personal law dependent upon the law of that domicile. A relation of dependence such as this upon the law of the country to which the ambassador is accredited, is too great a strain to put upon the position of an ambassador, and is quite irreconcilable with his office: besides, the impossibility of using the compulsitor of the law would give rise to intolerable predicaments: can one for a moment conceive that this comprehensive jurisdiction should exist without any compulsitors, or that the compulsitors to be applied should be those that flow from the authority of a foreign country, in spite of the judgment being pronounced by the courts within whose territory the residence of the person found liable actually was?

Again, too, the *forum domicilii* is not indispensable for the protection of the inhabitants of that country. They may be content with the *forum contractus*, the *forum rei sitæ*, the *forum hereditatis*, and lastly, the *forum delicti commissi*, for claims of damages.

THEORIES OF MORE MODERN AUTHORS, WHO ADOPT THE PRINCIPLE OF IMMUNITY FROM LEGAL COMPULSITORS ONLY, OR APPROACH THIS RESULT.

§ 514. At the bottom of the theory of Bynkershoek and Vattel, and of the edict of the States General of the Netherlands, of 9th Sept. 1679 (reported by the former, c. ix.), which prohibited the use of diligence against the person and the moveable property of ambassadors,¹¹ lies the distinction

¹⁰ See Bynkershoek, c. v. ; Wharton, § 49.

¹¹ The English Statute of 7 Anne, c. 12, §§ 3 and 5, which undoubtedly forbids arrestment and execution directed against the person and the property of the ambassador, but at the same time mentions the incompetency of citing him, is less distinct. Accordingly, practice has applied it to jurisdiction in both senses. See Westlake-Holtendorff, § 184; Foote, p. 105.

between right to pronounce judgment (jurisdiction in the narrower sense), on the one hand, and right to enforce obedience (*imperium*) on the other. Then, again, the remarks of G. F. Martens (*Précis*, § 217), although not expressed with perfect distinctness, must be understood in this sense. Heffter, § 205, speaks, not, it is true, altogether plainly or definitely, of the incompetency of applying any process of diligence involving force to the person of an ambassador: he does not speak of any absolute exemption. Halleck (i. c. 10, § 17) most pointedly recommends the distinction between "proceedings before the final judgment," and "supplementary proceedings for the execution of that judgment," as the best test for determining each case as it may arise.

Bluntschli, too (§§ 139, 140), proceeds upon the incompetency of using compulsitors. He traces the doctrine of the incompetency of raising action, which is so generally recognised, to the want of power to compel by force obedience to the decree: "the court," he says, "must not be exposed to the danger of exhibiting the powerlessness of its authority." But civil judgments of a competent foreign court will be executed by many countries, and, it may be, by the country to which the ambassador belongs: besides, such a regard as the author manifests for the authority of the courts is not now generally recognised in modern codes of procedure. As a matter of fact, in a very great number of processes the stage of diligence is never reached, and the moral pressure which is involved in the judgment is sufficient to ensure performance of the prestation decreed even in the case of an international court of arbitration, in which there can be no idea of doing diligence, or using force against the losing party. But why should any State refuse to execute the judgment of a foreign State, by which an ambassador is ordained to pay a sum of money on account of some bargain concluded by him in that foreign country, and to be performed there?

The jurisdictions established by the German *Civilprozessordnung* are almost entirely independent of the possibility of executing the decree. Even in the jurisdiction established by § 24 (see *supra*, § 433) this consideration is only imperfectly attended to. In continuing his discussion of the subject, Bluntschli allows voluntary subjection on the part of the ambassador to give rise to a more extensive jurisdiction over him, and then again he mixes up this question with the question of jurisdiction over foreign sovereigns and States. In both points he is wrong, as further discussion of the subject will show. It looks as if Bluntschli had substantially followed the obscure remarks of Phillimore (ii. § 230). V. Holtzendorff lays down the decisive point of distinction quite clearly in his *Encyclopædia of Legal Philosophy* (4th ed. p. 1231) thus: "It has been debated whether it is action against an ambassador, or diligence merely, that is excluded by the principle of extra-territoriality. At the present time the former view, which gives the ambassador immunity from all steps of legal procedure, seems to prevail (?)." This deliverance is somewhat hesitating.

Zorn (in Hirth and Seydels *Annalen des deutschen Reichs*, 1882, p. 110, and particularly p. 113) starts from the sound principle that in all

questions with an ambassador the diligences of the law of the State which receives him are barred, and that the law of that State, so far as he is concerned, is a *lex imperfecta*:¹² it might be more correctly said that to a certain extent it is a *lex imperfecta*.

Zorn points out, too, very properly, that in modern civil procedure diligences or compulsitors are not applied before judgment is given. But instead of drawing from that fact the inference that there is no check upon civil jurisdiction, except in so far as it must needs appeal to its compulsitors as against the ambassador and things that serve his immediate uses, he deduces from that characteristic of the civil procedure this strange result, that there may be a voluntary subjection to jurisdiction, a renunciation of the right of exemption from jurisdiction in civil causes. Any such subjection, he holds, must involve subjection to diligence: but he first points out that a renunciation of the privilege is incompetent unless with the consent of the State whose envoy the ambassador is. We have already frequently observed that if we admit the possibility of a tacit submission the whole privilege may be very easily got rid of. We shall return again to this point.¹³

V. Bulmerincq, too (Volkerr. § 73), has truly, as far as I can see, exemption from diligence, and not exemption from all civil jurisdiction in his mind, when he describes the exemption as "exemption from civil jurisdiction, but not in any matter relating to things which are the private property of the envoy (?), or to moveables which are dedicated to his use in his official capacity." Lastly, Gareis (*Institutionen des Völkerr.* 1888, p. 93) says very correctly, that all that is really implied in the exemption of the extra-territorial person from the whole police and fiscal regulations, and the whole judicial jurisdiction of the State in which he is stationed, is the privilege of personal inviolability. But, as I think, he fails, as he proceeds in his exposition, to draw the proper inferences from this proposition, and does not give, as he might, a sharp distinction between jurisdiction and execution.

¹² Stoerk's criticism on Zorn (p. 657) seems to me to this extent to be ill-founded.

¹³ Woolsey (§ 92a, p. 105) adopts Heffter's argument.

Geffcken on Heffter, § 205 (8th ed.), and in v. Holtzendorff's *Handbuch*, iii. p. 654, speaks in a vague way of the immunity of the ambassador from civil jurisdiction. (The ambassador cannot be called as a defender, nor can any articles, which he possesses as ambassador (?), be put under arrestment.) He then makes exceptions from this principle which have no foundation. (E.g. "If the ambassador has himself raised action, he must of course take all the consequences, e.g. liability to pay expenses. According to Geffcken, the ambassador, unless he obtains the sanction of his Government, can never of his own accord renounce his privilege; if that be so, it is difficult to understand why the judgment of the court against an ambassador who has raised action should be limited to expenses. Geffcken notices, in regard to matters of trade, that as a rule ambassadors are by the conditions of their service forbidden to trade. Yes, but what if they speculate?")

Let me distinctly say that no conclusion is to be drawn, from the sharp separation we have made in the text between jurisdiction, in the stricter sense, and diligence, as to the soundness of a similar distinction in criminal law. The exemption in matters of criminal law excludes even jurisdiction in my opinion.

SPECIAL QUESTIONS.

§ 515. Let us now proceed to draw the inferences that spring from our theory :—

First, It seems to be an absolutely irresistible conclusion that the jurisdiction of the courts of this country to decide in actions directed against an ambassador must be as extensive as it would be if the ambassador were not in this country at all. No further limitation of jurisdiction could be inferred from the condition of extra-territoriality, even although it were recognised as an operative legal fiction that the person is *extra territorium*, instead of being, as it truly is, merely a picturesque expression. But from this proposition we infer at once, as is generally conceded, that there is jurisdiction in the *forum rei sitæ* in questions about immoveable property, which the ambassador may happen to possess. This jurisdiction is independent alike of the personal presence of the owner in the country, and of any antecedent arrestment.¹⁴ Besides, any other theory would lead to negative conflicts of jurisdiction, which would be very difficult to dispose of; it would deprive all the ambassador's neighbours in a manner of the remedies of law, for the State to which the ambassador himself belongs would have no jurisdiction in the matter, and no tribunal that could deal with it; and, still more plainly, it could have neither the one nor the other over the adjoining properties; and yet in most cases a burden upon one property is a right in its neighbours.

Second, All jurisdiction is barred which postulates for the ambassador a domicile in the country,¹⁵ or which is founded on any measure of diligence, which would require to be put in force over assets of property belonging to the ambassador, for these are free from arrestment.¹⁶ On the other hand, all other kinds of jurisdiction may be asserted against an ambassador, in particular the jurisdiction of the *forum contractus*, and of the court of succession¹⁷ in matters affecting an inheritance, which has

¹⁴ The jurisdiction of the *forum rei sitæ* is generally admitted. As long ago as the days of Bynkershoek, he says (c. xiv. and xvi.) that no one disputes it. A judgment of the Supreme Court of Austria, of 3rd January 1878 (J. x. p. 67), refused to entertain an action for trespass directed against an embassy, the trespass being brought about by structural alterations in the building of the embassy. The discussion of this question, however, belongs to the next division of our subject, for the defender was the foreign State itself.

¹⁵ The ambassador retains his domicile in his own country, and may be sued there. That is Bynkershoek's opinion, c. xi. See the German *Civilprozessordnung*, § 16: "Germans who enjoy the rights of extra-territoriality, officials of the Empire, or of one of its States established in foreign countries, retain, for questions of jurisdiction, the domicile which they had in the State to which they belonged. If they have no such domicile, this domicile is held to be in the chief town of the State to which they belong."

¹⁶ Accordingly, § 24 of the German *Civilprozessordnung*, of which so much has been said (see *supra*, § 433), will have no application to the case of ambassadors. Neither will the *forum arresti*.

¹⁷ As regards succession actions, which in their nature are real actions, even Lovisoni (p. 3a) proposes to recognise the jurisdiction of the court of the State to which the ambassador is accredited, if the succession has opened there.

fallen either in whole or in part to an ambassador. Every one who, as pursuer, invokes a court, by the fact of doing so concedes its competency; and accordingly an ambassador, who has invoked any court, must acquiesce in its right to find him liable in expenses if the action is dismissed.¹⁸ On the other hand, in our view, the ambassador would be protected against jurisdiction *reconventionne*,¹⁹ which would be a very serious danger; many authorities, who in other respects confine the privilege of the ambassador to jurisdiction in the narrower sense, admit this ground of jurisdiction against him, on the score of voluntary submission. But since, in the course we have followed, we have come very near a limitation of jurisdiction, in the case of ambassadors, to the cases which, as we have already shown, proceed upon grounds that will command international recognition, it seems on the whole better to lay down the simple principle that none of the jurisdictions of the State that receives the ambassador shall be applied against him, except those that will receive effect on sound principles of international law, by way of diligence and execution in other countries. This course is recommended by the fact that all the jurisdictions of this or of that State which are not thus internationally recognised, are fanciful, modern, and isolated creations, and cannot, that being their character, prevail against the general usage of nations. These international jurisdictions, in which, of course, for this purpose we do not include that of domicile, rest upon the nature of things, and, in particular, on the consideration that the merits of the legal question in dispute are to be decided according to the law of the court in which the process thus depends. In applying these jurisdictions, too, there is sure to be no injustice or special hardship. We shall then be under no necessity for adopting any special casuistry to determine to what jurisdictions ambassadors are subject; nor need we take up any doctrine of voluntary subjection. According to the principles we have already laid down, we require no special rule, either, for the possible case that an ambassador is found carrying on business in the country. This is a simple case of a *forum contractus* being raised up against the ambassador. The possibility of such a case occurring is not so very remote as the most modern authors think. Of course, a government is not very likely to allow its envoy to carry on a trading or manufacturing business under his own name. But it is quite a familiar thing that landed proprietors should carry on very extensive businesses as distillers or wine

¹⁸ The ordinary view which, on the one hand, does not allow the ambassador the power of renouncing the privilege, but, on the other hand, allows the court to condemn the ambassador in expenses, if he is an unsuccessful pursuer, involves itself here in a contradiction which Laurent, § 80, properly points out.

¹⁹ Bynkershoek (c. vi. and c. xvi.) takes this view because the jurisdiction protects a *species defensionis*. Bluntschli, § 140, note; Westlake-Holtzendorff, § 181; Gerbaut, § 169; Phillimore, ii. § 183. But perhaps those who apparently propose to subject the ambassador generally to jurisdiction of this sort, are thinking of cases in which both actions are concerned with the same subject. In this case, I do not myself doubt the competency of suing the ambassador *reconventionne*.

merchants,²⁰ and it is by no means unprecedented that an ambassador should be the proprietor of estates in the country in which his duties lie, or should *e.g.* have in right of his wife an usufruct of some estate there. Such cases would not be touched by the disciplinary regulation which forbids ambassadors to carry on business; besides, any such regulation would be disregarded by the civil court as a mere matter of discipline. The actual nature of the legal relation, which it is proposed to discuss in the process, falls to be taken into consideration to exactly the same extent, neither more nor less, as it would be admitted to regulate the competency of the court in the case of any private person.²¹ No weight at all is to be laid on the distinction, which is unsound in itself, whether the ambassador has acted as such, and contracted debts in his character as ambassador.²² The older authors, in insisting that an ambassador must, as a trader, be subject to the courts of the country, do not lay so much weight, as one notices in reading their works carefully, on the nature of the legal transactions that are in question, as on the consideration that the ambassador, who carries on business in any form, will possess a separate establishment for business purposes, against which diligence can be done without hindrance.

It may possibly be maintained that the general proposition, viz. that (putting the *forum arresti* aside) jurisdiction, as distinguished from *imperium*, or the compulsitors of the law, may be set up in the case of an ambassador in exactly the same way as in the case of any other person who has no domicile in the country, must suffer modification in so far as a citation of the defender within the territory is a necessary condition of jurisdiction. It depends on the force which we ascribe to citation. It may be regarded as an act involving a compulsitor, in which case it must be barred in the case of an ambassador, and, along with it, all jurisdiction for the establishment of which a citation of the defender is necessary. It is, however, possible to look on citation as merely an intimation in solemn form, its object being to give the defender an opportunity of urging any objections he may have to the pursuer's allegations. This latter idea is undoubtedly the idea of the German *Civilprozessordnung*, and, as I think, it is also that of the law of Italy and of France. Although the French law, and in a particular case the German law also (§ 30), require, in order to set up the

²⁰ One must not be misled by the expression so often used, "ducal or baronial estate administration" (*Verwaltung*), etc. There is no separate juridical person in such cases. The "administration" indicates merely a mandatary or agent of the owner; the latter is the person to whom all the rights and obligations really belong.

²¹ To this effect see Bynkershoek's distinct exposition, c. xiv. He criticises sharply the opposite opinion, expressed in a deliverance of the *Curia Hollandiæ*. See, too, the decision of the English courts quoted by Phillimore (ii. § 181, *Maddalena Steam Navig. Co. v. Martin*, 1859, 2, E. and E. 94, 28, L. J. (Q. B.) 310). Foote, p. 153, reaches quite logically a denial of English jurisdiction, starting, as he does, from the point of view which the law of England assumes.

²² This distinction will have no meaning unless it was meant to say that the ambassador is not subject to the jurisdiction of the State, if the State which he represents is really the contracting party and is bound. In such a case, the rules of modern law do not in general allow any claim against the ambassador.

forum contractus, that the summons should be served within the territory of the court, this is only required on grounds of fairness to the defender. The object is that a man who is not actually within the district of the court, or who has left it on a journey, should not be molested by such an exercise of jurisdiction. It is not thought to be consistent with *bona fides*, on which the whole jurisdiction in matters of contract rests, that an action should be raised *in foro contractus* against an absent man. The ideas of the English law may make the question look more difficult, inasmuch as the competency of the court is to a certain extent derived from the presence of the defender within the territory of the court, and the consequent possibility of using compulsitors. There is some indication, however, that the new laws of procedure in England are more and more giving up this point of view, and are approximating more closely to that of the modern Continental systems in so far as citation is concerned.²³

Third, It follows from what has just been said, that a simple citation of the party, which will not have the result of actually compelling his personal appearance, may take place in the case of an ambassador with full effect.²⁴ The delivery of such a citation or summons to appear before the court, may take place through the post, by delivery of a registered letter. Does the dignity of the ambassador go so far, that it is impossible to deliver registered letters to him? Does the receipt of such letters hinder him in the discharge of his duties? Does the officer of court, who leaves a writ at his house, play a part that can in any way be distinguished from that of the postman, who, according to the German *Civilprozessordnung* (§§ 177, and 165-170), may, in certain circumstances, do the duty of the other official? There is no sort of compulsitor here, or the exercise of any *imperium*.²⁵ All that the officer does is to deliver a document, and, if it is refused, to leave it, preserving evidence of having done so in another document, which he hands to his employer, the other party to the action.

But even if the citation be accepted, that does not, either by the German *Civilprozessordnung* or by the French *Code de procédure*, involve a recognition

²³ See Schuster, *Bürgerliche Rechtspflege in England*, §§ 48, 49.

²⁴ The opposite view, however, is taken by many, perhaps because the different kinds of citation and their bearings are not distinguished, viz. citation as party, as witness, and citation merely to protect some interest, perhaps simply because of a misapprehension of a course of practice. See Vattel, iv. ch. 8, § 115; Calvo, iii. § 1527; Gerbaut, § 176, founding on a judgment of the Ct. of Paris of 12th July 1867 (Sirey, *Recueil*, 68, 2, p. 201). Gianzana, ii. § 130. He proposes that the ambassador should be cited, as if he were in a foreign country. On this theory, too, proceeded the reasons given (*motive*) for § 18 of the German Constitution (see Struckmann and Koch on this paragraph). But the statute itself lays down nothing on the point. The confusion between citation as a party and citation as a witness, which so often occurs, seems to have operated here.

Vattel speaks not of citation by diplomatic methods, but rather indicates that an ambassador should be cited like a person who is abroad. But, in certain circumstances, that is a most inconvenient form of citation.

Bynkershoek (c. xvi.) speaks most distinctly in favour of the view taken in the text: "*non violatur domus, quam legatus habitat, si apparitores iudicii ibi denuncient quod denunciandum est.*"

²⁵ So Lovisoni, p. 40.

of the jurisdiction of the court, and still less of its compulsitors. Any private person, even after accepting a citation, may plead that the court has no jurisdiction. In old days persons in high position, to show their independence, may have thought it necessary to dismiss with some unpleasantness the officer of court, who tried to serve them with a citation. But that was a different affair in this respect, that the officer was alleged to be attempting to perform an act in a place over which the person, who expelled him, claimed exclusive supremacy. But, in the case of an ambassador, that cannot for a moment be affirmed of the embassy bought for his residence by the State which accredits him.²⁶

Still less than in the simple citation as a party can any prejudice to the ambassador's immunity be discovered in the performance with reference to him of an act of voluntary jurisdiction, consisting merely in some privileged attestation, in favour of some third party. *E.g.* a protest of a bill, *i.e.* a documentary attestation that the ambassador refuses to accept or to pay it, may be taken by a notary as against an ambassador.²⁷

SPECIAL QUESTIONS. CITATION. OBLIGATION TO GIVE EVIDENCE.

§ 516. The requirement that all citations should be delivered to an ambassador by diplomatic means and by the hands of a minister, who is his official superior, is, according to the rules of modern systems of procedure, altogether meaningless, and might almost amount to a denial of justice in questions requiring dispatch (*e.g.* questions as to rights of building, or as to leases). Let us remember that the intimation might have to find its way twice over the ocean, and to pass through the hands of a multitude of intermediate officials; whereas if the ambassador is to be treated absolutely as if he were absent, the law of the country where the procedure was to take place would necessarily find the resource of edictal citation open to it according to the principles of international law. It must always be for the law of the court to say whether a citation is or is not sufficient.²⁸

²⁶ Lorimer, i. p. 240, says, no doubt, of an English ambassador in a foreign country, "his house is English ground." But in this assertion he stands pretty well alone. I am not aware that any European or American Government has renounced its real jurisdiction and local rights of police over an ambassador's hotel. Such a renunciation is quite impossible, without depriving his neighbours, or perhaps whole streets, of their legal rights. See Bluntschli, § 137, note; § 141, note. He reminds us that no State would, for instance, be bound to put up with firing-practice in the garden of the embassy, to the danger of the public.

²⁷ See Geffcken in *v. Holtzendorff's Handb.* iii. p. 657. He speaks, however, in too vague a way, of measures which are intended to ensure us our legal rights. Such an expression would cover arrestments.

²⁸ According to what I have said in the text, I cannot assent to what Geffcken (*v. Holtzendorff's Handb.* iii. p. 657) says in approval of a decision of the English Court of Common Pleas in 1854 (reported by Phillimore, ii. § 193, *Taylor v. Best*, 1854, 14 C.B. 487), in which jurisdiction was assumed over the secretary of a legation, because he had accepted the citation, and had even pleaded before the court, and subsequently put forward a plea of no jurisdiction. Such conduct is, of course, intolerable from the point of view of the law of procedure. But if the

Fourth, But the case is entirely different as regards the obligation of the ambassador to give evidence or a skilled opinion. Such an obligation as that will at once lead, in the event of refusal to perform it, to the use of compulsion, and besides it involves the risk that the ambassador may find it necessary to say something, which, in the interest of his office, he ought to keep to himself. Any such obligation trenches on the independence of the ambassador. It is therefore properly negatived, and thus all citations of the ambassador with intent to make him give evidence, even although the ambassador should not at once have refused to receive them, have no legal effect, and must be looked upon as an invasion of his position. In such cases, the proper course is to courteously request the ambassador, if he will be so good, to give evidence. So, too, the form of oath, and generally the shape in which his information is to be presented, is a matter for the discretion of the ambassador himself, or his official superiors.²⁹ Of course, the court in which the process depends, or the court which is acting on commission from it, must decide according to its own law, whether the form under which the ambassador chooses to give his information is satisfactory as evidence.

SPECIAL QUESTIONS. SUBJECTION TO THE COURT IN MATTERS OF DILIGENCE.

§ 517. *Fifth*, Again, the voluntary subjection of an ambassador³⁰ can have no further effect than such subjection has in the case of any private person.³¹ Accordingly, it may take place so far as jurisdiction to pronounce judgment is concerned, but not so as to sanction any compulsitor, which plainly is to be counted a part of *jus publicum*, and cannot therefore

court should not *per se* have jurisdiction, as may be the case in actions against an ambassador, and that on grounds of public law, it would be difficult to justify the decision of the English court. The result, I think, is right; the reasons for it are wrong. § 183 of the German *Civilprozessordnung* determines that summons addressed to Germans, who have extra-territorial privileges, shall be delivered through the Imperial Chancellor or a minister of the Federal State, as the case may be. This is only applicable to processes which are in dependence in German courts. The commentators take a different view.

²⁹ See the answer of the Dutch minister van Hall to the Secretary of State of the United States, with reference to evidence to be given by the Dutch envoy to the United States, Dubois, in a criminal proceeding depending at Washington in 1856 (see Calvo, ii. § 1519). See also Geffcken in v. Holtzendorff's *Handb.* iii. p. 655.

³⁰ See Gerbaut, § 183, as to the possibility of a voluntary subjection.

³¹ But the case of voluntary subjection is not to be confounded with the case of a person belonging to the diplomatic body contracting as the representative of another person, and being sued in that character. Even those who hold that the immunity of an ambassador extends so as to bar jurisdiction in the stricter sense will admit, that in such a case jurisdiction cannot be declined on the head of ambassadorial immunity. See Ct. of Bordeaux, 11th Nov. 1883 (J. x. p. 613). But in our view, even in such a case, no diligence can be done against the ambassador himself.

be prorogated by any private contract.³² (*E.g.* in the same way, no one by any private bargain could invest an executive officer with right to employ the compulsitors of the law beyond the territory assigned to that officer.) Nor can any consent on the part of the State, which accredits the ambassador, make any difference in this matter. Such a consent, which is so often mentioned in this connection, seems entirely irrelevant: as regards the action up to the date of the final judgment, it is not required; as regards execution, it is inoperative. For it is the interest of the State to which the envoy is accredited, only to deal with a completely independent official, whose dignity is not to be impaired by private diligence being done upon him or his. An example will make this plain. Suppose that imprisonment for debt still exists in the country to which the ambassador is accredited. Would it be consistent with the dignity of that State to treat with one who was kept in gaol by some private creditor? In a less degree this consideration applies, if it is proposed to poind the ambassador's furniture.

Lastly, it may quite justly be said that, if voluntary submission were allowed to operate so as to validate execution, the whole of the ambassador's privilege of independence would stand upon the most uncertain ground. In theory, a distinction may no doubt be taken between express and implied renunciation, but the distinction is not so easy in practice; and, on the other side, if renunciation were once admitted, it would be inconsistent with *bona fides* to exclude its application if it were only implied, and not express. Implied submission is simply another expression for a submission which may be inferred from the character of the dispute and the conduct of the parties. Thus, to admit the possibility of voluntary submission to execution, particularly if it were to be inferred from submission to the jurisdiction of the court to pronounce judgment, would very soon sweep away the whole privilege of an ambassador,³³ as has already been very properly noticed by other authors, *e.g.* by Mr Wheaton.³⁴

This is another reason for making a sharp distinction between jurisdiction to give decree and to award execution, for we cannot well dispense with the theory of voluntary submission to jurisdiction in the former sense to a certain extent (see *supra*, § 515).

³² Bynkershoek (c. xxiii. *ad fin.*) reaches the same result: "*Atque ita . . . forte dicendum est, legatum in causa delicti nunquam privilegio fori renunciare posse, in causa civili non aliter quam ut adversus eum jus dicatur, non ut sententia executioni mandetur.*"

³³ Gerbaut, § 184, warns us at least against assuming lightly that a voluntary submission should be implied from anything outside the process itself.

³⁴ V. Heyking (p. 55) rightly pronounces against the principle of voluntary submission which is upheld by so many publicists. See Trib. Civ. Seine, 8th March 1886 (J. xiii. p. 592). Some have gone the length of inferring it from the fact that an ambassador has contracted debt in any country, so that he can be forced to pay them there. V. Heyking does not confine the exemption to execution in the narrower sense, and so he finds himself forced (p. 86) to admit subsequently the possibility of a voluntary submission, with the assent of the State to which the ambassador belongs. This, he says, should be given in writing. What is his authority for saying so?

SPECIAL QUESTIONS: ACTIONS CONNECTED WITH REMOVAL FROM THE
 AMBASSADOR'S HOUSE. RIGHT OF HIS LANDLORD TO RETAIN AND
 TO SEIZE. PROVISIONAL MEASURES.

§ 518. *Sixth*, A special difficulty occurs in actions against an ambassador, connected with his removal from his house, a kind of question which is very likely to arise. If, in such cases, we are to hold that the right of the officers of the territory to do diligence is excluded, then the landlords of houses occupied by ambassadors are left with hardly any legal remedy open to them; for there is no doubt that in many cases the diligence which they would naturally use would be against the furniture which they find in the personal use of the ambassador, and which he is proposing to take away from the house he is now quitting. In such cases, the courts of the country to which the ambassador belongs are entirely incompetent, and in any case the circuitous process of appealing to them, or to the official superiors of the ambassador, would be too tedious a process. Slatin (J. xi. p. 468), who has treated this matter with exceptional thoroughness, arrives at the result, that in such cases both jurisdiction and execution should be sanctioned to their full extent against the ambassador, because actions of this kind are closely akin to real actions dealing with immoveable property, because they demand prompt settlement, and lastly, because they must be ruled by local law. Beauchet, who translates Slatin's article into French, declares (J. xi. p. 469) against the conclusiveness of these arguments.

I am inclined to agree with Slatin. If it is clear that the contract of lease has run out, then—at least according to the rules of the common law of Rome, and, as I think, by other laws also—the hirer has absolutely no further right to remain in the house, or to leave his property there. In place, therefore, of raising an action of removing the person who has let the house, particularly if he be the proprietor of it, or have some other real right to it, may employ the weapons of self-defence, which in this case take the shape of a right, to expel the property and the persons of strangers from the house by force if need be.³⁵ An action of removal is a more lenient and more prudent measure: to avoid the interference of a private individual *via facti*, the judicial authority is invited to step in, and the matter is placed under

³⁵ So long ago as the days of Bynkershoek, that author (c. xvi.) shows that certain interdicts, which, to use his expression, are directed against anarchy, *i.e.* against disorder which, as a matter of police, cannot be endured, or which represent a kind of self-defence, are admissible even against an ambassador. Phillimore, §§ 184, 185, takes the same view. It is a case of the same kind, when some defect in the building of the hotel of the embassy threatens danger to the adjoining houses. The ambassador may, as I think, be ordained to find caution *damni infecti* (if he is the owner of the house; if not, then the foreign State to which he belongs). If the ambassador is found liable, the caution must, by a fiction, be held to have been found, or the judgment pronounced in the case must be taken to represent an actual undertaking to make good the damage. See German *Civilprozessordnung*, § 779.

their control. But it is familiar doctrine that it is allowable to defend oneself even against an extra-territorial person, and that that self-defence may take the shape of the defence of one's property; from this it follows that an action of removal must be sanctioned, which, after all, is a less drastic form of the proceedings already referred to, as being allowable in self-defence. The considerations of expediency urged by Slatin are, besides, not to be forgotten.

As Slatin notices, the Supreme Court of Austria on 28th April 1874 held that an action of removal was competent. The ambassador apparently refused to accept the citation, and so a *curator absentis* was appointed, and the procedure was directed against him. Perhaps, however (see Beauchet *ut cit.* and Vesque v. Püttlingen, p. 389), the jurisdiction of the court was put upon the circumstance that the ambassador had himself brought the question of the lease of his house before the court on another point. This account of the decision, which v. Püttlingen and Beauchet both seem to think is correct, would in my view certainly be wrong. However, in any case, the result supports the theory which I have laid down, and sometimes the result of a judicial sentence is more important for legal theory than the *ratio* on which it proceeds.

But what, again, is to be said of a right of retention or a right of hypothec at common law (*pignus quod tacite contrahitur*) belonging to the landlord, in a case where the ambassador is leaving his house, while the landlord has some claim against him, *e.g.* for alleged damage done by him? A case of this kind, of which Wheaton (i. p. 293) gives us an account, formed in 1839 the subject of a correspondence between the Prussian Foreign Ministry and the Secretary of State for the United States. The Prussian courts and ministry took their stand, not so much on the contention that the ambassador was subject to Prussian jurisdiction, as on the contention that the landlord should be protected in his real right, which the ambassador himself must be held to have given to the landlord, by entering on the contract under the law of Prussia.

Still, I should be inclined in such a case to decide against the landlord. Furniture which is directly subject to the uses of the ambassador must be protected against all invasion by way of diligence, and although the right here takes the form of a *pignus tacitum*, it is none the less an invasion of that kind. The privilege, which is a matter of public law, existing in the public interest, must assert itself against such provisions of the territorial law, by means of which a private person would for a time at least be able to deprive an ambassador of important papers by seizing and keeping the desk in which they were lying: it might at least expose the papers to great risk.³⁶ Besides, any such right would work very differently in different countries.

³⁶ See despatch of the Secretary of State of the United States, Legaré, of 9th June 1843, extracts from which are given in Wharton's Dig. i. § 96 (p. 654). Perhaps the reasoning was inadequate, in respect it did not sufficiently insist on the contrast between express pledge and implied pledge, and the proof which the former affords that the article pledged is not indispens-

It may be said by some objector that an express pledge of any article is just as untrustworthy as the tacit pledge; and there is no doubt that a right of pledge may be carried too far. The ambassador, however, who expressly pledges any article, by that very act shows that it is not absolutely indispensable to him. The same thing cannot, however, be said of implied pledges or hypothecs, which in the particular case may never come to the knowledge of the contracting parties, but are supplied directly by operation of law. But the declaration implied in actual pledge, that the article is not indispensable to him as an ambassador, must receive effect. The *bona fides* of trade absolutely demands that it should: otherwise the ambassador could not pledge anything, and perhaps could not sell anything, for pledge and sale are just different methods of alienation. No one has as yet suggested that in transactions of this kind the approval of the ambassador's official superior should be obtained. Such a demand would place the ambassador, in so far as his civil rights were concerned, on the level of a minor, or of an *incapax*.

Seventh, No provisional measures, except such as have reference to real property, can be adopted, in so far as they imply any personal compulsitor against the ambassador himself, or involve any attachment of things which are actually in use by the ambassador.³⁷ It would require a very extreme case indeed to warrant us in sanctioning any such measures against the person of an ambassador on grounds of humanity: *e.g.* the ambassador would require to be insane, while the State by which he was accredited would in its turn require to be for the time unable to take the necessary steps.

SPECIAL QUESTIONS: APPLICATION OF THE RULES OF SUBSTANTIVE PRIVATE LAW: THE RULE "*locus regit actum*" IN PARTICULAR.

§ 519. *Eighth*, As regards the substantive private law to be applied to an ambassador, there is no need to treat the ambassador otherwise than any other private person, although we cannot allow him any domicile in the State to which he is accredited.³⁸ His rights of *status* and of family³⁹ will, of course, be ruled by his personal law, while his real rights in immoveable property must, as all admit, be ruled by the *lex rei sitæ*. In

able. Macri, i. p. 227, declares himself in accordance with the text, because, according to the principles of international law, the furniture of the ambassador is to a certain extent *extra commercium*.

Bynkershoek, besides (c. ix), decides in accordance with the text. The case occurred in Paris, in 1608, with the Venetian ambassador.

³⁷ See the President of the Trib. Civ. of the Seine, 29th September 1880 (J. viii. p. 514), in connection with provisional measures for behoof of the wife of an ambassador.

³⁸ See Zorn in Hirth's *Annalen des deutschen Reichs*, 1882, p. 82.

³⁹ An ambassador, however, in marrying, may submit himself to a foreign law of marriage as regards the property of the spouses, C. d'Aix, 22nd Feb. 1883 (J. x. p. 172). Why should the free will of an ambassador have less scope than that of a private person?

general, too, rights in moveables are, by the pressure of necessity, ruled by the *lex rei sitæ*. All that is left, then, is the sphere of the law of obligations, and the rule "*locus regit actum*."⁴⁰ If we were not to apply the law of the territory to contracts made by an ambassador, in cases where the nature of the subject requires it—and the application of the *lex loci contractus* is made in such cases only—the rule would involve an outrage on *bona fides*, and in many cases would do nothing but harm to the ambassador. What other law, *e.g.* could be applied to leases of real estate? The rule "*locus regit actum*" is only applied, however, if parties choose: in fact, it is an indulgence to the parties for facilitating legal intercourse. Is an ambassador to be excluded from that indulgence? That would seriously inconvenience him in his business relations in the country. No one, accordingly, doubts that the ambassador may avail himself of the machinery for acts of voluntary jurisdiction within the country:⁴¹ may *e.g.* conclude contracts before a notary of the country. That involves no invasion of his independence or dignity.

BEGINNING AND END OF THE AMBASSADOR'S IMMUNITY. AMBASSADORS
ACCREDITED TO ANOTHER COUNTRY ON THEIR JOURNEY TO IT.

§ 520. The privilege of extra-territoriality must, as regards exemption from diligence, begin so soon as the ambassador sets foot in the country to which he is accredited, and, in the case of goods that serve his personal or official wants, so soon as they reach the frontier of that country. It must also continue to subsist for a certain time, after he has been recalled, or has left the country, as the case may be: for what time must, in the want of special legislative provision on the point, depend on judicial discretion, taking account *inter alia* of the amount of the furnishings. Perhaps the best plan would be to allow the foreign minister of the State to which the envoy is accredited in each case to fix a time, with power to extend it within certain limits. The privilege will not ensure full protection, unless it outlasts for a certain time the functions of the ambassador. All are agreed on this point. It will be right, too, to protect ambassadors of powers that are not at war with us, travelling through our country, from all the compulsitors of our law.⁴² It is not our view that the whole

⁴⁰ The Prussian statute of 3rd April 1823 recognises the validity of the rule "*locus regit actum*" as regards the testaments of Prussian ambassadors abroad. § 1, "*Mortis causa* settlements of our ambassadors shall, as regards their form, be recognised as heretofore as valid, if they conform to the law of the place where they were executed."

§ 2 preserves the ambassador's right to execute a holograph settlement, which is to be transmitted to the ministry of foreign affairs, and kept in the archives of the Privy Council (Kammergericht). This is only available for a year after the ambassador has been recalled (§ 4). This Prussian statute has never been formally extended to ambassadors of the German Empire.

⁴¹ See Klüber, § 187*c*.

⁴² Bynkershoek (c. ix.) takes a different view: he applies the word "*passerende*," which

privilege of ambassadors is based exclusively on a *tacitus consensus* of the State in which the ambassador is received, although some of the conditions of it may depend on that *consensus*. Our view rather is that it is an universal and imperative necessity that diplomatic intercourse should be free and unrestrained, and that therefore such immunity does not require to be specially conferred, it arises as a matter of course, unless some individual State expressly forbids a particular ambassador, or the ambassadors of a particular State, from passing through its territory, or will only permit it on the understanding that this immunity is withdrawn.

If the privilege be extended to ambassadors on their journey, we can dispose in the same way of the disputed question, whether ambassadors, accredited to some federation of States, enjoy this privilege within the territory of each of the States that make up the federation. So, too, with the converse case of an ambassador accredited to some one of the federated States, while he is within another part of the federal territory.

EXTRA-TERRITORIALITY, IF THE AMBASSADOR BELONGS TO THE COUNTRY TO WHICH HE IS ACCREDITED.

§ 521. There remains still another point for discussion, viz. whether this privilege should be conceded to ambassadors, who are subjects of the State in which they act as ambassadors. Many authorities,^{43 44} and among them Bynkershoek (c. xi.), refuse him privilege in such a case. As a matter of fact, this privilege, if we regard it as a complete exemption from jurisdiction (excepting always real jurisdiction over immoveable property), would lead to a denial of justice in those cases in which the State to which the ambassador was accredited would have, but for the privilege, by reason of his belonging to it, an exclusive jurisdiction. The privilege is not so serious a matter, if it only applies so as to free him from diligence directed against his person, or against furniture necessary for the reasonable performance of his calling, or against the salary drawn by him as ambassador. In our view, his privilege is not solely to be referred to the assent of the State in which he is received as ambassador. This consent seems only to be necessary to enable him to be recognised as ambassador, and to do his duty as such. On the other side, however, this more limited

occurs in the edict of the Dutch States General of 9th Sept. 1697, only to ambassadors who are leaving a country to which, up to this time, they have been accredited.

The point has long been a disputed one. For the view of the text, see Vattel, iv. 7, §§ 84, 85; Klüber, § 204; Wheaton, p. 220; Neumann, *Volkerr.* p. 177; Lovisoni, p. 54, and (apparently) Geffcken in v. Holtzendorff's *Handb.* ii. § 368. Hartmann (*Institutionen des Volkerr.* § 109) takes an intermediate view, which, in my opinion, does not suit the conditions of modern traffic. Tacit assent to the ambassador's passage he holds to be necessary and sufficient. This assent he finds in the *visé* of the ambassador's passport.

⁴³ See Klüber, § 210; Heffter, § 214.

⁴⁴ Wiequefort, *Mémoires touchant les ambassadeurs*, 1677, has, as is well known, maintained that it should be conceded. He appears, however, as a judge in his own cause in this matter, for his character as envoy of the Duke of Luneburg did not protect him from criminal procedure in his character of a Belgian subject.

immunity is indispensable for the discharge of his ambassadorial duties. From this it will follow that his position as a subject of the State does not at all stand in the way of that limited immunity:⁴⁵ on the contrary, it must be conceded to him the moment he is recognised as ambassador.⁴⁶

But, of course, *jura quasita* acquired previously must not suffer by this privilege, even as regards the subjects which are attachable by diligence. Accordingly, without any personal constraint being put upon the ambassador, he will have to point out and to make available for diligence all the articles of property which he possessed at the time he was admitted as ambassador, and then, according to the nature of the subject matter, the rules "*res succedit in locum pretii*" and "*pretium succedit in locum rei*" will fall to be applied. The ambassador may be required to give up an inventory on oath (*manifestationseid*), but cannot be compelled by threat of imprisonment to do so. No ambassador, however, who was a person of honour, could bring himself to refuse to do so. If he did refuse, we may presume that the Government which had accredited him would dismiss him. In the last resort, the Government to which he was accredited would remonstrate, and remonstrate with effect, against such an ambassador, and thus put an end to his tenure as ambassador.

Many States, indeed, refuse to allow their subjects to act within their territory as ambassadors for foreign States. But that does not settle the question which we have stirred. In the first place, it may very well happen that any such maxim or rule should be infringed; and, again, mistakes may easily be made as to the character of an individual, *i.e.* whether he is a subject of this or of that State.

The German Constitution (§ 18) does not in itself give German subjects, who are chiefs or members of foreign embassies accredited to the German Empire, immunity from German jurisdiction (see *supra*, p. 1076, note 6 *ad fin.*), but lays down that any of the States of the Empire may renounce its jurisdiction over a subject who has been accredited to it as ambassador.⁴⁷ It is not quite plain to me how that is to take place in the particular case to the prejudice of third parties, looking to the other provisions of the Constitution, and the independence of the courts of law.⁴⁸

⁴⁵ *E.g.* Vattel, iv. § 112; Ch. de Martens, *Guide diplomatique*, i. p. 89, and Heyking, p. 60, all support the doctrine of immunity, unless the State which receives the ambassador declares to the contrary from the first.

⁴⁶ A decision of the Trib. Civ. Seine, 21st Jan. 1875 (J. ii. p. 89), recognises the privilege. Demangeat (*ibid.*) approves the decision.

⁴⁷ "If these persons are subjects of the State, they only enjoy immunity from German jurisdiction in so far as the State, to which they belong, has renounced its jurisdiction over them."

⁴⁸ The question, on the other hand, whether ambassadors, who are accredited to one of the States of the German Empire, are exempt from German jurisdiction all over the Empire, I think, according to the words of § 18 (2), must be answered in the negative. "The chiefs and members of embassies accredited to one of the States of the Empire, are not subject to the jurisdiction of this State. The same rule (?) holds good of the members of the Federal Parliament (*Bundesrath*) who do not represent the State in which the Parliament meets." (This

EXEMPTION FROM TAXES AND DUTIES.

§ 522. As regards taxation, ambassadors are as a rule considered free from all direct personal imposts by the Government of the country, which postulate a relation of submission to its authority (*e.g.* income-tax). There is, however, no actual necessity for any such exemption: a different rule will apply to taxation levied by way of local dues, although these, as much as the other, rest upon a relation of submission (*e.g.* indicated or created by a stay of a certain duration). But there is absolutely no ground in law to be found for immunity from indirect imposts and duties. We therefore leave this question, dependent as it is on the laws of each particular State, where we found it, and content ourselves with saying that, in levying and collecting duties and charges, no direct force or diligence may be used against the ambassador himself, or against those things which he has actually taken into his own use. It is therefore impossible to examine his baggage at a custom-house, if he declares that he has no articles with him that are liable to duty, or if he exhibits the articles, liable to duty, which he has.

JURISDICTION BELONGING TO AMBASSADORS THEMSELVES.

§ 523. An ambassador can only exercise what is known as a voluntary jurisdiction,⁴⁹ in matters that concern the persons belonging to the embassy, and to a certain extent—to what extent it is impossible to lay down any general rule—but, speaking roughly, in matter that concern persons belonging to the State which accredits him. We have already noticed that this is so as regards marriages, which are to be counted as a species of voluntary jurisdiction. The hotel of the embassy, however, never ceases to be a part of the territory in which it is actually situated. The rule "*locus regit actum*" can never, therefore, be pleaded in support of the exercise of jurisdiction of this nature,⁵⁰ to the effect of maintaining that a document executed in presence of the ambassador, or with his assistance, should be recognised as correct in point of form, if as regards its contents it must be ruled by some law other than

latter proposition is incorrectly expressed. Strictly speaking, *the same rule* cannot hold good of members of Parliament; they are not accredited to any of the States of the Empire.) See Hartmann, *Institutionen*, p. 110.

⁴⁹ As a matter of public law, there would be nothing to prevent the ambassador being invested with a certain contentious jurisdiction, if this were only to receive effect within the territory of the State which accredited him, and if, also, there were no proposal to use any diligence or compulsitor, or administer any oath in the country in which he is stationed. Of course, a sovereign, who happens to be living in a foreign State, may sanction laws which are to be carried out in his own State, and name officials, during his stay.

⁵⁰ The ambassador is, as Zorn (p. 85) rightly remarks, an official of his own State in foreign territory. But it is not right to infer from that, as Zorn does, that he has an *imperium*. Any *imperium* exercised by an ambassador, except as regards arrangements that touch the staff of the embassy only, rests upon a concession by the State to which he is accredited.

that of the country to which the ambassador belongs. Accordingly, apart from the power of assisting in or authenticating the execution of testaments by members of the embassy, a power which is universally conceded to an ambassador,⁵¹ it will be wrong to attribute to him in a civilised country, without the assent of the State to which he is accredited expressed in formal legal shape, any voluntary jurisdiction. No State is bound to sanction any such powers in a foreign ambassador, concurrent with those of its own notaries and officials, even if these powers are exercised only in the case of subjects of the country to which the ambassador belongs. It is all the less bound to do so, as such neglect of the application of the rule "*locus regit actum*" may be apt to lead to confusion in legal intercourse. It is only in cases in which the State, where the embassy lies, refuses all assistance, that such voluntary jurisdiction on the part of the ambassador is proper, at least in civilised countries. In any case it must, of course, be confined to subjects of his own State.⁵²

PRIVILEGES OF CONSULS. CONSULAR ARCHIVES.

§ 524. It is familiar law that consuls, except in so far as they also possess a diplomatic character, have no privilege of extra-territoriality.⁵³ The consular archives, however, in the interest of the performance of the international duties of the consul, must be held inviolable even against the civil jurisdiction of the country,⁵⁴ although, of course, only under certain conditions. The Institute of International Law in 1888 began to busy itself in laying down these conditions and in attempting to define the privilege.⁵⁵

If a private person asserts that a consul, unwarrantably as he alleges, has appropriated any articles or documents, and laid them up among the consular archives, then the question is a pure question of public law, and must be disposed of by diplomatic negotiations, and in the end by a court of arbitration selected by agreement. The consul has acted as the representative of the foreign Government, and has exercised a sovereign right which belongs to it, and is conceded by the other Government to

⁵¹ See Hartmann, *Institutionen*, p. 112; Geffcken in v. Holtzendorff's *Handb.* iii. p. 660. That depends, of course, on the law of the State which appointed him.

⁵² The question as to what persons of the ambassador's staff and his household are covered by the privilege of extra-territoriality, is a question which may be left to public law, and need not be discussed as a subject of private international law.

⁵³ See German Constitution, § 21: "Consuls appointed within the Empire are subject to its jurisdiction, unless there be some treaty between the Empire and the foreign power as to their immunity."

⁵⁴ See Clunet's paper (*J.* xv. p. 53) on the damage done to the archives of the French consulate at Florence by the Italian praetor Tosini in December 1887. Fiore maintains their inviolability (*Dir. pubb.* ii. § 1185). So, too, Calvo, iii. §§ 1404, 1405; and Gabba, *Rev.* xx. p. 244. The details of the case discussed by Clunet have no interest for us at present.

⁵⁵ Engelhardt drew a sketch for an international agreement. *Rev.* xx. pp. 592 and 610.

belong to it within its own territory. Gabba,⁵⁶ who takes the same view as we do, very soundly remarks, that (at least in Italy and in Germany) the courts themselves would not have any power themselves to seize papers belonging to executive officers of the Government, or to compel these officers to seize them. How can it be maintained that they have this power as against the official of a foreign State? One obvious exception to this rule, and it is the only one, is pointed out by Gabba (p. 241), viz. if the consul is appointed, by the country that appoints him, to be the representative of some private person, *e.g.* as *curator absentis*.⁵⁷ Consular treaties often provide for appointments of the kind.

But, if he alleged that a consul, acting altogether outwith his official duty, or within the scope of his office as representative of some private interest, has concealed some document in the inviolable archives of the consulate, then the civil courts would put in force the measures, which are applied in other cases, where an allegation is made that a person has concealed a paper or any other object which he is bound to make forthcoming, in some unknown place. The consul will be compelled either to depone on oath, or to undergo an action of damages, or, in so far as he represents a private person, run the risk of losing a process which he is carrying on for him, and of being liable to the party he so represents in damages.

The same rules must prevail in the case in which the consul has a diplomatic character, and so enjoys the privilege of extra-territoriality. But in that case no direct compulsitors, such as fine or imprisonment, could be used to compel him to depone on oath.

GENERAL ESTIMATE OF THE PRIVILEGE OF EXTRA-TERRITORIALITY.

§ 525. The privilege of extra-territoriality was attacked so early as the end of the seventeenth century,⁵⁸ in more modern times by Fiore,⁵⁹ and most markedly by Laurent.⁶⁰ Laurent thinks it is unnecessary, and therefore mischievous; he also pronounces it to be a serious and plain invasion of legal order, which must of necessity be the same for all, due to old inflated exaggeration of the idea of sovereignty, and the deification of princes; it is, he thinks, all the less defensible as different theories on its true import are so widely divergent one from another.

We must concede that these attacks are justified in so far as the

⁵⁶ Rev. xx. p. 239.

⁵⁷ A judgment of the Ct. of Poitiers, 4th November 1886 (J. xiii. p. 702), rests upon the distinction between a consul acting in his official capacity and as a private person, *e.g.* as representative of a captain or ship-owner.

⁵⁸ So in the academic disputation: "*De legato sancto, non impuni*," by Fr. W. de Lüderitz: "*auspiciis Henrici de Cocceji*," Franc. ad Viad. 1699; this is a disputation mentioned by Bynkershoek.

⁵⁹ *Dir. pub. internaz.* ii. § 1231.

⁶⁰ iii. §§ 10 and 11, 19 and 25 and 80.

defenders of the doctrine of extra-territoriality postulate, as the principle upon which they are to proceed, that the sovereign power of the foreign State is embodied in the ambassador, a principle from which they draw the most extravagant conclusions; *e.g.* they make this absurd inference, that it is an insult to the foreign State, if our courts of justice dare to bring an action to the notice of the ambassador, *i.e.* simply ask him to meet the demand made upon him. There is no such embodiment of the foreign sovereignty as that in him.

But within the limits, which we have felt ourselves constrained to draw, the privilege has good grounds of its own on which to rest. Apart from the privileges of sovereigns, there are in most countries privileges, which shield particular persons, *e.g.* members of Parliament, from some of the diligences of civil process.⁶¹ The right of the private citizen [the creditor] must in these cases, in respect of the public position which the obligant holds, give way to the public interest in the free and unconstrained exercise by the debtor of his office, or of the mandate entrusted to him by his fellow-citizens. It is exactly the same with the privilege of an ambassador, but his privilege, on account of the peculiar character of his office, is peculiarly important, and is consecrated by an universal tradition. This privilege was in old days more necessary than it is now, but even at the present day it is not to be dispensed with. The administration of justice is no doubt in civilised countries, in form at least, independent. But as a matter of fact it may not be so everywhere to the extent to which the language of the law asserts it to be, and there is no absolutely trustworthy guarantee against the force of national prejudices and unreasonable national hatred, which it is impossible for the individual to estimate. The ambassador of a nation which is disliked must, therefore, on that account hold a very dangerous post. Again, apart altogether from such prejudices, miscarriages of justice are specially likely to occur in cases in which international relations are under consideration. It is not always easy to distinguish the public capacity of a representative of a foreign power, from his capacity as a private individual, as the process in Florence recently showed [J. xv. p. 53]. But lastly, in our view, the question is one solely of exemption from direct compulsitors against the person of the ambassador, or against things that he is in direct need of for his support and the discharge of his office.

If this limit is observed, and the privilege is not extended to questions of jurisdiction in the narrower sense, it does not involve any very serious invasion of the principle of equal justice to all, and, at the same time, it gives the ambassador sufficient protection. The only difficulties are those that may arise, as they do in all departments of international law, from the

⁶¹ See *e.g.* German *Civilprozessordn.* §§ 785, 786, as to the immunity of certain persons from imprisonment in case of refusal to depone on oath that he has made a full surrender of his property, and see § 812 as to the incompetency of arrest of the person in security in the like cases.

new-fangled jurisdictions, with as many arms as a polypus, which, however, do not merit international recognition. But if it is proposed to extend the privilege beyond the limits of these indispensable requirements, it will be exposed to violent attack, which will be founded on good reason, and from time to time will meet with success.

One special risk, which is involved in too wide an extension of the privilege, and which is most prominent when we extend the privilege so as to give a general immunity from jurisdiction in the fullest sense of the word, is plainly this—that if it is so extended we must introduce some restrictions. But each different State will have a different theory as to these restrictions, since they depend upon matters of process law, which, again, is different in each State. The want of uniformity which will thus be produced will give the whole doctrine an appearance of caprice and of chance, and will in turn make men think that it may be dispensed with altogether. The theory which refers important limitations of this kind to an express or to a tacit renunciation of the privilege, ruins entirely the whole principle. In our view, the privilege is closely limited to the measure of its necessity, but, on the other hand, should be to that extent protected by all alike, and be entirely beyond renunciation or prorogation.

GENERAL EXTENSION OF THE EXEMPTION TO OFFICIALS WHO ARE
EMPLOYED WITHIN A FOREIGN STATE.

§ 526. But, of course, we must not extend too far the circle of persons who are entitled to rely on the privilege of immunity from the *imperium* of the territory in which they happen to be. It would, *e.g.* be a mistake to give this exemption to consuls, who are carrying on business for themselves, except in so far as the inviolability of their archives is concerned.

It may, however, seem questionable, whether the exemption is not also to be accorded to other officials and commissioners of a foreign Government who are present in our territory with the knowledge and consent, or even perhaps on the invitation of our State, although they have no real diplomatic character. This question has become one of special practical importance in view of the technical international conferences and congresses, which now take place so frequently. In the case of Schnaebeli,⁶² in which questions were raised about the arrest of a French frontier policeman, who had entered German territory in his official character, Stoerk⁶³ finds ground for the proposition that a principle was involved which had always existed, but till it was brought to light in that case had been latent, viz. that persons, who in their official capacity set foot on a foreign country,

⁶² See Clunet, *Questions de droit relatives à l'incident franco-allemand de Pagny*, Paris 1887, and the extract from this paper in J. xiv. p. 386. Further, Calvo, ii. § 935. This case raised other interesting questions, mainly of criminal law, which cannot be discussed here.

⁶³ V. Holtzendorff's *Handb.* ii. p. 661.

enjoy a certain amount of exemption, which is not necessarily to be brought, and indeed cannot, to all intents, be brought under the rule of extra-territoriality, which has been elaborated for another condition of things altogether.

Now, it is quite certain that the presence of such a person, either by invitation or by permission, cannot be used to arrest him in pursuance of a plan prepared beforehand, cannot be made a trap for him. Accordingly, we must assent to the despatch of the Chancellor of the German Empire, of 28th April 1887, in connection with the Schnaebele affair. It set out that parties crossing the frontier, in consequence of official agreements between the officers of two adjoining States, must be considered as having taken place under the tacit assurance of a safe-conduct. Any other treatment⁶⁴ would seem in fact to be at variance with the *bona fides* of international intercourse,⁶⁵ and this we must maintain not only with reference to frontier officers, but with reference to all representatives of foreign States invited or admitted to our State, without regard to the nature of the public affairs which they have to transact or to represent. It seems, however, dangerous to go further, for plainly the ordinary course of justice must not be broken through unnecessarily; while in the administration of civil affairs there is no reason for further exemption, if we exclude the application of arrestment to found jurisdiction, and the jurisdiction which is set up by § 24 of the German *Civilprozessordnung*, which we have so often mentioned. It would be better to remove these altogether, and that, in our view, is only a question of time. The full measure of exemption must be reserved for the higher representatives of the international intercourse of Governments: in their case, we have other guarantees that international law and international courtesy will be observed, than we have in the case of any official or agent of the State selected at random. The purely logical conclusion that every person who acts or who appears in name of a foreign State can claim international privilege, must not lead us astray.⁶⁶ It must not go so far as to allow the country to swarm with persons⁶⁷ who claim immunity from the legal compulsors of the territory.

NOTE CCC ON §§ 509-526. PRIVILEGES OF AMBASSADORS BY
THE LAW OF ENGLAND.

[The distinction taken by the author between jurisdiction to pronounce judgment, on the one hand, whereby a claim may be constituted by decree,

⁶⁴ Among frontier officials, if any other rule were followed, it would soon result in constant brawls and bloody conflicts.

⁶⁵ Commissioners, sent by a State to ensure its being well represented at an international exhibition, have, however, no diplomatic character: as such they are not in any sense extra-territorial. See Clunet, *Questions de droit relatives à l'exposition universelle internationale*, 1878 (J. v. pp. 81 *et seq.* and 197 *et seq.*).

⁶⁶ I cannot go so far as Zorn (p. 82) and Stoerk (p. 662), who hold apparently that each and every representative of a State, while in foreign service, is to be treated as a diplomatist.

⁶⁷ Let it be remembered that wives, children, and servants share the privilege of extra-territoriality.

from which process ambassadors are not to be protected, and the compulsors of the law from which they and their goods are to be protected, is not recognised in the law of England. The protection it gives is much fuller than the author proposes to allow, and the theory on which it seems to proceed is the representative character of the ambassador, who must be free from all the jurisdiction of the courts of this country, just as his own sovereign would be: it is the respect paid by one Sovereign State to the independence of every other Sovereign State. (See Brett, J. in the *Parlement Belge*, 1879, L. R. 4, P. D. 129.)

The common law is declared by the statute 7 Anne, c. 12. It proceeds on the preamble that "several turbulent and disorderly persons having in a most outrageous manner insulted the person of . . . Ambassador Extraordinary of His Czarish Majesty Emperor of Great Russia . . . by arresting him and taking him by violence out of his coach in the publick street, and detaining him in custody for several hours in contempt of the protection granted by Her Majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other publick ministers authorised and received as such have at all times been thereby possessed of, and ought to be kept sacred and inviolable. . . .

"§ 3. And to prevent the like insolences for the future, be it declared . . . that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or State authorised and received as such by Her Majesty . . . or the domestick or the domestick servant of any such ambassador or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions and purposes whatsoever."

In the case of *Taylor v. Best* (1854, 14, C. B. p. 487), in the course of the discussion Mr Justice Maule made several observations which tend in the direction of the doctrine of the text, viz. that it might be lawful to constitute a claim of debt against an ambassador by decree, so as, it might be, to avoid prescription, although it would not be lawful to follow up the decree by diligence of any kind. Campbell, C. J., however, in the later case of the *Maddalena Steam Navigation Co. v. Martin* (1859, 2, E. & E. p. 94, 28, L. J. (Q. B.) 310), alludes to these observations, and holds them not to be sound, while the judgment of the court affirmed that a public minister "cannot, while he remains such public minister, be sued against his will in this country in a civil action, although such action may arise out of commercial transactions by him here, and although neither his person nor his goods be touched by the suit." The Chief Justice, in concluding his opinion, says "it certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions, but we think that this follows from well-established principles" (pp. 115, 116).

The transaction in question in that case was a transaction in shares of

a limited company, and the tenor of the Chief Justice's opinion might seem to give some countenance to the idea that a different rule might be applied if the ambassador were engaged in trade. That that is not so, however, seems certain from a passage in the opinion of Jervis, C. J., in the case of *Taylor v. Best*, already referred to, upon which Chief Justice Campbell certainly did not mean to go back. The passage is as follows (p. 519): "If an ambassador or public minister during his residence in this country violates the character in which he is accredited to our Court by engaging in commercial transactions, that may raise a question between the Government of this country and that of the country by which he is sent, but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character." Then, again, the grounds on which the judgment in the *Maddalena* case is put—viz. the impossibility of bringing any one into court without some measure of *coactio*, which is inadmissible in the case of an ambassador, and the practical impossibility of service, since no officer may enter his hotel, for that is foreign territory, and therefore inviolable, while he must not be stopped on the street, since he may be going about the affairs of his master, the foreign sovereign—show that all actions, no matter what the subject matter, are intended to be excluded.

It is, however, observed that there may be a specific remedy by injunction to remove an ambassador from a house which he has hired and refuses to quit, when bound to do so.

In the recent case of *Macartney v. Garbutt* (1890, L. R. 24, Ch. D. 368), it was held that a British subject, accredited to Great Britain by a foreign Government as a member of its embassy—English secretary—is exempt from the local jurisdiction of his own country, unless he has been received by the British Government upon the express condition that he shall be subject thereto. But one who has obtained his position as member of an embassy *mala fide*, and with the view of evading his creditors, will not be protected by the court (Cloeté, 1st June 1891, Times L.R. 565).

The power of ambassadors to celebrate marriages, and to allow them to be celebrated in their houses, has been discussed *supra*, note on p. 362, and again p. 374.]

III. JURISDICTION OF COURTS OF LAW OVER FOREIGN SOVEREIGNS AND STATES.

INTRODUCTORY. OLDER THEORY (BYNKERSHOEK).

§ 527. It is a complicated question to determine what powers must be conceded to the courts of law over foreign sovereigns and foreign States. Modern law makes a distinction between the personal rights of a sovereign, and those which he exercises as the representative of the power of the State. Courts of law may, therefore, have entirely different powers in

questions with a foreign sovereign in his character as the owner of a private fortune or estate, from those which they have against him in so far as he represents the power of the foreign State.

The older writers know nothing of this distinction; they speak simply of judicial measures, which are directed against foreign princes. Thus Bynkershoek, in his treatise *de foro legatorum*, deals at the same time with the question of judicial jurisdiction over foreign princes. It is plain, from what he there says, that he looks upon the privileges enjoyed by foreign ambassadors as the more important in a practical point of view, and as the leading subject; whereas his discussion of those of foreign princes takes second place, although, no doubt, he says that they have at least the same privileges as their representatives the ambassadors. This, as we have already said, is historically accurate, inasmuch as the inviolability and extra-territoriality of ambassadors is an indispensable requirement of public law, while there is no such requirement for their sovereigns, unless they act as ambassadors. The exalted position, however, enjoyed by monarchs, and the possibility that, at any moment they please, even although they bring in their train a responsible minister, they may deal with foreign States as the representatives of the States over which they rule, has made it a rule, now of long standing, that the privilege of extra-territoriality, which grew up out of the inviolability of the ambassador, should be allowed to foreign sovereigns also.¹ It is superior to the ambassador's privilege, in so far as it, by general consent, is not nowadays dependent on any previous notification of the coming of the travelling sovereign, and is not to any extent conditioned by the consent of the other State, which has no rights save to turn him back at the frontier or to expel him.

Bynkershoek, then, holds no doubt at all that courts of law can entertain an action against a foreign prince. Not only, says he, does it frequently happen that princes voluntarily submit themselves to particular courts for the decision of some legal difficulty (c. xxiii.); it is also certain that princes are treated just like private persons in questions as to contracts made by them ("*ipsos principes dum contrahunt haberi privatorum loco*"), c. xiv. As regards the brocard, so often cited in later days, upon this subject, "*par in parem non habet jurisdictionem*," Bynkershoek says just the reverse (c. iv.), viz. that as regards "*bona*," an "*inferior*" may exercise jurisdiction over a *superior*. The rule "*par in parem non habet jurisdictionem*" can in truth only be applied to criminal jurisdiction, and closely considered is perhaps only meant to apply to princes holding direct from the emperor. He only held the person of the foreign prince, his retainers and his whole furnishings, which he can use for himself and his train of retainers, as exempt from arrestment and execution. No doubt, he says, policy may suggest that an arrestment, which is asked for against a foreign

¹ Logically, too, we must concede it to the presidents of republics, unless, like the Bürger-meisters in the free towns of Germany, they are merely chairmen of a body of colleagues, in whose hands the supreme administration of the State rests.

prince, should not be facilitated, but, apart from that, "*nihil est quod arrestum et jurisdictionem impediatur*." Bynkershoek then adduces a series of cases in which, in the seventeenth century, arrestments had been used and processes carried on in the Netherlands against the Elector of Brandenburg, the Republic of Venice, the Duke of Mecklenburg, the King of Spain,² and the Duke of Courland, and adds, "*possum plurima exempla addere quæ vel mea memoria inciderunt*." Lastly, he tells of a process in the eighteenth century against the King of Prussia, remarking that the King did not feel himself aggrieved so much by being cited to the process, as by the publicity of the citation (*per campanam ut fit*); he appeared, however, and appealed, taking no protest against the jurisdiction.³ The discussion closes with the remark, "*adco res in mores transivit ut tanquam de re liquida, nunc quidem inter omnes videatur constare*." No doubt, however, he gives the warning that things of very small value should not be arrested, or a prince cited on such an arrestment, a warning which we might fairly extend even to the case of private persons. Bynkershoek has no hesitation in holding this to be an abuse of the *summum jus*,⁴ or, as we should call it, a judicial interpretation of the law.

INFLUENCE OF MODERN DEVELOPMENT OF CONSTITUTIONAL LAW.

§ 528. The question of jurisdiction over foreign princes has been subsequently developed. In the first place, there has been gradually introduced a distinction between the private property of princes, or of the princely family, and the property of the State. When this distinction first became part of legal doctrine, it was no longer possible to hold the prince and his property responsible in a foreign country for the debts of the State, or conversely. The enquiry on the point was often difficult,

² In this case (1668) they went so far as to lay arrestments on ships of war. No doubt the States General busied themselves to release the ships. The letter of the States General, of which an extract is given by Bynkershoek, gives no indication that they had found anything contrary to law in the arrestment.

³ I have thought it right to reproduce somewhat more exactly the exposition by Bynkershoek, who is rightly regarded as a high authority on this question, for Bynkershoek, who certainly should be read carefully, although often cited, is not so much studied. Gabba, in his paper, "*De la compétence des tribunaux à l'égard des souverains et des Etats étrangers*" (J. xv. p. 180), reproduces Bynkershoek's view incorrectly, although he gives the actual words of the conclusion of the chapter, where Bynkershoek speaks merely of arresting worthless articles, and then invoking the jurisdiction of the court for a sum of very considerable amount. He takes, as an instance of such a worthless object, according to the values of that day, an *equus*, or "any nag you can lay hold of," as we might say. It is not true to say, as Gabba represents, that Bynkershoek does not speak of arrestments which persons, not subjects of the country, might use against a foreign prince. Since Gabba has read Bynkershoek inaccurately, I cannot complain that he has paid no attention to my paper in J. xii. p. 645, and disposes of me very shortly (J. xv. p. 189).

⁴ Compare § 433, note 103, for what is there said as to § 24 of the German *Civilprozessordnung*.

and although there were comparatively few courts that were completely independent, yet, on the other hand, princes had often good reasons for limiting the recourse of their subjects against other princes: they, too, might some day be sued in a foreign country, and, of course, the proverb "*manus manum lavat*" has always a certain amount of force. If it could be asserted that there was no jurisdiction at all against the foreign sovereign, then the sovereign could *in majorem gloriam* represent his own conduct in allowing actions to proceed against himself in the courts of his own country, as a gracious concession, which in certain circumstances he could recall.

Further, the theory sprung up that the State, as such, could make bargains in such a way that the other contracting party should submit himself to the good pleasure of the administrative authority of the State with which he contracted. As legislation and administration began to diverge one from the other more sharply in point of form, this divergence exhibited itself most distinctly in the permission which the legislature by special enactment⁵ would give to the administrative authority to conclude bargains, especially to contract loans, and to amounts which were formerly unknown, under quite definite conditions. It was clear, that if all the creditors in such cases could assail the property of the State with real diligence, the machine of the State, which is always embracing more and more, might be brought to a standstill or thrown into confusion, to the prejudice of the public. These large debts, contracted with an indefinite number of creditors on equal conditions, on the authority of special statute, all exist under the reservation that the State shall be in a position to satisfy them, and the supreme administration of the State, in the shape of legislation, will finally determine whether the State is in that position. The State has a kind of *beneficium competentiae* to a large extent: it must in the first place support itself, and the payment of debt only stands in the second line. Demands against the State thus directly subject to its own legislative authority will give rise to diligence or to jurisdiction in the stricter sense, only so far and so long as the legislature, which in this matter has a sovereign power of disposition, permits it. But it is plain—and this is the only point of interest—that there can be no idea of subjecting one State to the jurisdiction of another. Where claims are thus made dependent on the good pleasure of the debtor, it cannot be maintained that that debtor is subject to the jurisdiction of a foreign court. Nor does any jurisdiction arise *ratione materiae*, even although the conditions, on which local jurisdiction depends, are satisfied, even although *e.g.* the

⁵ In my first edition (pp. 614, 615), in which the subject is only shortly dealt with, I certainly did not deal fully with this special case, which occurs so frequently nowadays, of an obligation which is in theory contractual, but which in fact is from the first placed at the mercy of the legislature. I think that so keen-sighted a writer as Gabba is might have been able to discover my meaning, especially if he had remembered the historical development of the circumstances which regulate the case.

payment of the debt or of the interest on it should be undertaken by the State as debtor in some foreign country at the option of the creditor.⁶

But, again, it is obvious that no one can ever propose to make the authority of a foreign State answerable in our courts for what it has done in the exercise of its supreme authority, to make it liable in damages for what it has done in the exercise of its sovereign rights. The provisions which regulate jurisdiction in matters of private obligation have no application here, because the sovereign power of the foreign State has to be considered in that character, and not as the holder of private rights, or as the subject of private obligations. Nor have the foreign courts in such matters jurisdiction *ratione materiae*.⁷ It is the discretion of the individual State, and nothing else, that can control the fashion in which that State shall manage its own sovereign rights. Thus, for instance, the courts of State A can never entertain an action directed against State or sovereign B,⁸ or against any official, now in office or retired, of that State or sovereign, founded on the consideration that this State, or its official or representative,⁹ in the exercise of its supreme authority within State B, has injured some one in person or in property. No doubt, the authority of the State may, even within its own dominions, transgress public law, *e.g.* by wilful ill-treatment of foreigners. But in such a case there would not be any such transgression of law as could be pleaded before the courts of another State. For transgressions of public law satisfaction can only be demanded by the means known to that law, *viz.* diplomatic interference by the State to which the sufferers belong, or, in the last resort, warlike intervention by that State.¹⁰ On these points there is no discussion in Bynkershoek or in any of the older writers. This blank is explained by the fact that, by the older law of procedure, trespasses upon legal rights taking place abroad were referred exclusively to the foreign tribunal, and could not, because all the elements for local jurisdiction were wanting in the courts of other countries, be dealt with in any of these other countries. But in more modern times, as we have frequently had to notice, a multitude of jurisdictions have been somewhat capriciously set up, by means of which, sometimes in the interest of its own subjects only, a State withdraws legal questions from the cognisance of the judge to whom, in a certain sense, they naturally belong. These jurisdictions make

⁶ In my view, the establishment of an office for payment in the foreign country does not create a *forum contractus* there with international validity.

⁷ See to this effect Laurent, iii. § 46.

⁸ See Westlake-Holtzendorff, § 181, and the judgments of the English courts against the King of Hanover, there cited [Duke of Brunswick *v.* King of Hanover, 1844, 6, Beav. 57, and 2 House of Lords, Ca. 20]; Beach-Lawrence, iii. p. 429. See, too, Phillimore, ii. § 109, on the Duke of Brunswick's case; see also Foote, p. 140.

⁹ This principle was not disputed in the process quoted by Beach-Lawrence, iii. p. 430, against the Englishman M'Leod. But M'Leod had, in addition to his other offence, trespassed on the territory of the United States.

¹⁰ See the extracts from the despatch of the Secretary of the United States, Webster, of 15th March 1841, given by Beach-Lawrence, *ut cit.*

it possible for a person to submit to the determination of the courts of his own country delicts committed in a foreign country, or legal relations which in substance belong entirely to that foreign country, and that even where foreigners are concerned. Let us remember the jurisdictions provided by § 14 of the *Code Civil* and § 24 of the German *Civilprozessordnung*. Now, although such excesses of jurisdiction may not be considered matters of much moment where private persons are concerned, there is an instinctive feeling that such fanciful jurisdictions, created by the State at its own hand, cannot be set in motion against a foreign power.

Then, too, the execution of a judgment against a foreign power gives rise to difficulties. If there are no assets in this country on which to do diligence, then it may be apprehended that the foreign State will decline to implement the judgment; while, on the other side, we observe that it is not every article belonging to a foreign Government that happens to be in this country that can be made available for diligence.

THE MODERN VIEW. INCOMPETENCY OF FOREIGN COURTS, AS A MATTER OF PRINCIPLE, EXCEPT THE *forum rei sitæ* AND THE *forum* OF VOLUNTARY PROROGATION. TRADITION AND *communis opinio* AS THEY ARE REPRESENTED TO BE AND AS THEY REALLY ARE.

§ 529. In this way we explain the theory,¹¹ which is nowadays often proclaimed with great confidence, that actions against foreign States and sovereigns must not be entertained at all by the courts, and that it is entirely incompetent to give judgment against foreign Governments in the course of a process. Convenience recommends this principle. If there is so distinct a prohibition, we need apprehend no mistakes and no abuses in the conduct of the tribunals, and we shall have no occasion to consider the susceptibilities of a foreign Government, which might possibly be hurt by the fact of an unfavourable judgment being pronounced against it.

Of course, there is no lack of reason to support this comfortable theory, and many are attracted by it, because it invests the sovereign power with the mysterious splendour of inaccessibility, and to a certain extent withdraws it from the general legal bond that unites all men. But the reasons given are in truth, as we must concede to Laurent, but weak. In many instances writers have not taken the trouble to read the older authorities with care, or to notice on what state of facts this or that judgment was pronounced. Whereas we know that judicial sentences are often sounder in their results than in the reasons given for them: in drawing up the statement of these reasons, the judge who gives the leading opinion, and draws up that statement, frequently pays little heed to some

¹¹ Droop's paper in Rassow and Künzel's *Beiträgen zur Erläuterung des Deutschen Rechts*, vol. xxvi. pp. 289-316, makes a special attempt to establish this theory by judgments and citations of authority.

expression or to a general proposition which he uses; those who concur with him pay even less. Lastly, one author, who has no desire to go deeply into the reasons of the doctrine, appeals to the authority of another, and so the tale of authorities, which is represented as constituting a tradition, grows apace. Let us examine a little more closely how this tradition stands. Bynkershoek's view we have already ascertained. For instance, at the end of last century the French minister for foreign affairs, in 1772, raised the question of the competency of arrestment against foreign sovereigns:¹² so, too, did the Prussian Allgemeines Landrecht, and one of the most eminent and thoughtful writers on this subject, G. F. v. Martens, says, in his edition of the *Précis du droit des gens* (i. § 147), dated 1789:—

“Les biens d'un Souverain étranger absent aussi bien que ceux qui appartiennent plus proprement à son état ou à ses sujets sont soumis à la juridiction et par conséquent à la saisie.”

It is quite true that he speaks of an absent sovereign only. That is explained by the circumstance that he has previously spoken of the case of a sovereign who is present in the territory, and has conceded to him, and to the things that are actually being used by him, the privileges of extra-territoriality. We cannot complain of any want of precision in his declaration that the foreign State and the foreign sovereign are in the same position as the foreign subject. All the same Martens is generally passed over when authorities on this point are enumerated, or included among those who exempt foreign States and sovereigns from all jurisdiction.

Klüber, in § 50 of his *Völkerrecht*, does not indeed speak specially of jurisdiction over foreign States: he does, however, treat of jurisdiction as regards foreign sovereigns, and simply holds that the *forum hereditatis*, *rei sitæ*, and *arresti* are competent, in so far as both the opposing parties are looked upon merely as private persons. This latter proposition is decisive: it shows that Klüber applies to States what he says of sovereigns; for sovereigns, in so far as they do not represent the State or are identified with it, are, as regards property and patrimonial suits, merely private persons.

Heffter, too (vi. § 53), does not for a moment think of asserting that one State is not subject to the jurisdiction of another in patrimonial questions.¹³ On the contrary, he remarks that the sovereign is, “as regards private estates and succession within a foreign territory, and also for private obligations which fall to be performed there,” subject to the legal rules of that foreign territory. The whole context shows that in the phrase “legal rules,” rules of jurisdiction are included. At the outset

¹² Printed in de Martens, *Causes célèbres*, ii. p. 112, and in Phillimore, ii. p. 628.

¹³ Nevertheless, Ad. de Cuvelier, in his new essay, cites Heffter, without hesitation, as an authority for the opinion that there is absolutely no jurisdiction over foreign States, and v. Holtendorff (J. iii. p. 432) says, in spite of the fact that Bynkershoek, G. F. v. Martens, and Klüber are, as we have seen, of a directly contrary opinion: “*Les autorités du droit international sont unanimes à reconnaître qu'aucun Etat ne peut exercer des actes de juridiction vis-à-vis du Pouvoir Souverain d'un autre Etat.*” See, as against this unfounded assertion of Holtendorff, in particular v. Martens, i. p. 319.

of the passage Heffter attributes to the sovereign, "immunity from acts of sovereignty in every shape, and in particular from the jurisdiction of a foreign State:" he is speaking of the personal immunity of the sovereign from diligence. So, too, Demangeat (note on Fœlix, i. § 213) pronounces in favour of the jurisdiction of the courts. He asserts that, if foreign Governments are empowered to enter into relations of private law with private individuals, it will be an intolerable privilege that these private persons should be disabled from obtaining justice from the courts. Demolombe (i. § 25) expresses himself, as is right, with more caution: he describes the axiom of the incompetency of the courts against foreign Governments as modern doctrine in which he concurs. This era was opened in France by a judgment of the French Court of Cassation of 22nd June 1849, cassing a judgment to the opposite effect pronounced by the Appeal Court at Pau.¹⁴ The reasoning on which this judgment is supported has been the principal armoury¹⁵ from which the weapons to resist any jurisdiction in the courts of law have been drawn. Demangeat has already criticised this reasoning most excellently.

The first argument used is that of "sovereignty," which requires that one State should be independent of another, whereas jurisdiction requires a relation of dependence. But, as Demangeat remarks, there is no idea of any such independence as the essence of sovereign power, where we are dealing with the State simply as endowed with certain private rights. We add to that that there is no such thing known as the absolute independence of any State. In our view, all States are, in the first place, subject to international legal order; and, in the second place, it is quite impossible for a State, which takes its place in the legal order of another State, although in respect merely of some relations of private law¹⁶—as is the case when it owns land or enters into contracts there—to remain absolutely independent of that other State. Whether and to what extent the one State must hold the legal arrangements of the other as applicable to its transactions and property situated there, is a matter to be determined not by the blind worship of a theory, but by a real practical consideration of facts, and by the necessities of existence. Every one must undoubtedly confess that a State cannot be exempted from the operation of the law of a foreign country upon the substance of any relations of private law which that State may have assumed within the territory of that foreign country: from this it seems to follow, without prejudice to the inviolability of certain persons and certain things as guaranteed by the doctrine of extra-territoriality, that the State must be subject to the jurisdiction of the

¹⁴ Extracts are given by Demangeat on Fœlix, i. § 15.

¹⁵ So, too, the tribunal of Brussels of 3rd Nov. 1870 declared quite generally for the incompetency of the courts (Rev. ii. p. 153).

¹⁶ Cuvelier (Rev. xx. p. 120) says that it is impossible to distinguish in the State a *persona* with relations of private law. For the value of this argument, I shall simply appeal to the fact that Cuvelier will on this point have the whole of German legal authority against him. Cuvelier refuses to admit any relations of private law for the person of the sovereign. That goes even beyond the proposition, "*L'Etat, c'est moi.*"

courts of that country to the same extent: for, so far as possible, the application of the law of a country to the substance of any legal relation and the jurisdiction of that country should go *pari passu*.

In the second place,¹⁷ it is said that every one who contracts with a foreign State is bound to know that he is subjecting himself to the jurisdiction of that State.^{18 19} Demangeat very justly declares that this is simply a *petitio principii*. It might just as fairly be maintained that the foreign State which acquires property within the territory of our State, or concludes contracts with private persons there, subjects itself to the jurisdiction of the country so far as these are concerned.

But if we turn to the most modern authors, we find that the position of the alleged unanimity with which, as it is said, all reject the jurisdiction of courts of law over sovereigns and States, is very peculiar. The unanimity substantially rests upon the fact that it is a very common habit for authors to read the works of others somewhat cursorily.

Among such authors we may certainly count Fœlix (i. § 213), Rolin Jacquemyns (Rev. vii. p. 714), Westlake (§ 190), Field (§ 637), and even more emphatically, Demolombe v. Holtzendorff (J. iii. p. 341), Droop, and, most recently of all, Gabba and Cuvelier²⁰ (Rev. xx. p. 109). Phillimore quotes the opinions of others rather than sets up distinct principles, so too does Calvo (iii. §§ 1460 *et seq.*), and Bluntschli²¹ expresses himself so cautiously that he cannot for certain be counted as an adherent of the doctrine that jurisdiction is to be absolutely negatived in the cases now under discussion. On the other hand, besides Laurent, Spée (J. iii. p. 329), Fiore (*Dir. Publ.* i. § 500), Macri (pp. 230, 231), and, in a more marked way, v. Martens,²² Weiss²³ (p. 886), Gianzana (ii. § 103), and v. Heyking (p. 127)

¹⁷ Gabba (J. xv. p. 187) has reproduced Demangeat's counter-arguments unfairly and without fully understanding them.

¹⁸ We pass over the argument based upon § 14 of the Code Civil as immaterial to the general doctrine of international law.

¹⁹ Cuvelier (p. 123) finds it a great evil that, according to the doctrine advocated in the text, the French State cannot apply its rules for the administration of justice abroad. I can see nothing unjust in refusing to the French State any privilege in matters of jurisdiction against the subjects of another State in connection with a legal question which in its essence belongs to that other State.

²⁰ (P. 127, *cette incompétence est absolue*).

²¹ Bluntschli says: "As the holder of private property, as a private creditor or debtor, the sovereign is not in any sense the representative of the State, he is not a sovereign." All he says is that the courts as a rule will not entertain any civil action, and in particular any action for debt, against extra-territorial persons.

²² I cannot explain how Gabba (p. 185) reaches the statement that v. Martens declared against this jurisdiction. Exactly the opposite is the fact (see i. p. 317, of the German edition): he says, "As a sovereign, the foreign prince is exempt from civil jurisdiction; as a private person, he is not: e.g. in the event of the claim preferred against him having some connection with the immoveable property belonging to him in the foreign country in question, or arising from some commercial undertakings on his part." Further (p. 319), he says, "the decisions we have cited show that the courts, although they will concede a privilege to the public character of a sovereign or a government, are far from inclined to concede a general exemption from civil jurisdiction. It may be very difficult, in this or that case, to prove whether the prince has dealt as a private person or as the holder of the sovereign power; but, as practice shows, it is possible to maintain the distinction."

²³ Weiss says: "*C'est une question célèbre que celle de savoir si un souverain étranger peut*

adopt the view that, as regards the purely private suits of foreign States and sovereigns, the local courts have jurisdiction.

ARGUMENTS AND COUNTER-ARGUMENTS.

§ 530. As a matter of fact, the principle of an absolute want of jurisdiction against foreign States and sovereigns involves a serious outrage upon the general legal conscience. So far Laurent is right.

A foreign Government claims in this country all the rights of a private person: it buys, trades, and acquires property here, and if it thinks that any advantage is being taken of it by any private person, it appeals to our courts. But in the converse case it exclaims at once: "Against me there is no right of action in this country: any one who thinks he has claims against me, may follow me abroad, and although the goods I ordered but did not pay for are still in this country, you shall seek justice in my own courts²⁴ (it may be over seas), if, indeed, I should be of opinion that claims of the kind can be brought before the courts at all." Those who defend this principle find themselves constrained to make exceptions. The first is of all real actions affecting real property. In this case, as in the case of ambassadors, it would be intolerable if action were not allowed. But it is also held to be permissible for the court to find the foreign State liable in expenses, and generally to give judgment against the foreign State if it has voluntarily, expressly, or by implication subjected itself to the judgment of the court: as a general rule, too, on this principle of prorogation it is, as a rule, held that the court has jurisdiction against a foreign Government *reconventionne*.²⁵

But in these exceptions we find the condemnation of the principle. The recognition of prorogation *per expressum* might possibly be regarded as reconcilable with the principle: but the recognition of prorogation by implication cannot. In the latter case, there is no question of a reference to the concrete will of the individual; the subjection of the party to the

être soumis à la juridiction de nos tribunaux. La jurisprudence semble l'avoir résolu par une distinction. Lorsque le souverain est actionné en France à raison d'un acte gouvernemental qu'il ne pouvait faire que comme souverain, le tribunal Français est incompétent, . . . au contraire, si dirigée contre le souverain étranger est d'ordre exclusivement privé, si c'est comme personne privée qu'il est actionné, les tribunaux Français en connaîtront valablement."

²⁴ The Government of the Sovereign Congo State has its seat in Brussels. Of course, it concludes numerous contracts in Belgium with Belgian merchants. Cuvelier (p. 128) proposes to refer his countrymen, if any differences should arise on such contracts, to the Congo for determination of the question, *e.g.* whether goods, still in Belgium, delivery of which has been refused for some fault not admitted by the merchant, must be accepted or not. *Fiat justitia, pereat mundus!* At the same time, he confuses the question of the extra-territoriality of the Congo Government and its offices, etc., with the question of jurisdiction over contracts concluded by that Government. I, too, think that there is no doubt about this extra-territoriality. The Congo Government would certainly take no advantage from the doctrine so warmly recommended by Cuvelier.

²⁵ See *e.g.* Gerbaut, § 169; Westlake-Holtzendorff, § 182.

jurisdiction is inferred from the nature of the subject. Again, too, it is the nature of the subject, and that alone, or, if the expression is preferred, natural justice alone, that will support the condemnation of the unsuccessful pursuer in expenses, if he has not expressly agreed to be liable in expenses in the event of his failure. It will not do to give any one such a privilege as will enable him, by raising an unfounded action, to put any one he pleases to great cost, and to remain exempt from liability to make these costs good. What we term a voluntary prorogation of the liability to pay expenses²⁶ is merely a form of this principle. Indeed, it may be said that such a prorogation is a *conditio sine qua non* of appearing as a suitor. But we may go on to maintain that submission to the courts of the country is a *conditio sine qua non* of the right to make bargains, or to acquire property in our territory. If we make an exception of implied submission, we may effect a great deal, more even than if we threw the principle altogether aside. The exception of reconvention, which most admit, is an illustration of this. But if we propose to limit the exceptions to cases of express prorogation, then a foreign Government might protest against being found liable in expenses, if it had lost an action, but had not expressly bound itself to make good expenses in the event of non-success. Upon the whole, if we ask for express prorogation, we shall land ourselves in technicalities which will make legal intercourse hardly possible, because they will offend against *bona fides*.

THE CORRECT PRINCIPLE. JURISDICTION AND WANT OF JURISDICTION
ratione materiae.

§ 531. In our view we must distinguish in this subject, as well as in reference to ambassadors, between jurisdiction in the stricter sense, on the one hand, and executorials on the other.

As regards jurisdiction, foreign States or Governments are subject to the courts of the country in so far as the nature of the subject requires, but no further.

Taking the nature of the subject as our guide, the courts are incompetent *ratione materiae*, if an obligation has been created by some act of the supreme authority of the State, *e.g.* if a person has been in the service of a foreign Government, and proposes to sue it for arrears of pay, or for pay which has been refused. Although it may well be that this act of the foreign Government by its own law will give the official right to sue for the salary that has been promised, still the act which gives rise to this right is an act of the sovereign power, and not an act of ordinary private intercourse: nor can any transactions that may, previously to the action,

²⁶ Of course, too, a foreign State is bound to find caution for expenses, if foreigners generally, or subjects of the particular State, would be required to do so. We do not need to assume any submission for this purpose. That a suitor should find caution is a condition precedent to the exercise of his right to sue.

have been had with the official, make any difference in the matter. Nor will the courts have any jurisdiction founded on locality against a foreign Government, as we shall see.

Jurisdiction, too, *ratione materiæ* will be excluded likewise in cases in which there is to all appearance a contract obligation, *e.g.* an obligation arising on a loan, but in which the Government, placing the contract under some special enactment, reserves to itself right to modify its bargain by means of special legislation, if it should come to be unable to implement it. In such a case, even although no such modifying legislation—legislation, *i.e.* in fact announcing the partial bankruptcy of the State—has not yet been passed, no action can be raised in the courts of this country against the foreign Government. So, too, an action in the foreign courts is excluded, just because the State, in choosing the solemn form of a statute or ordinance for laying down the conditions of the bargain or bargains, indicated that its obligation was of an entirely different character from an obligation of ordinary private law. This point of view is specially applicable in the case of the great loans of the present day, which rest on some special financial statute, and are thrown open to public subscription, with obligations payable to bearer.²⁷ But neither will the courts in such cases have any jurisdiction in respect of locality.²⁸ We might have to determine this point otherwise, if these States gave some special right of pledge to its creditors over some article that actually was in another country. By this very act it would have declared that the article so given in security was not absolutely necessary for its own maintenance, and would thus have sanctioned an action which would be altogether an action on private rights.

On the other hand, an action against a foreign State, and of course, too, an action against a foreign sovereign personally, may be entertained *ratione materiæ* if the foundation of the action be an act belonging to the ordinary administration of the State in which the foreign Government has acted not *jure imperii* but *jure gestionis*, as it has been well expressed.²⁹ Such is the jurisdiction that is *e.g.* assumed in an action arising out of a sale of guano, made by a foreign Government (C. de Gand, 14th March 1879, J. viii. p. 82). The distinction is generally approved of in an interesting judgment of the Appeal Court at Lucca on 14th March 1887 (J. xv. p. 289).

²⁷ See to this effect a judgment of the English Court of Chancery, of 25th May 1869 (J. iii. p. 125) [Smith v. Weguelin, L.R. 8, Eq. 198]; and in particular the admirable judgments of the English Court of Appeal on 18th April 1877 (J. v. p. 46) [Twycross v. Dreyfus, L.R. 5, Ch. D. 605]. The point here insisted on is that in such debts the obligation is a debt of honour, in so far as the indispensable necessities of the State must have precedence of it. See C. de Bruxelles, 4th August 1877 (J. v. p. 515); Trib. de Cairo, 3rd March 1877 (J. iii. p. 177).

²⁸ Gianzana, ii: § 103, is sound on this point.

²⁹ See Gianzana, § 103, who takes a very sound distinction between jurisdiction in respect of locality and in respect of subject matter.

JURISDICTION BASED ON LOCALITY.

§ 532. As regards local jurisdiction, a foreign Government is by the nature of things subject to:—

1. The *forum rei sitæ*, for actions connected with immoveable property. As we have said, this is admitted on all hands. Since it is generally maintained that the *forum rei sitæ* is exclusive in such matters, any other view would lead to an absolute denial of justice.

2. The *forum hereditatis*, in so far as the foreign sovereign or foreign State is concerned in any succession. This is laid down by all who deal with this point.³⁰ It may also be asserted that a foreign State or a foreign sovereign, that has fallen heir to an individual, and is sued for a debt of the deceased, must answer just like any private person. If any one desires to be the legal successor of a citizen of this country, he cannot choose to take up this position in so far only as it confers rights on him; he must take over the liabilities also, and that, too, under the eye of the court of this country. Is it proposed that the creditors of a succession in this country should look quietly on, while the succession, which is liable to them, is carried off to another country, and have this comfort only, that they may seek justice at a distance and under serious disadvantages?

3. It is subject to every jurisdiction, which it has itself recognised for the case on hand, be it that it has instituted the action, or be it that it has not pleaded want of jurisdiction in the court. That is required by *bona fides*, and the individual character of the sovereign or his representative need not in such circumstances be invoked to determine the consequences of such recognition of the tribunal. Thus the sovereign or State whose action has been thrown out will be found liable in expenses like any other party. So, too, for instance, a foreign sovereign will have to emit an oath, if any other party would have to do so, to gain his case; and, again, he will be liable to exhibit documents in the same way as any other party.³¹ It is impossible in a civil process to suspend the rule as to equality of weapons,³² and to allow a party to entrench himself, when it will suit him, behind the privilege of a foreign sovereign. No direct compulsitor will be used. If a foreign sovereign considers it to be inconsistent with his dignity to take some step of process that is required of him, he may surrender the object of the action, or allow himself to be found liable in a payment of money,

³⁰ See Westlake, § 193, and the judgment of Lord Langdale quoted there. [D. of Brunswick v. King of Hanover, 1844, 6 Beav. 57.] In that judgment expression is given to the theory that all that will be done will be to give the extra-territorial person the opportunity of claiming his rights. (See Beach-Lawrence, iii. p. 421.) By such an argument as this, a very wide jurisdiction might be conferred in all cases in which the object of the suit or of the diligence happened to be in the country.

³¹ Thus an English court required the King of Spain to emit an oath [King of Spain v. Hullet & Widder, 1833, 1, Cl. and F. 348]; and the Queen of Portugal was held to be liable to produce documents [Rothschild v. Queen of Portugal, 1839, 1, Young and Collyer, 594]. See Westlake Holtzendorff, § 181, and note; Phillimore, ii. § 113.

³² So, too, Foote, p. 103.

or delivery of some article. The same thing, of course, holds in cases in which the jurisdiction of the court is assumed without any voluntary prorogation on the part of the foreign sovereign or State.

4. A foreign government or sovereign is also subject to the *forum contractus*, but only to the extent already (§ 423) laid down, *i.e.* only in cases in which the whole affair on both sides was intended to be worked out and fully disposed of in that country. As we have already shown, a declaration that payment should be made at some particular place in the country is not enough by itself. To that limited extent, however, the *forum contractus* satisfies the *bona fides* which international intercourse demands, and this leading principle of the law of nations, perhaps the most essential of them all, must be respected by a foreign sovereign, or by a foreign Government. It has generally been laid down, that if a foreign Government carries on a commercial business in any State, by means of a separate establishment,³³ it is to that extent subject to the courts of that country.³⁴ It cannot be suffered that any one, be it a foreign State, should contract obligations as a merchant or manufacturer by transactions that are to be carried through at the place where his trading establishment is situated, and should then be able to declare that his trade-creditors must seek their rights in a distant foreign country.

According to the principle we have already laid down, it is obvious that the foreign State must be subject to the jurisdiction, and it requires no special rule to make it so; the *forum contractus* is set up with international validity. No doubt Westlake, § 190, says: "Foreign States and those persons in them who are called sovereigns . . . cannot be sued in England on their obligations, whether *ex contractu*, *ex delicto*, or *quasi ex contractu*." But here one must remember, that originally the law of England traced the authority of the court to judge in any case to service within the jurisdiction, *i.e.* to a personal submission by the person through his actual presence in the territory, a condition which can, of course, never be present in the case of a foreign State or foreign sovereign. Accordingly, an exception has been made in practice in the case of certain maritime actions *in rem* in which personal service is not required. Since the modern law of procedure in England tends to lay less weight on the consideration that the defender has been personally served with the action within the territory, and to refer jurisdiction less and less to the possibility of using compulsitors at the moment at which action is raised, we may expect to see the rule laid down by Westlake as a principle of law very soon riddled with exceptions from all sides. For it is certain that the law of England is familiar with the distinction between private trade and an act of the sovereign, or of the supreme power as such. This appears from the judgments of famous English judges such as Westlake cites in § 191.

³³ Such cases may occur, when a Government within a dominion of another State undertakes contracts of carriage, or sells mining products.

³⁴ So Bluntschli, § 140, note 2. See the note in Westlake-Holtzendorff, § 180, and the extracts there given from decisions, which seem to rest on this principle.

In fact, Alexander (J. v. p. 36) asserts, in accordance with the exposition of the law given by Lord Langdale in the King of Hanover's case [D. of Brunswick v. King of Hanover, 1844, 6 Beav. 39], that a foreign sovereign, who carries on trade in England, is subject to English jurisdiction *quoad hoc*.

QUESTIONS OF EXECUTION.

§ 533. But in disposing of jurisdiction in the narrower sense, we have determined nothing as to execution or diligence, or as to the lawfulness of an arrestment. Diligence and also arrestment in security are excluded from everything to which the privilege of extra-territoriality extends.³⁵ As a rule, too few articles are reckoned among this privileged class. They are not confined to things which a foreign monarch is carrying with him, or has in his own use, and to foreign ships of war.

Everything belonging to a foreign Government which, by agreement between the States, is set apart for the purposes of that foreign Government,³⁶ e.g. a custom house, with its furniture, even although one State, as is sometimes the case at frontier stations for the convenience of travellers, takes its custom-dues within the territory of another State, is invested with a limited extra-territoriality, *i.e.* an extra-territoriality in the sense that they must not be withdrawn from the uses to which they have been allowed to be put. Things,³⁷ however, which are also available for conveyance in the interests of private persons, and do not belong to the foreign State itself, but to private persons or limited companies, do not necessarily enjoy exemption from arrestment and diligence.³⁸ Neither do mail-boats, which

³⁵ Thus the ambassador's hotel could never be taken in execution upon a claim of debt.

³⁶ But they must at the moment be in use for these purposes: it is not enough that they are to be so used at some future time. *E.g.* arms or cannons which have been bought in this country, so long as they have not actually been taken into use by the military authorities of the State, are simply goods, open to be arrested, and the fact that some one, be he even a military official or officer, has taken delivery of them, cannot be regarded as use by the supreme authority. V. Holtzendorff (J. iii. p. 433) overlooks this: he seems to hold that the arrestment of cannon packed up as goods is equivalent to an attack on the army.

³⁷ Things sent by private persons to international exhibitions are not extra-territorial: they are not so, even if the customs officers of the State in which the exhibition takes place treats these objects, sent from a foreign country, as if they were still in their own country. Such things are subject to arrestment and to execution: the creditor, by paying the duty on them, may remove them from the exhibition, and so apply them in satisfaction of his debt. See Clunet's pamphlet, "*Questions de droit relatives à l'exposition Univ. de 1878*." (See also J. v. pp. 81 and 187.) The question, to what extent the directors of the exhibition can be ordered, to facilitate the arrestment of things exhibited in their buildings, to give them up, is a question of the local municipal law, and depends on the shape of the legal relation between the exhibitors and the directors of the exhibition (See Lyon-Caen, J. v. p. 446, and the criticism there of judgments given by the Austrian courts in a case of the kind).

³⁸ It will, however, be a matter of convenience to allow the rolling stock on foreign railways to be free from arrestment, as is done in the German Imperial Statute of 3rd May 1886, on condition of reciprocity. This does not prevent its being attacked by bankruptcy, if the railway should become bankrupt. See, too, the Railway Freight Convention of Berne, art. 23, § 5. . . . "*Le matériel des chemins de fer, ainsi que les objets mobiliers quelconques généralement*

receive subventions from the State, but are the property of limited companies and managed by them.³⁹ Credits belonging to a foreign Government in a bank cannot claim freedom from arrest. Such outstanding sums do not serve directly to keep the engine of the State going. For the most part they are intended for the payment of debts. Why, then, should they be withdrawn from the grasp of creditors? It may be that such claims by creditors would cause a foreign Government inconvenience. But when a Government has such outstanding balances that can never be absolutely excluded, *e.g.* it will occur, if the bank, with whom the balance is lying, has difficulty in making cash payments. If the foreign Government has any further credit, it will be easily able to help itself; for, as has been already noticed, arrestments proceeding on claims in respect of great State loans are always excluded, since such claims can never be made good before foreign courts.⁴⁰

Thus jurisdiction and execution, even against foreign Governments, are not absolutely excluded: but at the same time the provisions of the law of process, applicable to the case of foreign Governments, cannot be put in force in quite the same way against them as they can against private persons. Each case must be carefully considered, if it is to be properly dealt with, and it is quite possible that miscarriages may occur in the inferior courts, especially if, as, for instance, is the case in the German Empire, the study of public law, and in particular of international law, is lamentably neglected in the training of judges and advocates. But, nevertheless, the view adopted in these pages will not present any difficulty in practice, if we couple with it the rule which we have laid down in another connection, that in cases of doubt the competency of the courts *ratione materie* should be negatived, so that we may save all the rights of foreign Governments and sovereigns.

contenus dans ce matériel et qui appartiennent au chemin de fer, ne peuvent également faire l'objet d'aucune saisie sur un territoire autre que celui dont dépend le chemin de fer propriétaire, sauf le cas où la saisie est faite à raison d'un jugement rendu par l'autorité judiciaire de l'Etat auquel appartient le chemin de fer propriétaire."

³⁹ The French Government at one time concluded treaties with some of the Italian States for the exemption from arrestment of the mail-boats used by the post-offices of both countries, although they belonged to private companies and were administered by them. The matter is now regulated between France and the Kingdom of Italy by the treaty concluded in November 1875. (See the paper on the subject by Guilibert, *De l'insaisissabilité, dans les rapports internationaux, des navires affectés au service postal* (J. xii. pp. 515-526). According to him it is necessary, to exempt from arrestment, that the line of steamers should receive a subvention under special statute, and should be accurately described therein; that it should provide a regular postal service, and that the conditions of a true postal service should be observed by it. Under these conditions, he thinks that the ship is exempt from arrestment not merely in its ports of departure, arrival, and call, but in any harbour of the two States concerned, into which it may be brought by storm or by damage.

⁴⁰ Art. 23, § 4, of the International Freight Treaty of Berne, concedes immunity from arrestment to a balance belonging to foreign railway administrations, except such as may be laid on at the requisition of the courts of the State to which the administration belongs. The circumstances of railways are not, however, of much use as analogies here, since they require constant balancing of accounts.

CRITICISM OF PRACTICE. APPLICATION OF OUR RULES.

§ 534. A careful examination of judgments delivered on this subject shows us, as a matter of fact, that in very many cases in which jurisdiction was negatived, this was in our view, too, a sound result. That was so in the great majority of cases, which Droop, in his work to which we have referred, indiscriminately cites in support of his proposition that no such jurisdiction is allowable. They are claims of damages which have reference to some act of a foreign Government done in its capacity of supreme ruler, or actions arising out of State loans in modern times which are based on some special statute. This latter consideration was undoubtedly applicable to the case, which obviously gave rise to Droop's treatise. The coupons in favour of bearer, coupons of the Roumanian loan, on which the arrestment applied for by the engineer Ziemer to the court of Berlin, and granted on the authority of that court, proceeded, were issued in virtue of a special statute of Roumania of 1st May 1880. We can, therefore, approve the result of the judgment which was pronounced in 1882 by the Prussian Court, in the determination of the conflict which then arose between the courts and the administrative officers; although we cannot assent to the reason given for it.⁴¹

These reasons lay it down as a proposition which will be universally recognised in the law of nations, that no State can exercise jurisdiction in reference to another State, excepting only in cases of voluntary submission.⁴²

This exception is well calculated to show the weakness of the principle, even if the exception is limited to the case of express prorogation, a limitation which, on the grounds already explained (§ 530), seems inadmissible. If the conception of a sovereign power excludes the possibility of one State being subject to the jurisdiction of another, even in matters of purely private trade, then a voluntary prorogation of jurisdiction is itself impossible. A State cannot dispose of rights which are

⁴¹ On this matter, see also the pamphlet published anonymously, "*De la compétence des tribunaux et particulièrement des tribunaux prussiens dans toute contestation relative aux biens mobiliers qu'un état étranger peut posséder en Prusse.*" Berlin 1882.

⁴² No appeal could be made to §§ 201, 202, of the appendix to the Prussian *Allgemeine Gerichtsordnung*, now repealed by statutes of the German Empire. These declared arrestments against reigning German princes, and ambassadors accredited to the Prussian Court, to be unlawful. On the other hand, they are declared admissible against non-German princes, and against ambassadors travelling through Prussia, but not accredited there, needing only the sanction of the minister of justice and of the minister of foreign affairs, according to well-known traditions of older Prussian law in difficult cases on other subjects.

The provision of the Prussian *Allgemeine Gerichtsordnung* is favourable to the jurisdiction which we maintain, not against it. For in the days of the old German Empire it was the non-German princes who were sovereign princes. At that time they were not *de jure* complete sovereigns. But they are exempt from arrestment in Prussia just because they were not foreigners in all respects, and were subject to German tribunals in all actions on matters of private interest.

essential appurtenances of its sovereign power; it is as incompetent to do this as an individual is to traffic in inalienable rights. By that principle the voluntary subjection of a State to jurisdiction would be ineffectual. But it is an exception that *de facto* cannot be dispensed with, for this reason, if for no other, that without it there would be no foundation on which to set up the *forum rei sitæ*, and the right of the court to find a foreign State, which has appeared as a pursuer and has been unsuccessful, liable in expenses.⁴³ Besides, Bynkershoek long ago pointed out that, if an exception is made in the case of a voluntary submission to jurisdiction, the principle itself is imperilled in the highest degree.

On the one hand, then, we cannot assent to the views of those who deny all jurisdiction against foreign States, apart from a case of prorogation; on the other, we cannot assent to the theory of those (*e.g.* B. Spée, J. iii. p. 329, p. 420) who propose to apply the provisions of the law of procedure to foreign States, just as if they were dealing with private persons.⁴⁴ This latter view overlooks the fact that rules of public law do not require, in order to their validity, to be laid down in the statutes of the States concerned.

POSSIBILITY OF INTERNATIONAL COMPLICATIONS. PROGRESS OR RETROGRESSION ?

§ 535. It has also been pointed out that if jurisdiction is to be extended over foreign States, serious complications may very probably arise. This was actually pointed out by the Prussian Ministry for foreign affairs, when the conflict of jurisdiction arose in the process already mentioned of Ziemer against the Roumanian Government.

This apprehension may very well be groundless.⁴⁵ A judgment which decrees some prestation of private law—it will ordinarily be payment of a sum of money—does not involve any insult to the person against whom the judgment goes; if it were so, the liability to pay expenses, which every one admits, would also be an insult. The memorandum of the German foreign office lays no weight on this consideration. The opinion expressed is that, if arrestments were generally admitted against foreign Governments,⁴⁶ they would accumulate, and would lead to general reprisals. No doubt that is possible, if such jurisdictions as those of the Code Civil, § 14, or of the German *Civilprozessordnung*, § 24, are invoked against foreign

⁴³ It might perhaps be a result that in such a case one would require to politely request the foreign State to graciously repay the defender his expenses.

⁴⁴ Spée goes so far as to propose to apply to foreign Governments some such provision as that of § 14 of the Code Civil.

⁴⁵ See, on the other hand, Laurent, iii. § 54.

⁴⁶ D'Aiguillon, French minister of foreign affairs under Louis XV., was not afraid to say, in a memorandum addressed to the European courts in 1772: "*On pourrait saisir les biens mobiliers du prince même que le ministre (ambassador) représente, s'il en possédait sous notre juridiction.*" See above, p. 1107.

Governments. These provisions involve excesses of jurisdiction which, as a matter of fact, cannot be approved by the principles of public law; the *corpus vile* of private persons must put up with these legislative experiments, because it is helpless to resist them. Protests, too, may certainly be expected from foreign Governments if the limits of jurisdiction *ratione materiæ* are not observed, if it is proposed to adjudicate upon the exercise of sovereign rights, or if petitory actions are entertained, which proceed upon State loans, to regulate which a special law has been passed by the foreign State.

But why should we expect a foreign Government to protest in the same way against the judgment of an independent court in a lawsuit on a purely private matter, if that suit in its essence belongs to the territory of the State in which the court has its seat? Will the suit not be decided by the very court which is most likely to give the best and fairest judgment, looking not only to the proofs, which will be best adduced on the spot, but also as regards the law of the case, which in its leading points will be also the *lex fori*? In fact, it is hardly possible to discover a reasonable ground for refusing jurisdiction in such matters; unless it comes to this, that every State in turn must necessarily regard the administration of justice by other States with distrust in every case in which one of the parties belonged to a foreign nationality. There may, perhaps, be some ground for maintaining that there has been a voluntary prorogation of jurisdiction⁴⁷ in the cases in which we assert that there is jurisdiction; indeed, many refer the doctrine of the applicability of the *lex loci contractus* to a voluntary prorogation, even where that doctrine is used to interpret the material import of a contract.

But in many cases an absolute denial of jurisdiction will be no advantage to the foreign Government. It would be very shy of making use of the odious⁴⁸ privilege of calling a private person away to a distant country to settle a piece of business which is to be decided by the law of this country, and is intended, looking to the obvious meaning of the parties, to be all worked out here. But now many publicists hail this doctrine of "no jurisdiction" with a loud chorus of approbation, to the effect that the State cannot and dare not subject itself to a foreign jurisdiction even in matters of private business, without somewhat compromising its dignity. The matter thus becomes an affair of honour, and the foreign State has often to

⁴⁷ As has been noticed, this idea of prorogation is the source from which some infer an unlimited jurisdiction *reconventionne*; but that is a much more serious matter than the *forum contractus* in the limited extent to which it is sanctioned in the text. Bluntschli, § 140, note 3, declares against the competency of jurisdiction *reconventionne*, because every reason that can be urged against jurisdiction in other cases apply to the case of reconvention.

⁴⁸ It is quite clear that a foreign State, which maintains ambassadors or agents in this country, will proceed more conveniently in this country against an individual, than that individual will be able to do against a foreign State in a distant country. According to Roman theories of law, the foreign State would have been held "*potentior*" in its own courts. Cuvelier's discussion (p. 126) is to be disposed of by what is said in the text. What we say in the text cannot be described as exaggerated language, "*lyrisme*."

pay more out of goodwill, and by way of compromise, than the judge would award to the other party as a pursuer in an action. But, on the other hand, there is some uncertainty in the position of the tradesman. There may still be Governments in interested or half-civilised States, in which bribery and corruption are not impossibilities. Thus the individual who contracts with a foreign Government will be inclined to put a substantial addition on his price, as a premium of insurance, to meet the case that legal remedies shall be altogether denied to him in his own country, and he be referred for his remedy to the courts in a country of which he knows nothing, or to diplomatic agency, the results of which too often depend on the constellations of higher politics, on which no one can calculate.

In the little Republic of Holland, which was compassed about with enemies on every side, and had not long before succeeded in fighting out its independence against Spain, no apprehension was felt in allowing actions upon contract to proceed in the courts against powerful princes. This we learn from Bynkershoek. That was in the seventeenth and eighteenth centuries, a time at which, on the one hand, there was much likelihood that trifling occasions and personal susceptibilities might lead to war; and, on the other hand, the independence of the courts was by no means so entirely protected, in form at least, as it is in the civilised States of the present day. Nowadays, in one of our most powerful States, personal actions and arrestments of every kind are declared, if used against foreign States, to be a matter of the utmost risk, and it is thought necessary to introduce a bill,⁴⁹ the effect of which will be in many cases *de facto* to leave the private individual, and in particular the industries of the country, on which so many claims are made by foreign Governments, almost without legal remedies.⁵⁰ Is it not something very like a denial of legal remedies to refer the injured party to diplomatic intervention, which has frequently to take all sorts of considerations into view,⁵¹ or to suggest to him to seek his rights beyond seas, and, it may be, before ignorant courts and through ignorant advocates, of whom report says, that they know how to protract even the simplest processes to an incredible extent, and to make even the most valuable subjects of a suit melt away in inordinate expenses?

Is that progress or retrogression? Is it right, without pressing necessity,

⁴⁹ On the bill brought into the Reichstag by the German Government in 1885, which proposes to put aside radically all rights of jurisdiction, apart from the *forum rei sitæ*, and perhaps jurisdiction founded on prorogation, see Bar in the magazine "*Die Nation*," 1885, No. 21, p. 292, and the translation of this article (J. xii. p. 645), also (*ibidem*) Beauchet on the fate of this abortive statute.

⁵⁰ Take the following case. By some mistake, goods that have been ordered are delivered to the representative of a foreign Government without payment having been made. Then the manufacturer cannot vindicate them. He must look on at their being loaded and carried away across seas, and may consider what advocate he shall employ in a country two thousand miles away to conduct his case, and what the expenses will be.

⁵¹ Diplomacy will not have the same means of ascertaining the facts on which actions that are purely private depend, as the courts have.

to bar the path of justice, and in that way to do violence to the very conceptions of right and wrong.

It may be said, on the other side, that there is no guarantee in most cases for the execution of a judgment against a foreign State, and that therefore it would be better to give up the claim of jurisdiction. But has the judgment of an independent court of high standing not an important moral influence upon any Government? Will any foreign Government, without a special ground, desire to shirk the performance of any such judgment? If it does desire to do so, it is nothing but a consequence of the theory which views it as an attack upon the sovereignty of a foreign State, that it should be treated like any private person, when it has entered like any private person into the private trade of the country, and enjoyed the advantages of doing so. There may, however, be many cases in which there are sufficient subjects available for diligence, perhaps the very wares which the tradesmen, to whom payment is refused under some excuse or other, has delivered to an agent for his customer.

PARTICULAR QUESTIONS OF LAW.

§ 536. On points of detail we have to notice: *First*, The courts are free to consider and pronounce an opinion upon exercises of sovereign power by a foreign Government, if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question of private right, which in itself is subject to the competency of the courts of law.⁵² In fact, in such a case the court is merely dealing with premises on which its judgment in the private suit is to proceed.

Second, The agents and representatives of a foreign Government (*e.g.* banking houses which have exposed public loans of a foreign Government for subscription) cannot of course personally decline the jurisdiction of the State, and they are not responsible, if they have not given a special guarantee, for the performance of the promises given by a foreign Government.⁵³ They are responsible only for the accuracy of representations made by themselves: but no doubt claims may be made against them for any oversight connected with the payment of interest, and in respect of obligations issued or advertised by them, at the instance of holders of these obligations.⁵⁴

Third, A sovereign, too, is not responsible personally for obligations undertaken by him on behalf of the State in his capacity as its head.⁵⁵

⁵² French Ct. of Cass. 1st Feb. 1875 (J. iii. p. 274).

⁵³ See Ct. of Paris of 25th June 1877. The appeal at once taken against this judgment was thrown out by the Court of Cassation (13th Aug. 1877, J. vi. p. 173).

⁵⁴ See judgments of Trib. Comm. of Nantes, 7th Feb. 1885 (J. xiii. p. 330), and Ct. of Rennes, 16th November 1885, on the same matter; and Trib. Comm. Seine, 14th April 1886.

⁵⁵ The judgment of the Ct. of Paris of 15th March 1872 (J. i. p. 32) may be justified on this ground. The heirs of the Emperor of Mexico were sued in respect of commissions for insignia of orders given in Paris by the Emperor. The grounds of judgment went generally to this, that

He has not in this case undertaken any personal obligation. Still less can there be any idea of holding a dethroned sovereign liable in such cases.⁵⁶

Fourth, If, however, a State takes up an obligation which was originally undertaken by some private debtor, although the State does so on the ground of a special statute empowering it to do so, the rights of creditors of this private individual will not in themselves be affected. The creditor can therefore follow out the rights of the original bargain, under the necessary conditions even in a foreign court, without being met by the objection of there being no jurisdiction *ratione materiæ*. In particular, he can lay under arrestment all the assets that belonged to the private debtor (under all the conditions required in other cases of arrestment), and if the State which has acquired the debt has commixed the property of the private debtor with the rest of the property belonging to the State, so that it can no longer be distinguished, the creditor must have the same right of arrestment over the whole mass of the property belonging to the State, but, of course, only in so far as it is not altogether withdrawn from private diligence by virtue of some dedication to public purposes. This may under certain circumstances be an important matter, *e.g.* in cases of nationalisation, *i.e.* of acquisition of great private undertakings by the State. All this follows from the simple principle that, as a matter of public law, a State cannot have the power of modifying at its own good pleasure, *i.e.* of confiscating in certain circumstances individual concrete claims of debt, which were, when they were acquired, claims against private persons. But, on the other hand, of course, the right of the creditor to prosecute his claim as a claim of private law, *i.e.* as a claim which foreign courts will not throw out *ratione materiæ*, will be lost if he accepts as his debtor a foreign State which assumes the character of debtor by virtue of some special statute, *e.g.* receives payments from it under that statute. Every subsequent holder of an obligation payable to bearer is bound by anything of this kind which a previous holder may have done. Of course, however, the subsequent holder, in accordance with the nature of an obligation payable to bearer, is only in so far bound as there is a marking upon the obligation or the coupon, as the case may be, that a smaller sum than was due has been accepted.

Fifth, It is possible that a company made up of private persons should at the same time exercise sovereign rights in some other territory. In that case, the company can be sued like any private company in the country in which it has its seat, and execution against it may take place in that country.⁵⁷

Sixth, On the other hand, disputes between two States, although the subjects of these disputes may be matters of private right, are withdrawn

the French courts had no jurisdiction, "*pour juger les engagements contractés par les souverains étrangers agissant comme chef d'Etat au titre de puissance publique.*" But in ordinary contract relations there is no element of *puissance publique*.

⁵⁶ App. Ct. of Turin, 8th March 1871 (Norsa, Rev. vi. p. 252).

⁵⁷ See Foote, p. 130, on the old East India Company.

from the adjudication of the courts,⁵⁸ as questions of public law, and this rule will prevail in all cases in which the right in dispute is based upon a public treaty.^{59 60}

G. F. v. Martens treats disputes on private matters between two sovereigns, in which the State has no concern, as subject to the jurisdiction of the courts.⁶¹ As a matter of principle, nothing can be said against this; but a sovereign who is party to such a case, if it fell to be tried in the courts of his own country, would do well to propose that it be referred to arbitration.

ACTIONS ON ACCOUNT OF INJURIES DONE BY WARSHIPS.

§ 537. Warships are State property, in connection with which the character of extra-territoriality is allowed to operate in quite a peculiar fashion by consent of all authorities. The ambassador's hotel is subject, under certain formal restrictions, to police authority and jurisdiction so far as that necessarily exists over real property and real rights: but the ship-of-war seems, as has been said, to be a floating fortress of the State, entitled to repel any actual force used against her by force, and on board of which there is actually a real right of asylum. It is out of the question to use any diligence or arrestment against her. The case, however, has occurred, and may occur again any day, that a ship-of-war should damage and sink a trading vessel of another nationality, either by the carelessness

⁵⁸ See *Précis d. droit d. g. i.* § 147 *ad fin.*

⁵⁹ The character of a treaty as an agreement in the region of public law does not, as every one knows, depend upon the character of the subject of the treaty, but on the rank of the contracting parties.

⁶⁰ The question may be raised whether one Government has a right of expropriation as against another Government with reference to the immoveable property which the latter has within the territory of the other. Field, §§ 50 and 638, assumes generally such a right of expropriation, although he sets very limits on jurisdiction (cf. §§ 637, 638). I cannot concur in this view, and I believe that one Government has a right of expropriation against another only if the latter has acquired the property from a private individual, and not if it has acquired it from another Government. In the latter case, the relation of the Governments to each other is regulated by a treaty which is within the sphere of public law, and a Government cannot, by itself, loose itself from a treaty of public law, even by force of a statute. A Government, *e.g.* which by treaty has acquired from another Government a coaling station within the latter's territory, or the right to set up a railway station there, cannot without its own consent be declared to have forfeited that property, because it suddenly seems good to the other Government to use the place in question for another purpose. If it could, what becomes of the security of treaty obligations? But, on the other hand, a property which a foreign Government acquired from a private person, without the interposition of a public treaty, cannot by the fact of this acquisition acquire a privileged position, and the simple assent of the State in which the property lies is not equivalent to a public treaty, by which the right of property is itself created. All that the consent implies is that the acquisition, as a private matter, is not objected to by the Government.

⁶¹ In such cases there would certainly be suspected to be partiality, although it might be unconscious. See Hartmann on the question (*Instit.* § 26): he thinks that the judge who would have jurisdiction in other circumstances should have it here also, but thinks it very doubtful whether any judge would have a sufficiently independent position.

of the captain, or in consequence of the defective condition of some part of the equipment of the warship, under circumstances such as would have founded an action of damages against the owners of a private ship. If the occurrence happened on the high seas or the territorial waters of the State to which the warship belongs, no law other than the law of that State could possibly apply. But the case might very well be different if the occurrence took place in the territorial waters of another country, or in one of its harbours. It is plain that even ships-of-war must obey the police regulations of the territorial State, when they are in such a position. Otherwise, nothing but disorder and uncertainty could ensue, and every State would have to think seriously before it would allow foreign ships-of-war to enter its harbours. But from the necessity of subjecting them to the laws of police that prevail within the territory, and from the consequent equality of all ships that frequent these waters in the eye of the law of that country, it follows in my opinion that the foreign State, which sends its warship into the harbour, subjects it to the substantive territorial law as regards any claims of damage that may arise from collisions. It would be intolerable that the owners of private ships in a harbour should be saddled with the strictest rules of responsibility, while it should be said of warships lying alongside the most valuable trading steamers, that they were "*legibus soluta*." This maxim would apply, "*non est ferendus qui lucrum amplectitur et onus annexum contemnit.*"⁶²

This view, too, hangs together, in the strictest logical connection, with the principle of extra-territoriality. This can only, so far as substantive law is concerned, apply to occurrences on board ship, but cannot apply to the external relations of that ship to other ships, or to other persons or things outside the warship. The claim of damages, too, may, in our view be followed out before the courts of the country in which the injury took place. If, of course, the true view be that, as a matter of principle, jurisdiction against a foreign State does not under any circumstances exist, then the only recourse is to the courts of the State to which the ship that did the damage belongs. Of course, all arrestment is excluded.

If we take the view that the *lex fori* should rule in cases of collision of this kind, then the impossibility of arrestment may, no doubt, *de facto* be fatal to the claim for damages. For, although the *lex fori* as such should in our view be applied, we are also of opinion that the judgment will not be recognised and cannot be enforced. The application of the *lex fori* as such to the substantive legal relation is merely an expression of the fact, that the legal systems in question proceed upon entirely different conceptions in dealing with such subjects, and do not mutually recognise each other, or at least do not fully recognise each other on a matter, which, if they did, would belong to their jurisdiction from the nature of the case.

⁶² The converse case, of course, may occur that a warship is damaged by a trading ship. A State which will not obey the *lex loci actus*, in so far as damages caused by its warships are concerned, could, of course, not appeal on its side to the *lex loci actus* for the purpose of claiming damages.

This view, however, which was adopted by the Congress of Antwerp and by the Institute of Public Law, that in cases of collision in territorial waters the *lex loci actus* should rule, will often do little good to the owners of the injured vessel, unless at the same time the rule which we recommended already (p. 716) for the reform of the law, be adopted, viz. that the owner of the ship that does the damage is responsible up to the value of his own ship, if the law of the place where the damage was done imposes liability upon him, even although the law of the owner himself, the law of the flag, relieves him of all such responsibility.⁶³

If we were not accustomed, without, as we think, any good reason to mix up the question of jurisdiction with that of direct diligence, a State could hardly withdraw itself from responsibility for damage done by its warships, as that responsibility is fixed by the law of the territory where the damage is done.

NOTE DDD ON §§ 527-537. JURISDICTION OVER FOREIGN SOVEREIGNS
OR STATES.

Of the general rule of law in England and Scotland with regard to jurisdiction and execution against foreign States and sovereigns, there can be no doubt. It is as has been laid down by Westlake (§ 190) in the terms quoted in the text. The leading authority is the case of the Duke of Brunswick *v.* the King of Hanover, 1844 (6, Beav. 57, and in the House of Lords, 2, H. of L. 1). In that case the Duke of Brunswick sought from the Court of Chancery a declaration that certain procedure by which the

⁶³ In accordance with these rules we should determine the case of the sinking of the French ship *Ville de Victoria*, in consequence of an injury inflicted by H.B.M.S. Sultan, of which so much has of late been heard (See paper by Clunet, J. xv. pp. 226-237, and again, J. xv. p. 502). These two ships were lying at anchor in Lisbon roads at the mouth of the Tagus on 24th Dec. 1886, when a violent blast of wind broke the cable of the English ship; she swung with such force upon the French trading steamer, that the ram of the English ship pierced her, and in ten minutes she sank. Twenty-two sailors and nine passengers on the French ship were drowned, and the English Government afterwards paid the sum of £20,000 to the surviving relatives, without admitting that there was any claim against them. But England refused to give any compensation to the owners of the ship, and appealed to the English law that the State could not be liable for any fault in the ship's captain, and that he was the only person against whom a claim could be made, or more accurately that the person who was directly responsible for the mishap could alone be sued. Any such responsibility would, in most cases, looking to the great value of ocean steamers and their cargoes, be a mockery, and finally the question might arise, as it would in this very case, whether the deficiency in the material, in this case the cable, was not the true cause of the mishap. Who would be responsible for it? Clunet rightly maintains that neither the Portuguese nor the French Government could possibly have arrested the vessel, and, in accordance with the prevailing legal doctrine, also lays it down that no State except England could have any jurisdiction in the matter. He calls attention, however, to the defective state of the law of England as regards the responsibility of the State for its ships. We can assent to that. But it will be difficult to move States to adopt new and comprehensive principles extending their liabilities. It would be simpler to adopt the principle of private international law suggested in the text, which, looking to the great value of warships in most cases, would generally insure full compensation.

Duke of Cambridge, and subsequently the Duke of Hanover, had been appointed his guardians, were null. Objection was taken to the jurisdiction of the Court by the King of Hanover on the ground that he, although in England a subject of the Queen, was an independent sovereign prince, and that the acts done by him were done in the latter capacity. He had been served with the process while on a visit to England. The House of Lords had no doubt that the procedure complained of had been taken by the king in his capacity as sovereign, and would not therefore render him liable to be sued in the English courts in respect of them. Lord Langdale, however, was clearly of opinion that for any acts done by him or any transactions in which he might be engaged as a subject of the Queen, he might be made to answer in England. Lord Brougham, in the House of Lords, thought that if a foreign sovereign, who was also a naturalised subject of this country, possessed a landed estate here, the English court could compel him to perform a contract of sale or mortgage with respect to that estate. Lord Campbell was "by no means prepared to say that" that the King of Hanover, if he had been trustee of a marriage settlement while he resided in England, might not have been amenable to the jurisdiction of the Court of Chancery in respect of that trust. It is not, however, to be supposed that in any of these cases in which jurisdiction might have been sustained, the court could have worked out that jurisdiction, if His Majesty had disregarded its orders, by imprisonment, as they would have done in the case of a private person.

While personal jurisdiction against the sovereign, if he happens to be present in the territory, is undoubtedly excluded (*Parlement Belge*, 1880, L.R. 5, P. & D. 19, 7 per Brett, J.) jurisdiction which can be established and enforced by proceedings *in rem* will be admitted. The indignity of personal execution or service of the summons will thus be avoided, and the ground for the plea of extra-territoriality then no longer exists. "The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between Governments, although they may be dilatory, and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity, or embarrass the functions of the representatives of a foreign State; if the suit takes a shape which avoids this inconvenience, the object both of international and ordinary law is attained—of the former, by respecting the personal dignity and convenience of the sovereign, of the latter, by the administration of justice to the subject," per Sir R. Phillimore in the case of the *Charkeh*, where it was sought to enforce a damage lien by proceedings *in rem*, viz. against a ship belonging to the Khedive of Egypt. The ground of decision was that the Khedive was not a sovereign prince, but the opinion just quoted was delivered as an exposition of the general principles of international law (1873, L.R. 4, A. & E. 59). It has been explained by the same judge in a subsequent case (the *Constitution*, 1879, L.R. 4, P.D. 39) that he

did not mean, in sanctioning proceedings *in rem*, to lay down that such proceedings could be taken against a ship-of-war, or any cargo carried on board of her for public purposes. Such vessels and cargo are exempt from jurisdiction and execution. So, too, in the case of the *Parlement Belge* (*supra*) the exception was extended to all public vessels, whether vessels of war or not, *e.g.* mail-packets, and it was held that the declaration of the sovereign of the public character of the vessel shut out enquiry by the court into the true character of her employment.

As regards the immunity of public property of a foreign sovereign, it was held in the case of *Vavasour v. Krupp* (1878, L.R. 9, Ch. D. 351) that shells, which had been made in Germany for the Japanese Government, and had been brought to England for the purpose of being shipped to Japan, could not be seized or detained on the application of an English subject, who alleged that they had been manufactured in disregard of his rights as a patentee.

But, while a foreign sovereign or State and foreign public property are thus exempt from action or diligence, if "he sues here as a plaintiff the court has complete control over him, and may hold him to all proper terms" (Lord Lyndhurst in *Hullet v. King of Spain*, 1828, 1, D. & Cl. 169). Hence, as has been already noticed, the king was held bound, like any other plaintiff, to answer a cross-bill on oath (*King of Spain v. Hullet*, 1833, 1, Cl. & F. 333). See the other authorities on this point, cited by Westlake, § 192. A foreign sovereign, who sued an action for damages caused by collision, was ordered to find caution for expenses (*the Newbattle*, 1885, L.R. 10, P.D. 33).

Again, a foreign sovereign may be brought into court in circumstances such as the following. A foreign sovereign can sue in a foreign country; and where "a fund is in the Court of Chancery, that court may proceed to administer it even although a foreign sovereign may be interested in it, and may not think fit to come before the court in a suit relating to it," per Lord Cairns, C. in *Larivière v. Morgan*, 1875, L.R. 7, E. and I.A. 423. But although the court will interfere so as to prevent a foreign Government from taking possession of a fund to which they have no title, they will not pronounce any order against them to compel specific performance of a contract, nor entertain the suit unless a trust or some right of property or hypothecation in the fund be proved. See Westlake, p. 216, § 183. The principle is explained in the case of *Smith v. Weguelin*, 1869, L.R. 8, Eq. 198, where the Court of Chancery was asked to pronounce an order against the agents of the Peruvian Government ordaining them to pay the proceeds of a quantity of guano lodged in their hands by that Government to certain bondholders, the Government having contracted with the bondholders that the loan and interest should be met in that way. The case of *Gladstone v. Musurus Bey*, 1862, 1, H. and M. 495, was cited, but in giving judgment it was said by Lord Romilly: "In that case the court did not enforce the specific performance of any contract between the foreign Government and the English company, nor did it

assume any power to do so, but as an English company had deposited a sum in the hands of a third party to await a certain result, the court interposed directly to prevent the foreign Government from taking possession of this fund until it had established that, according to the contract with the English Company, it was entitled to do so. . . . All that it did was to prevent the foreign Government from dealing with the fund as its own before it was shown that the amount was forfeited." In the case of *Weguelin*, the order asked was refused in respect that there was no hypothecation of the fund such as to admit the jurisdiction of the court.

As a necessary condition for the effective administration of any fund by the Court of Chancery, it must be shown that there is some trust created in the agent who holds the fund, or that the fund is hypothecated in England or is the property of the English claimant; this is the kind of jurisdiction which Lord Campbell (*Duke of Brunswick v. King of Hanover*, 2 H. of L.), and Lord Langdale (*ib.* 6 Beavan), professed themselves as ready to sustain; how difficult it is to establish any such trust, hypothecation, or property, may be seen from the case of *Larivière v. Morgan* quoted above, reversing a decision reported in L.R. 7, Ch. 550.

A foreign Government is presumed to contract under its own laws, but may voluntarily subject itself to the law of another country (*Gouvernement Ottoman and Comptoir d'Escompte*, 1875, Trib. Civ. de la Seine, J. iii. p. 271). If the bankers who issue a foreign loan come under personal guarantees to subscribers, they may be called on to make these good in the courts of the country to which they belong, although the foreign Government cannot be cited (*Dreyfus, C. de Paris*, 1877, J. v. p. 516).

Similarly, the English courts have held that when the Government of a foreign State contracts a loan in another country, that contract is governed by the law of the State whose Government contracts the debt, and not, as would be the case with private persons, by the law of the country in which the contract is made. So, where the Peruvian Government had contracted a loan on the security of a quantity of guano, which was hypothecated in the hands of an agent in England for payment of the loan and interest, the Court of Chancery refused to compel payment out of the proceeds of the sale of this guano, holding that it had no power to enforce a personal obligation undertaken by a foreign Government (*Weguelin, ut supra*). In *Gladstone v. Ottoman Bank* (1863, 1 H. and M. 505) the court refused to consider whether the Turkish Government had violated an agreement which the plaintiffs alleged had been made with them, and violated by rights conferred on others in derogation of the rights so conferred on them.

The English courts have interfered to enforce the law of a foreign country in a case where an invasion of the rights of the foreign sovereign was being prepared in England, the right so to be invaded being a great public right, the regulation of the coin of the foreign realm (*Emp. of Austria v. Day and Kossuth*, 1861, 2, Giff. 628).

A foreign sovereign would seem to be answerable in the courts of this country for the consequences of a wrong personally committed by him in this country. In the case of *Rosses v. Thakoor Sahib of Gondal* (1891, Ct. of Sess. Reps. 4th ser. xix. p. 31), a foreign sovereign was sued for aliment for an illegitimate child alleged to have been procreated by him in England. The court assoilzied the defender on the ground that the act complained of, viz. the seduction of the plaintiff, not being a wrong by the law of England, where it was committed, would not found an action in Scotland, although by Scots law such an action would give right to redress. No plea was taken to the jurisdiction of the court in respect of the defender's position as a sovereign prince, from which it may be inferred that it was thought to be untenable.

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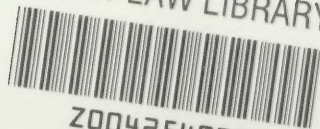
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